THE GENERAL STATUTES OF NORTH CAROLINA OF 1943

Containing the General Laws of North Carolina to and Including the Legislative Session of 1943

Prepared under Legislative Authority by the Department of Justice of the State of North Carolina

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

UNDER THE DIRECTION OF
A. HEWSON MICHIE, CHAS. W. SUBLETT
AND BEIRNE STEDMAN

IN FOUR VOLUMES

VOLUME ONE

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Scope of Publication

Constitutions:

The Constitution of North Carolina of 1868, with amendments to 1943.
The Constitution of the United States.

Statutes:


Annotations:

Sources of the annotations to the North Carolina Constitution and General Statutes appearing in this work were:

North Carolina Reports volumes 1-222.
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-134 (p. 416).
Federal Supplement volumes 1-49 (p. 224).
United States Reports volumes 1-317.
Supreme Court Reporter volumes 1-63 (p. 861).

Abbreviations

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

C. C. P. .........................Code of Civil Procedure (1868)
C. S. .........................Consolidated Statutes of North Carolina (1919, 1924)
Code ..........................The Code of North Carolina (1883)
R. C. ..........................Revised Code of North Carolina (1854)
R. S. ..........................Revised Statutes of North Carolina (1837)
Rev ..........................Revisal of 1905
Preface

It has been customary for the publication of each official revision of the North Carolina statutes to contain, in its preface, a reference to the authority for the revision and the general procedure for the execution of this authority. Read together, these prefaces form a continuous history of the North Carolina codes through the last official code, the Consolidated Statutes. As a projection of that history, the steps which have led to the preparation and adoption of the General Statutes of 1943 are hereinafter set forth.

The Act of the General Assembly creating the North Carolina Department of Justice, Chapter 315, Public Laws 1939, authorized the Attorney General to set up therein a division to be designated as the Division of Legislative Drafting and Codification of Statutes.

This Division was assigned two principal duties by the statute: (1) to prepare bills to be presented to the General Assembly at the request of the Governor, state officials and departments, and members of the General Assembly, and to advise and assist counties, cities and towns in drafting legislation to be submitted to the General Assembly; (2) to supervise the recodification of the general public statutes and to keep such recodification current.

With respect to the latter duty, the General Assembly authorized the Division to arrange with any publisher or publishers for doing the necessary editorial work and publication of the recodification, with annotations, appendixes, and index, under the supervision and direction of the Division and subject to the final approval and acceptance by the General Assembly. Acting upon this legislative authority, the Attorney General contracted with The Michie Company, Law Publishers of Charlottesville, Virginia, for publication of this recodification. It should be pointed out that The Michie Company, for over fifteen years, had published the unofficial codes and supplements in the state, and its Code of 1939 was used as a basis upon which to prepare the new codification.

This Division was set up on July 1, 1939, with W. J. Adams, Jr., as the director of the staff employed to carry on the work.

At the request of the Attorney General, Honorable Kingsland Van Winkle, President of the North Carolina Bar Association, and Honorable Fred S. Hutchins, President of the North Carolina State Bar, appointed a committee of able lawyers to assist in planning the new code. For the North Carolina Bar Association the following were named: Bennett H. Perry, Henderson; H. G. Hedrick, Durham; H. Gardner Hudson, Winston-Salem; Clifford Frazier, Greensboro; and Bryan Grimes, Washington. For the North Carolina State Bar the following were named: C. W. Tillett, Charlotte; Jack Joyner, Statesville; H. J. Hatcher, Morganton; Frank E. Winslow, Rocky Mount; and William T. Joyner, Raleigh.

At the request of the Attorney General, the following named persons also served as a part of this committee: Honorable A. A. F. Seawell, Associate Justice of the Supreme Court; Dean M. T. Van Hecke, of the University Law School; Dean H. C. Horack, of the Duke University Law School; Dean Dale F. Stansbury, of the Wake Forest Law School; and Dillard S. Gardner, Raleigh, Supreme Court Marshal and Librarian.
Full acknowledgment is made of the valuable assistance given by this committee in formulating the plans for the new code. The members of the committee very generously responded to the call for this service, giving a great deal of their valuable time to it without compensation or even reimbursement for their travel expenses.

In keeping with the procedure in prior revisions, the General Assembly of 1941 (Public Laws, Chapter 35) authorized the preparation and printing of a Legislative Edition of the proposed code for submission to the General Assembly of 1943.

The General Assembly of 1941 also adopted Joint Resolution No. 33, providing for a Commission on Recodification to cooperate with the Attorney General and the Division of Legislative Drafting and Codification of Statutes, naming on this Commission the following persons:


The Commission organized shortly after the adjournment of the Legislature and elected Mr. F. E. Wallace as Chairman.

The members of this Commission have cooperated to the fullest possible extent in the manner provided by the Statute. Every chapter and every section of the new code has been checked and approved by the Commission. This has involved an enormous amount of work as must be evident. The cooperation and approval of this Commission affords assurance that the work has been properly done and errors reduced to a minimum. A detailed statement of the methods used in preparing the new code may be found in the Preface to the Legislative Edition.

The Act revising and consolidating the General Statutes of the State of North Carolina was ratified on February 4, 1943. Chapter 15 of the Session Laws of 1943 provided that this Act should not be printed in the Session Laws of 1943.

Chapter 15 of the Session Laws of 1943 provided that the Division, under the direction of the Attorney General, should complete and perfect the recodification, which should be designated "General Statutes", by inserting 1943 Acts in their proper places, deleting repealed statutes and making other necessary corrections and rearrangements. This Act specifically provided that "after the completion of such codification of the general and public laws of one thousand nine hundred and forty-three, such laws, as they appear in the printed volumes of the General Statutes, shall be deemed an accurate codification of the statutes of one thousand nine hundred and forty-three contained therein."

Chapter 543 of the Session Laws of 1943 enacted many of the recommendations of the Attorney General and the Legislative Commission, and Legislative Committees, designed to clarify various statutes, and correct other defects, and these changes are reflected in the General Statutes.

**Volume and Chapter Arrangement**

It is clearly apparent that a one-volume code is no longer practicable because of the increase in the volume of legislation, the great increase in the size of the index, the use of much heavier paper, and the inclusion of frontal tables and ad-
ditional supplemental material. After much consideration, a four-volume code was decided upon as the most practicable.

Once the idea of a one-volume code was abandoned, it became necessary to devise a new classification and arrangement of statutes since the arrangement used in the Consolidated Statutes would require in many instances that all volumes be consulted in the study of certain related statutes in different chapters. In order to avoid this inconvenience as much as possible, an effort was made to group related chapters in larger "divisions" and to place related divisions together. At the same time, it was necessary to maintain a balance so that all four volumes would be as nearly uniform in size as would be conveniently possible.

It is believed that the adopted chapter arrangement will be convenient and also allow for an expansion of the code within a basic framework.

**Numbering System**

The enactment of thousands of new laws since adoption of the Consolidated Statutes of 1919 made it necessary to change the section numbers in the new code. The numbering system of the Consolidated Statutes had grown unwieldy through much sub-numbering. Furthermore, adherence to the old system forestalled any improvement in the arrangement of the statutes.

The choice of a satisfactory numbering system for the new code was carefully studied. After a consideration of various systems, it was finally decided that a modified form of consecutive numbering would be the most satisfactory system to adopt, and such a system was approved by the Legislative Commission on Recodification. This system consists of: (1) numbering the chapters of the code consecutively, (2) using the chapter number as the first part of each code section number, and (3) numbering the sections in each chapter consecutively from "one" on through the end of the chapter. The code section number consists of the chapter number, a dash, and the number of the section in the chapter. This system will have two advantages. New sections may be added indefinitely at the end of each chapter without necessitating sub-numbering and disturbing the numbering system. This numbering system will readily permit the insertions of new chapters with a minimum of inconvenience and confusion in the numbering of the new sections. The old Consolidated Statutes section number has been carried forward in the citations at the end of the statutes as has been the practice heretofore in noting prior official code references. Comparative tables translating the Consolidated Statutes and Michie Code section numbers to the new code numbers are included in an appendix.

**Local Laws**

The recodification has been made of the "general public statutes." North Carolina has enacted a great volume of private, special and local legislation. The problem of local legislation seems to be more serious in North Carolina than in most states. The problem of the proper disposition of these laws has harassed the preparation of the General Statutes to an even greater degree than prior revisions, which have included many local laws for convenience or to fill some gap in the general laws. However, with the great increase in the volume and complexity of legislation, it was clearly apparent that to continue to include in the code statutes which are essentially local in nature (except for necessary exceptions) would result in an over-bulky code and greatly complicate the search for the general laws.
The last official revision of the statutes was that embodied in the two volumes of the Consolidated Statutes of 1919, as brought forward by the third volume in 1924. Thus, the main basis for the present work is that revision and subsequent public session laws. However, many of the statutes in the “public laws” volumes are of local application, and it was necessary to make a decision as to which statutes should be codified. It was finally decided that any statute or portion of a statute which did not affect at least 10 or more counties would not be placed in the code. All portions of the statutes or direct amendments to statutes affecting 9 counties or less have merely been cited in the first annotation paragraph following the statute and entitled “Local Modification.” Under this heading the affected counties, together with the appropriate session law or Consolidated Statutes citation, have been listed alphabetically without any attempt to summarize the provisions of the local laws modifying the general law. It was found that any attempt to analyze the exact effect of particular local provisions would often be not only misleading but inaccurate in the absence of a comprehensive study of all the vast body of local legislation appearing in the Public-Local and Private Law volumes since the vast majority of local laws do alter the general law without making direct references.

A great deal of attention has been devoted to the index in a section-by-section analysis, designed (1) to delete inapplicable index references, (2) to correct inaccurate index references, and (3) to add new index references where sections or portions of sections are found to be indexed inadequately or not at all. At the same time, index lines have been repeated as often as the limitations of space and utility permit, to the end that “Cross References” or “See” references (some of which are absolutely necessary in a code index) may be reduced to a minimum, and where they cannot be entirely eliminated, the inclusive section numbers have been listed along with the Cross Reference.

As will be noted, the index type has been increased from six point to eight point, and set in a two-column page.

Annotations

The work of preparing the annotations rested largely with the editorial staff of the publishers. The editors, in co-operation with the Division’s Codification Staff, have made an effort to provide annotations which are as complete and accurate as are necessary for an understanding of the statutes. It is believed that the proper function of the code annotations is to aid in the construction of the statutes and that the annotations should not take the scope of a general digest of case law. In an effort to provide effective annotations, various sources have been checked, including the citators, the annotations of the Consolidated Statutes of 1919, and the annotations in Pell’s Revisal of 1908. Annotations in the General Statutes begin with Volume 1 and extend through Volume 222 of the North Carolina Reports.

Additional Features

A complete table of contents is inserted at the beginning of each volume of the code and will be of considerable assistance in locating any chapter or article immediately. Frontal tables, listing the titles of each section in a chapter, are being placed at the beginning of each chapter and should be of great assistance in locating...
any section desired. The code will be kept current for as long as possible by pocket supplements. The comparative tables have been expanded, and citations have been added to the State Constitution indicating the authority by which the various constitutional provisions were adopted. The appendix material has also been supplemented.

**The Publisher's Editorial Staff**

The publisher's editorial staff, headed by A. Hewson Michie, the Company's President, and Chas. W. Sublett, Editor-in-Chief, specially assisted by Beirne Stedman and Robert H. Davis, Jr., has cooperated fully in the preparation of this code, and, notwithstanding difficulties brought on by war conditions, has ably carried its responsibilities associated with this publication.

**The Codification Staff**

The staff of the Division has varied from two to five lawyers, including the director, and one secretary. The calls of the military and naval services and the opportunities for advancement elsewhere have resulted in many changes in personnel since the work was first begun. During this time the following persons have served on the legal staff: Moses B. Gillam, Jr., Cornelia McKimmon Trott, James E. Tucker, Carmon Stuart, John Lawrence, Harry W. McGalliard, James B. McMillan, Kemp Yarborough, J. B. Bilisoly, Sarah Starr Gillam, Junius D. Grimes, Jr., Joseph B. Cheshire, IV, Catherine Paschal and Joel Denton; and the following persons have served as secretaries: Minerva Coppage, Marjorie Mann and Effie McLean English. All of them have given loyal and diligent service. Grateful acknowledgment is made to them for their labors which were both extensive and difficult.

When W. J. Adams, Jr., was named Assistant Attorney General in October, 1941, Harry W. McGalliard was appointed Director of the Division. Mr. Adams continued to assist in the supervision of the recodification work. Mr. McGalliard has continued to serve as Director until the present. He has personally done the important job of revising the index.

**Continuous Revision**

The General Assembly of 1943 enacted Chapter 382 of the Session Laws, which provides in part as follows:

"In order that the laws of North Carolina, as set out in the General Statutes of North Carolina, may be made and kept as simple, as clear, as concise and as complete as possible, and in order that the amount of construction and interpretation of the statutes required of the courts may be reduced to a minimum, it shall also be the duty of the Division of Legislative Drafting and Codification of Statutes to establish and maintain a system of continuous statute research and correction. To that end the Division shall:

1. Make a systematic study of the general statutes of the State, as set out in the General Statutes and as hereafter enacted by the General Assembly, for the purpose of ascertaining what ambiguities, conflicts, duplications and other imperfections of form and expression exist therein and how these defects may be corrected."
“2. Consider such suggestions as may be submitted to the Division with respect to the existence of such defects and the proper correction thereof.

“3. Prepare for submission to the General Assembly from time to time bills to correct such defects in the statutes as its research discloses.”

By Joint Resolution No. 23, the General Assembly of 1943 created a Commission on Statutory Revision, consisting of Senators Irving E. Carlyle, Brandon P. Hodges, D. E. Hudgins, Wade B. Matheny and K. A. Pittman; and Representatives Oscar G. Barker, Frank W. Hancock, Jr., A. I. Ferree, Bryan Grimes, W. I. Halstead, Robert Moseley and Kerr Craige Ramsey, “to cooperate with the Attorney General and the Division of Legislative Drafting and Codification of Statutes in the study of the recommendations of the Division with respect to desirable clarifying statutes and the preparation of such proposed statutes for submission to the General Assembly of 1945.”

The General Assembly, by this Act and Resolution, laid the foundation for a system of continuous statutory revision in North Carolina similar to systems that have been inaugurated in some of the other states with much success.

The purpose of this system is to provide an agency which will continuously study the statutory law of the State, and prepare recommendations to successive General Assemblies in the form of revision bills for the elimination of statutory defects as soon as possible after their appearance, and thus to avoid, or at least postpone, the necessity of the periodical bulk revisions that have heretofore been necessary.

Supplements

Under the contract with the publishers, the General Statutes will be kept current by use of cumulative pocket supplements for as long as possible and a minimum period of eight years, before any other edition can be published. The publishers will issue these supplements within six months of each regular or extra session of the General Assembly, and they will contain complete annotations and indexes. Each six months after the publication of the General Statutes, the publishers have agreed to issue interim annotation supplements, containing all pertinent annotations since the publication of the General Statutes or the last supplement, all of which will be done under the supervision of the Department of Justice.

Harry McMullan,
Attorney General.

August 15, 1943.
# Table of Contents

## VOLUME I.

### DIVISION I. CONSTITUTIONS

- Constitution of North Carolina ........................................ 1
- Constitution of the United States .................................... 68

### DIVISION II. COURTS AND CIVIL PROCEDURE ........................................ 79

  **Chap. 1. Civil Procedure** ........................................ 81
  - Art. 1. Definitions .................................................. 87
  - Art. 2. General Provisions .......................................... 88
  - Art. 3. Limitations, General Provisions .......................... 90
  - Art. 4. Limitations, Real Property .................................. 102
  - Art. 5. Limitations, Other than Real Property .................. 113
  - Art. 6. Parties ...................................................... 133
  - Art. 7. Venue ........................................................ 148
  - Art. 8. Summons ...................................................... 137
  - Art. 9. Prosecution Bonds .......................................... 171
  - Art. 10. Joint and Several Debtors ................................. 174
  - Art. 11. Lis Pendens ................................................ 175
  - Art. 12. Complaint .................................................. 177
  - Art. 13. Defendant’s Pleadings .................................... 183
  - Art. 14. Demurrer .................................................... 185
  - Art. 15. Answer ...................................................... 190
  - Art. 16. Reply ........................................................ 197
  - Art. 17. Pleadings, General Provisions ........................... 198
  - Art. 18. Amendments ................................................ 206
  - Art. 19. Trial ......................................................... 214
  - Art. 20. Reference ................................................... 236
  - Art. 21. Issues ....................................................... 241
  - Art. 22. Verdict ...................................................... 243
  - Art. 23. Judgment .................................................... 246
  - Art. 24. Confession of Judgment ................................... 268
  - Art. 25. Submission of Controversy without Action ............ 270
  - Art. 26. Declaratory Judgments .................................... 273
  - Art. 27. Appeal ....................................................... 275
  - Art. 28. Execution ................................................... 309
  - Art. 29. Execution and Judicial Sales ............................. 317
  - Art. 30. Betterments ................................................ 320
  - Art. 31. Supplemental Proceedings ................................. 323
  - Art. 32. Property Exempt from Execution .......................... 329
  - Art. 33. Special Proceedings ....................................... 338
  - Art. 34. Arrest and Bail ............................................. 342
  - Art. 35. Attachment .................................................. 348
  - Art. 36. Claim and Delivery ......................................... 361
  - Art. 37. Injunction .................................................. 365
  - Art. 38. Receivers ................................................... 371
  - Art. 39. Deposit or Delivery of Money or Other Property .... 374
  - Art. 40. Mandamus .................................................... 375
  - Art. 41. Quo Warranto ............................................... 378
  - Art. 42. Waste ....................................................... 382
  - Art. 43. Nuisance .................................................... 383
  - Art. 44. Compromise ................................................ 384
  - Art. 45. Arbitration and Award .................................... 387
  - Art. 46. Examination of Parties .................................... 391
<table>
<thead>
<tr>
<th>TABLE OF CONTENTS</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 47. Motions and Orders</td>
<td>395</td>
</tr>
<tr>
<td>Art. 48. Notices</td>
<td>397</td>
</tr>
<tr>
<td>Art. 49. Time</td>
<td>399</td>
</tr>
<tr>
<td>Art. 50. General Provisions as to Legal Advertising</td>
<td>400</td>
</tr>
<tr>
<td>Chap. 2. Clerk of Superior Court</td>
<td>401</td>
</tr>
<tr>
<td>Art. 1. The Office</td>
<td>401</td>
</tr>
<tr>
<td>Art. 2. Assistant Clerks</td>
<td>404</td>
</tr>
<tr>
<td>Art. 3. Deputies</td>
<td>404</td>
</tr>
<tr>
<td>Art. 4. Powers and Duties</td>
<td>405</td>
</tr>
<tr>
<td>Art. 5. Reports</td>
<td>414</td>
</tr>
<tr>
<td>Art. 6. Money in Hand; Investments</td>
<td>414</td>
</tr>
<tr>
<td>Chap. 3. Commissioners of Affidavits and Deeds</td>
<td>417</td>
</tr>
<tr>
<td>Chap. 4. Common Law</td>
<td>419</td>
</tr>
<tr>
<td>Chap. 5. Contempt</td>
<td>420</td>
</tr>
<tr>
<td>Chap. 6. Costs</td>
<td>424</td>
</tr>
<tr>
<td>Art. 1. Generally</td>
<td>425</td>
</tr>
<tr>
<td>Art. 2. When State Liable for Costs</td>
<td>427</td>
</tr>
<tr>
<td>Art. 3. Civil Actions and Proceedings</td>
<td>428</td>
</tr>
<tr>
<td>Art. 4. Costs on Appeal</td>
<td>432</td>
</tr>
<tr>
<td>Art. 5. Liability of Counties in Criminal Actions</td>
<td>433</td>
</tr>
<tr>
<td>Art. 6. Liability of Defendant in Criminal Actions</td>
<td>433</td>
</tr>
<tr>
<td>Art. 7. Liability of Prosecutor for Costs</td>
<td>436</td>
</tr>
<tr>
<td>Art. 8. Fees of Witnesses</td>
<td>437</td>
</tr>
<tr>
<td>Art. 9. Criminal Costs before Justices, Mayors, County or Recorders’ Courts</td>
<td>441</td>
</tr>
<tr>
<td>Chap. 7. Courts</td>
<td>441</td>
</tr>
<tr>
<td>Art. 1. Organization and Terms</td>
<td>446</td>
</tr>
<tr>
<td>Art. 2. Jurisdiction</td>
<td>447</td>
</tr>
<tr>
<td>Art. 3. Officers of Court</td>
<td>454</td>
</tr>
<tr>
<td>Art. 4. Supreme Court Library</td>
<td>455</td>
</tr>
<tr>
<td>Art. 5. Supreme Court Reports</td>
<td>455</td>
</tr>
<tr>
<td>Art. 6. Salaries of Supreme Court Employees</td>
<td>455</td>
</tr>
<tr>
<td>Art. 7. Organization</td>
<td>456</td>
</tr>
<tr>
<td>Art. 8. Jurisdiction</td>
<td>459</td>
</tr>
<tr>
<td>Art. 9. Judicial and Solicitorial Districts and Terms of Court</td>
<td>462</td>
</tr>
<tr>
<td>Art. 10. Special Terms of Court</td>
<td>482</td>
</tr>
<tr>
<td>Art. 11. Special Regulations</td>
<td>483</td>
</tr>
<tr>
<td>Art. 12. Commission for Improvement of Laws</td>
<td>485</td>
</tr>
<tr>
<td>Art. 13. In Counties with a City of at Least Twenty-five Thousand Inhabitants</td>
<td>486</td>
</tr>
<tr>
<td>Art. 14. Election and Qualification</td>
<td>488</td>
</tr>
<tr>
<td>Art. 15. Jurisdiction</td>
<td>489</td>
</tr>
<tr>
<td>Art. 16. Dockets</td>
<td>493</td>
</tr>
<tr>
<td>Art. 17. Fees</td>
<td>493</td>
</tr>
<tr>
<td>Art. 18. Process</td>
<td>494</td>
</tr>
<tr>
<td>Art. 19. Pleading and Practice</td>
<td>496</td>
</tr>
<tr>
<td>Art. 20. Jury Trial</td>
<td>499</td>
</tr>
<tr>
<td>Art. 21. Judgment and Execution</td>
<td>500</td>
</tr>
<tr>
<td>Art. 22. Appeal</td>
<td>503</td>
</tr>
<tr>
<td>Art. 23. Forms</td>
<td>504</td>
</tr>
<tr>
<td>Art. 24. Municipal Recorders’ Courts</td>
<td>513</td>
</tr>
<tr>
<td>Art. 25. County Recorders’ Courts</td>
<td>518</td>
</tr>
<tr>
<td>Art. 26. Municipal-County Courts</td>
<td>521</td>
</tr>
<tr>
<td>Art. 27. Provisions Applicable to All Recorders’ Courts</td>
<td>521</td>
</tr>
<tr>
<td>Art. 28. Civil Jurisdiction of Recorders’ Courts</td>
<td>522</td>
</tr>
<tr>
<td>Art. 29. Elections to Establish Recorders’ Courts</td>
<td>523</td>
</tr>
<tr>
<td>Art. 30. Establishment, Organization and Jurisdiction</td>
<td>524</td>
</tr>
<tr>
<td>Art. 31. Practice and Procedure</td>
<td>527</td>
</tr>
<tr>
<td>Art. 32. District County Courts</td>
<td>530</td>
</tr>
</tbody>
</table>
Table of Contents

Art. 33. With Jurisdiction Not to Exceed $3000 ........................................ 532
Art. 34. With Jurisdiction Not to Exceed $5000 ........................................ 535
Art. 35. With Jurisdiction Not to Exceed $1500 ........................................ 536
Art. 36. County Criminal Courts .......................................................... 540
Art. 37. Special County Courts ............................................................ 543

Chap. 8. Evidence ............................................................................. 547
Art. 1. Statutes .............................................................................. 548
Art. 2. Grants, Deeds and Wills ......................................................... 550
Art. 3. Public Records ...................................................................... 554
Art. 4. Other Writings in Evidence ...................................................... 555
Art. 5. Lie Tables ............................................................................ 558
Art. 6. Calendars ............................................................................ 560
Art. 7. Competency of Witnesses ......................................................... 569
Art. 8. Attendance of Witness ............................................................... 571
Art. 9. Attendance of Witnesses from without State .......................... 572
Art. 10. Depositions ......................................................................... 573
Art. 11. Perpetuation of Testimony ....................................................... 579
Art. 12. Inspection and Production of Writings ................................. 579

Chap. 9. Jurors ................................................................................ 581
Art. 1. Jury List and Drawing of Original Panel ................................. 581
Art. 2. Petit Jurors; Attendance, Regulation and Privileges ............. 584
Art. 3. Peremptory Challenges in Civil Cases ...................................... 587
Art. 4. Grand Jurors ......................................................................... 587
Art. 5. Special Venire ......................................................................... 590

Chap. 10. Notaries ........................................................................... 592

Chap. 11. Oaths ............................................................................. 594
Art. 1. General Provisions ................................................................. 594
Art. 2. Forms of Oath, Official and Other Oaths ............................... 596

Chap. 12. Statutory Construction .................................................... 600

DIVISION III. CRIMINAL LAW AND PROCEDURE ....................... 607

Chap. 13. Citizenship Restored ........................................................ 609

Chap. 14. Criminal Law ................................................................. 610
Art. 1. Felonies and Misdemeanors ..................................................... 616
Art. 2. Principals and Accessories ....................................................... 619
Art. 3. Rebellion .............................................................................. 620
Art. 4. Surrersive Activities ................................................................. 621
Art. 5. Counterfeiting and Issuing Monetary Substitutes .................. 622
Art. 6. Homicide .............................................................................. 623
Art. 7. Rape and Kindred Offenses ...................................................... 635
Art. 8. Assaults ................................................................................. 636
Art. 9. Hazing ................................................................................ 631
Art. 10. Kidnapping and Abduction ..................................................... 631
Art. 11. Abortion and Kindred Offenses ............................................ 632
Art. 12. Libel and Slander ................................................................ 633
Art. 13. Injuring Others by Use of High Explosives ....................... 634
Art. 14. Burglary and Other House-Breakings .................................. 634
Art. 15. Arson and Other Burning ...................................................... 637
Art. 16. Larceny ............................................................................. 640
Art. 17. Robbery ............................................................................. 641
Art. 18. Embezzlement .................................................................... 645
Art. 19. False Pretenses and Cheats ................................................... 648
Art. 20. Frauds .............................................................................. 653
Art. 21. Forgery .............................................................................. 654
Art. 22. Trespasses to Land and Fixtures .......................................... 656
Art. 23. Trespasses to Personal Property .......................................... 661
<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 25</td>
<td>Regulating the Leasing of Storage Batteries</td>
<td>665</td>
</tr>
<tr>
<td>Art. 26</td>
<td>Offenses against Public Morality and Decency</td>
<td>666</td>
</tr>
<tr>
<td>Art. 27</td>
<td>Perjury</td>
<td>671</td>
</tr>
<tr>
<td>Art. 28</td>
<td>Bribery</td>
<td>674</td>
</tr>
<tr>
<td>Art. 29</td>
<td>Prisons Breach and Prisoners</td>
<td>675</td>
</tr>
<tr>
<td>Art. 30</td>
<td>Custodial Institutions</td>
<td>679</td>
</tr>
<tr>
<td>Art. 31</td>
<td>Offenses against the Public Peace</td>
<td>681</td>
</tr>
<tr>
<td>Art. 32</td>
<td>Offenses against the Public Safety</td>
<td>684</td>
</tr>
<tr>
<td>Art. 33</td>
<td>Lotteries and Gaming</td>
<td>685</td>
</tr>
<tr>
<td>Art. 34</td>
<td>Protection of Minors</td>
<td>690</td>
</tr>
<tr>
<td>Art. 35</td>
<td>Protection of the Family</td>
<td>691</td>
</tr>
<tr>
<td>Art. 36</td>
<td>Intoxicating Liquors</td>
<td>693</td>
</tr>
<tr>
<td>Art. 37</td>
<td>Public Drunkeness</td>
<td>694</td>
</tr>
<tr>
<td>Art. 38</td>
<td>Vagrants and Tramps</td>
<td>696</td>
</tr>
<tr>
<td>Art. 39</td>
<td>Regulation of Sales</td>
<td>697</td>
</tr>
<tr>
<td>Art. 40</td>
<td>Regulation of Employer and Employee</td>
<td>699</td>
</tr>
<tr>
<td>Art. 41</td>
<td>Cruelty to Animals</td>
<td>700</td>
</tr>
<tr>
<td>Art. 42</td>
<td>Animal Diseases</td>
<td>701</td>
</tr>
<tr>
<td>Art. 43</td>
<td>Protection of Livestock Running at Large</td>
<td>701</td>
</tr>
<tr>
<td>Art. 44</td>
<td>Protection of Letters, Telegrams, and Telephone Messages</td>
<td>701</td>
</tr>
<tr>
<td>Art. 45</td>
<td>Protection of the Game of Baseball</td>
<td>702</td>
</tr>
<tr>
<td>Art. 46</td>
<td>Miscellaneous Police Regulations</td>
<td>703</td>
</tr>
<tr>
<td>Art. 47</td>
<td>Protection of Weapons</td>
<td>706</td>
</tr>
<tr>
<td>Chap. 15</td>
<td>Criminal Procedure</td>
<td></td>
</tr>
<tr>
<td>Art. 48</td>
<td>General Provisions</td>
<td>708</td>
</tr>
<tr>
<td>Art. 49</td>
<td>Record and Disposition of Seized, etc., Articles</td>
<td>710</td>
</tr>
<tr>
<td>Art. 50</td>
<td>Warrants</td>
<td>712</td>
</tr>
<tr>
<td>Art. 51</td>
<td>Search Warrants</td>
<td>713</td>
</tr>
<tr>
<td>Art. 52</td>
<td>Peace Warrants</td>
<td>714</td>
</tr>
<tr>
<td>Art. 53</td>
<td>Arrest</td>
<td>715</td>
</tr>
<tr>
<td>Art. 54</td>
<td>Fugitives from Justice</td>
<td>716</td>
</tr>
<tr>
<td>Art. 55</td>
<td>Extradition</td>
<td>718</td>
</tr>
<tr>
<td>Art. 56</td>
<td>Preliminary Examination</td>
<td>719</td>
</tr>
<tr>
<td>Art. 57</td>
<td>Bail</td>
<td>723</td>
</tr>
<tr>
<td>Art. 58</td>
<td>Forfeiture of Bail</td>
<td>726</td>
</tr>
<tr>
<td>Art. 59</td>
<td>Commitment to Prison</td>
<td>727</td>
</tr>
<tr>
<td>Art. 60</td>
<td>Venue</td>
<td>730</td>
</tr>
<tr>
<td>Art. 61</td>
<td>Presentment</td>
<td>730</td>
</tr>
<tr>
<td>Art. 62</td>
<td>Indictment</td>
<td>731</td>
</tr>
<tr>
<td>Art. 63</td>
<td>Trial before Justice</td>
<td>732</td>
</tr>
<tr>
<td>Art. 64</td>
<td>Trial in Superior Court</td>
<td>740</td>
</tr>
<tr>
<td>Art. 65</td>
<td>Appeal</td>
<td>741</td>
</tr>
<tr>
<td>Art. 66</td>
<td>Execution</td>
<td>748</td>
</tr>
<tr>
<td>Art. 67</td>
<td>Suspension of Sentence and Probation</td>
<td>752</td>
</tr>
<tr>
<td>Chap. 16</td>
<td>Gaming Contracts and Futures</td>
<td></td>
</tr>
<tr>
<td>Art. 68</td>
<td>Gaming Contracts</td>
<td>756</td>
</tr>
<tr>
<td>Art. 69</td>
<td>Contracts for “Futures”</td>
<td>757</td>
</tr>
<tr>
<td>Chap. 17</td>
<td>Habeas Corpus</td>
<td></td>
</tr>
<tr>
<td>Art. 70</td>
<td>Constitutional Provisions</td>
<td>760</td>
</tr>
<tr>
<td>Art. 71</td>
<td>Application</td>
<td>761</td>
</tr>
<tr>
<td>Art. 72</td>
<td>Writ</td>
<td>764</td>
</tr>
<tr>
<td>Art. 73</td>
<td>Return</td>
<td>763</td>
</tr>
</tbody>
</table>
Table of Contents

Art. 5. Enforcement of Writ ................................................................. 764
Art. 6. Proceedings and Judgment ....................................................... 765
Art. 7. Habeas Corpus for Custody of Children in Certain Cases .............. 767
Art. 8. Habeas Corpus Ad Testificandum ............................................. 769
Chap. 18. Regulation of Intoxicating Liquors ..................................... 770
   Art. 1. The Burlington Act ............................................................ 771
   Art. 2. Miscellaneous Regulations ................................................ 779
   Art. 3. Alcoholic Beverage Control Act of 1937 ............................... 781
   Art. 4. Beverage Control Act of 1939 .......................................... 787
   Art. 5. Fortified Wine Control Act of 1941 ................................... 797
   Art. 6. Light Domestic Wines; Manufacture and Regulation .................. 798
   Art. 7. Beer and Wine; Hours of Sale .......................................... 798
Chap. 19. Offenses against Public Morals .......................................... 798

DIVISION IV. MOTOR VEHICLES ........................................................ 801
   Chap. 20. Motor Vehicles ............................................................. 803
      Art. 1. Department of Motor Vehicles ........................................ 805
      Art. 2. Uniform Driver’s License Act ....................................... 806
      Art. 3. Motor Vehicle Act of 1937 ........................................... 812
      Art. 4. State Highway Patrol .................................................. 843
      Art. 5. Enforcement of Collection of Judgments against Irresponsible Drivers of Motor Vehicles .............. 850
      Art. 6. Giving Publicity to Highway Traffic Laws through the Public Schools .......................... 854
      Art. 7. Miscellaneous Provisions Relating to Motor Vehicles ........... 854
      Art. 8. Sales of Used Motor Vehicles Brought into State ................ 855

DIVISION V. COMMERCIAL LAW ...................................................... 857
   Chap. 21. Bills of Lading ............................................................. 859
      Art. 1. Definitions ................................................................. 859
      Art. 2. Issue of Bills of Lading ............................................... 859
      Art. 3. Obligations and Rights of Carriers upon Bills of Lading ........ 860
      Art. 4. Negotiation and Transfer of Bills ................................... 862
      Art. 5. Criminal Offenses ....................................................... 864
   Chap. 22. Contracts Requiring Writing ......................................... 864
   Chap. 23. Debtor and Creditor ...................................................... 869
      Art. 1. Assignments for Benefit of Creditors ............................. 870
      Art. 2. Petition of Insolvent for Assignment for Creditors .............. 873
      Art. 3. Trustee for Estate of Debtor Imprisoned for Crime .............. 874
      Art. 4. Discharge of Insolvent Debtors ..................................... 874
      Art. 5. General Provisions under Articles 2, 3, and 4 ..................... 877
      Art. 6. Practice in Insolvency and Certain Other Proceedings .......... 879
      Art. 7. Bankruptcy of Taxing, etc., Districts, Counties, Cities, Towns and Villages .................. 879
   Chap. 24. Interest ............................................................................ 879
   Chap. 25. Negotiable Instruments ................................................ 888
      Art. 1. General Provisions ........................................................ 890
      Art. 2. Form and Interpretation ............................................... 891
      Art. 3. Consideration .............................................................. 897
      Art. 4. Negotiation ................................................................. 898
      Art. 5. Rights of Holder ............................................................ 902
      Art. 6. Liabilities of Parties ..................................................... 905
      Art. 7. Presentment for Payment ............................................... 908
      Art. 8. Notice of Dishonor ....................................................... 910
      Art. 9. Discharge ................................................................. 913
      Art. 10. Bills of Exchange ........................................................ 914
      Art. 11. Acceptance ............................................................... 914
      Art. 12. Presentment for Acceptance ........................................ 915
TABLE OF CONTENTS

Art. 13. Protest ................................................................. 916
Art. 14. Acceptance for Honor .......................................................... 917
Art. 15. Payment for Honor ............................................................. 917
Art. 16. Bills in a Set ............................................................... 918
Art. 17. Promissory Notes and Checks ................................................ 918
Chap. 26. Suretyship ................................................................. 920
Chap. 27. Warehouse Receipts .......................................................... 927
Art. 1. General Provisions ............................................................ 927
Art. 2. Issue of Warehouse Receipts ................................................ 928
Art. 3. Obligations and Rights of Warehousemen on Receipts .................... 928
Art. 4. Negotiation and Transfer of Receipts ........................................ 932
Art. 5. Criminal Offenses ............................................................. 933

VOLUME II.

Division VI. Decedents' Estates.
Division VII. Fiduciaries.
Division VIII. Real and Personal Property.
Division IX. Domestic Relations.
Division X. Corporations and Associations.
Division XI. Police Regulations.
Division XII. Occupations.
Division XIII. Employer and Employee.
Division XIV. Miscellaneous Provisions.
Division XV. Taxation.

VOLUME III.

Division XVI. State Government and Agencies.
Division XVII. County and City Government.
Division XVIII. Elections and Election Laws.
Division XIX. Concerning the General Statutes of North Carolina.

VOLUME IV.

Division XX. Appendix.
   I. Rules of Practice in the Supreme Court and Superior Courts of North Carolina.
      (1) Rules of Practice in the Supreme Court of North Carolina.
      (2) Rules of Practice in the Superior Courts of North Carolina.
   II. Removal of Causes.
   III. Authentication of Records.
   IV. Extradition.
   V. Naturalization.
   VII. Rules Governing Admission to Practice of Law.
   VIII. Comparative Tables.
Division XXI. Index.
Division I. Constitutions.

| Constitution of North Carolina | 3 |
| Constitution of the United States | 68 |
Constitution of North Carolina
Adopted April 24, 1868, with Amendments to 1943

Art. I. Declaration of Rights

1. The equality and rights of men.
2. Political power and government.
3. Internal government of the State.
4. That there is no right to secede.
5. Of allegiance to the United States Government.
6. Public debt; bonds issued under ordinance of Convention of 1868, '68-'69, '69-'70, declared invalid; exception.
7. Exclusive emoluments, etc.
8. The legislative, executive, and judicial powers distinct.
9. Of the power of suspending laws.
10. Elections free.
11. In criminal prosecutions.
12. Answers to criminal charges.
13. Right of jury.
15. General warrants.
16. Imprisonment for debt.
17. No person taken, etc., but by law of land.
18. Persons restrained of liberty.
19. Controversies at law respecting property.
22. Property qualification.
23. Representation and taxation.
24. Militia and the right to bear arms.
25. Right of the people to assemble together.
27. Education.
28. Elections should be frequent.
29. Recurrence to fundamental principles.
30. Hereditary emoluments, etc.
31. Perpetuities, etc.
32. Ex post facto laws.
33. Slavery prohibited.
34. State boundaries.
35. Courts shall be open.
36. Soldiers in time of peace.
37. Other rights of the people.

Sec.
17. Protest.
18. Officers of the House.
19. President of the Senate.
20. Other senatorial officers.
23. Bills and resolutions to be read three times, etc.
24. Oath of members.
25. Terms of office.
26. Yeas and nays.
27. Election for members of the General Assembly.
29. Limitations upon power of General Assembly to enact private or special legislation.
30. Inviolability of sinking funds.

Art. II. Legislative Department

1. Two branches.
2. Time of assembly.
3. Number of senators.
4. Regulations in relation to districting the State for senators.
5. Regulations in relation to apportionment of representatives.
6. Ratio of representation.
7. Qualifications for senators.
8. Qualifications for representatives.
11. Private laws in relation to names of persons, etc.
12. Thirty days' notice shall be given anterior to passage of private laws.
13. Vacancies.
15. Entails.

Art. III. Executive Department

1. Officers of the executive department; terms of office.
2. Qualifications of Governor and Lieutenant-Governor.
3. Returns of elections.
4. Oath of office for Governor.
5. Duties of Governor.
6. Reprieves, commutations, and pardons.
7. Annual reports from officers of executive department and of public institutions.
9. Extra sessions of General Assembly.
10. Officers whose appointments are not otherwise provided for.
11. Duties of the Lieutenant-Governor.
12. In case of impeachment of Governor, or vacancy caused by death or resignation.
13. Duties of other executive officers.
15. Compensation for executive officers.
16. Seal of State.
18. Department of justice.

Art. IV. Judicial Department

1. Abolishes the distinctions between actions at law and suits in equity, and feigned issues.
2. Division of judicial powers.
3. Trial court of impeachment.
4. Impeachment.
5. Treason against the State.
6. Supreme Court.
7. Terms of the Supreme Court.
8. Jurisdiction of Supreme Court.
9. Claims against the State.
11. Residences of judges; rotation in judicial districts; and special terms.
12. Jurisdiction of courts inferior to Supreme Court.
Sec. 13. In case of waiver of trial by jury.
15. Clerk of the Supreme Court.
16. Election of Superior Court clerk.
17. Term of office.
18. Fees, salaries and emoluments.
19. What laws are, and shall be, in force.
20. Disposition of actions at law and suits in equity, pending when this Constitution shall go into effect, etc.
21. Elections, terms of office, etc., of justices of the Supreme and judges of the Superior courts.
23. Solicitors and solicitorial districts.
24. Sheriffs and coroners.
25. Vacancies.
26. Terms of office of first officers.
27. Jurisdiction of justices of the peace.
28. Vacancies in office of justices.
29. Vacancies in office of Superior Court clerk.
30. Officers of other courts inferior to Supreme Court.
31. Removal of judges of the various courts for inability.
32. Removal of clerks of the various courts for inability.
33. Amendments not to vacate existing offices.

Art. V. Revenue and Taxation
1. Capitation tax; exemptions.
2. Application of proceeds of State and county capitation tax.
4. Limitations upon the increase of public debts.
5. Property exempt from taxation.
6. Taxes levied for counties.
7. Acts levying taxes shall state objects, etc.

Art. VI. Suffrage and Eligibility to Office
1. Who may vote.
2. Qualifications of voters.
3. Voters to be registered.
4. Qualification for registration.
5. Indivisible plan; legislative intent.
6. Elections by people and General Assembly.
7. Eligibility to office; official oath.
8. Disqualification for office.
9. When this chapter operative.

Art. VII. Municipal Corporations
1. County officers.
2. Duty of county commissioners.
3. Counties to be divided into districts.
4. Townships have corporate powers.
5. Officers of townships.
6. Trustees shall assess property.
7. No debt or loan except by a majority of voters.
8. No money drawn except by law.
9. When officers enter on duty.
10. Governor to appoint justices.
11. Charters to remain in force until legally changed.
12. Debts in aid of the rebellion not to be paid.

Art. VIII. Corporations Other than Municipal
1. Corporations under general laws.
2. Debts of corporations, how secured.
3. What corporations shall include.
4. Legislature to provide for organizing cities, towns, etc.

Art. IX. Education
1. Education shall be encouraged.
2. General Assembly shall provide for schools; separation of the races.
3. Counties to be divided into districts.
4. What property devoted to educational purposes.
5. County school fund; proviso.
6. Election of trustees, and provisions for maintenance, of the University.
7. Benefits of the University.
8. State Board of Education.
10. Agricultural department.
11. Children must attend school.

Art. X. Homesteads and Exemptions
1. Exemptions of personal property.
2. Homestead.
3. Homestead exemption from debt.
4. Laborer's lien.
5. Benefit of widow.
6. Property of married women secured to them.
7. Husband may insure his life for the benefit of wife and children.
8. How deed for homestead may be made.

Art. XI. Purishments, Penal Institutions, and Public Charities
1. Punishments; convict labor; proviso.
2. Death punishment.
3. Penitentiary.
4. Houses of correction.
5. Houses of refuge.
6. The sexes to be separated.
7. Provision for the poor and orphans.
8. Orphan houses.
9. Inebriates and idiots.
10. Deaf-mutes, blind, and insane.
11. Self-supporting.

Art. XII. Militia
1. Who are liable to militia duty.
2. Organizing, etc.
4. Exemptions.

Art. XIII. Amendments
1. Convention, how called.
2. How the Constitution may be altered.

Art. XIV. Miscellaneous
1. Indictments.
2. Penalty for fighting duel.
3. Drawing money.
4. Mechanic's lien.
5. Governor to make appointments.
7. Holding office.
8. Intermarriage of whites and negroes prohibited.
PREAMBLE
We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign ruler of nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do for the more certain security thereof, and for the better government of this State, ordain and establish this Constitution: (Const. 1868.)

ARTICLE I
Declaration of Rights
That the great, general and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and Government of the United States, and those of the people of this State to the rest of the American people, may be defined and affirmed, we do declare:

§ 1. The equality and rights of men.—That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness. (Const. 1868.)

"Liberty" Qualified by Common Law Doctrines.—It is a recognized principle that personal liberty is a constitutional right, and any act of Assembly which violates this right is not the law of the land and would be void by Art. I, sec. 17, of the Constitution. However, the meaning of general expression such as "liberty" is qualified by the doctrines of the common law, and which as modified to suit our institutions, have been held a part of the law of this state. London v. Headen, 76 N. C. 72, 73, 75.

Same—Penalty for Refusing to Accept Office.—It is a doctrine of the common law that every citizen in peace, as well as in war, owes his services to the state when they are demanded, and a legislative enactment prescribing a penalty of $25 against any person who is duly elected or appointed to an armed force and refuses to serve is not unconstitutional. State v. Headen, 76 N. C. 72, 73, 75.

Occupational Qualifications.—While the legislature, in the exercise of the police power, may protect the public against insurance fraud and oppressive practices by establishing standards of personal fitness and requiring the examination and licensing of those desiring to engage in the learned professions and occupations requiring scientific or technical knowledge or skill, or which involve a trust relationship with the public, it may not impose such restrictions upon those wishing to engage in the ordinary trades or occupations which are harmless in themselves, since the right to choose and pursue a means of livelihood is a property right and a personal liberty guaranteed by the constitution, which right may be interfered with only when necessary to the protection of the public safety or welfare. State v. Harris, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658.

Exercise of Police Power Not Unlimited.—Compulsory vaccination is a valid exercise of governmental police power for the protection of health and safety, and if there are exceptional cases, where owing to the peculiar state of the health or system, vaccination would be dangerous, then the legislature cannot validly compel the person to submit to such practice against his will since this would be in violation of the rights recognized by this section as pre-existing and inherent in the individual. State v. Hay, 126 N. C. 296, 1006, 55 S. E. 600; see also State v. Headen, 76 N. C. 72, 73, 75.

The statute regulating the practice of photography, codified as § 92-1 et seq., does not violate this section, nor deprive any person of fundamental, inalienable rights under art. I, §§ 17, 29, nor create a monopoly in contravention of art. I, § 31. State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366.

§ 2. Political power and government.—That all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole. (Const. 1868.)

In General.—In construing the provisions of the constitution in regard to elections (see Art. VI, sec. 1) it should be kept in mind that this is a government of the people in which the majority—legally expressed, must govern and that these provisions should be liberally construed, that tend to promote a fair election, or expression of this popular will. Quinn v. Lattimore, 120 N. C. 426, 429, 55 S. E. 659.

Repeal of Laws.—It is axiomatic that since all political power is derived from the people and all government originates from them, the sovereign power of the people, expressed through their choice of representatives in the General Assembly, is supreme, and a law by them enacted may not be set aside by the courts unless it contravenes some prohibition or mandate of the Constitution by which the people of the state have been elected to be limited and restrained, or unless it violates some provision of the granted powers of Federal Government contained in the Constitution of the United States. State v. Warren, 211 N. C. 75, 80, 189 S. E. 108.


§ 3. Internal government of the State.—That the people of this State have the inherent, sole and exclusive right of regulating the internal and governmental and police thereof, and of altering and abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right should be exercised in pursuance of law, and consistently with the Constitution of the United States. (Const. 1868.)

Duty to Follow Decisions of Supreme Court.—It is the duty of the Supreme Court of the state to follow the decisions of the Supreme Court of the United States, upon questions involved in interstate commerce where Congress has assumed control of the matter relating thereto, and involved in the litigation. Norris v. Telegraph Co., 174 N. C. 92, 91 S. E. 465. But in intrastate cases, the decisions of the state Supreme Court are binding and will be followed in the U. S. Supreme Court though they appear "absurd and illogical." Id.

Regulation of Criminal Practice. — The legislature has power to shape the criminal procedure of the state to provide remedies required by the exigencies of the present time. State v. Lewis, 142 N. C. 626, 628, 55 S. E. 600. See also Roman v. Mekas, 211 N. C. 412, 189 S. E. 790.

§ 4. That there is no right to secede.—That this State shall ever remain a member of the American Union; that the people thereof are a part of the American nation; that there is no right on the part of this State to secede, and that all attempts, from whatever source or upon whatever pretext, to dissolve said Union or to sever said nation, ought to be resisted with the whole power of the State. (Const. 1865.)

§ 5. Of allegiance to the United States Government.—That every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and that no law or ordinance of the State in contravention or subversion thereof can have any binding force. (Const. 1868.)

§ 6. Public debt; bonds issued under ordinance of Convention of 1868, '68-'69, '89-'70, declared invalid; exception. — The State shall never assume or pay, or authorize the collection of any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; nor shall the General As-
Assemble and within the power of a city or town to provide, by contract with the vendors, with reasonable charges for the stalls. State v. Perry, 151 N. C. 661, 65 S. E. 915.

Regulation as to Maintenance of Market House.—It is within the power of a city or town to provide, by contract with the vendors, with reasonable charges for the stalls. State v. Perry, 151 N. C. 661, 65 S. E. 915.

Regulation as to Practice of Medicine.—An act prohibiting the practice of medicine by persons who are not licensed to practice in the State is not an unreasonable or arbitrary restraint of the public liberty or property, but is a regulation of a subject which comes within the police power of the State. State v. St. George, 147 N. C. 88, 60 S. E. 920.

Regulation as to Pilots.—The selection by a commission authorized to conduct examinations for pilots is a matter of public interest and within the power of the State to control. State v. McFadden, 217 N. C. 575, 279, 182 S. E. 453, dissenting opinion of Justice Bynum.

This section is a fundamental democratic principle of "equal rights and opportunities to all, special privileges to none." It is a protection of the individual against the injustice of the public, and is a safeguard against the exercise of which is for the benefit and good of the public.

Purpose.—In summarizing the purpose of this section the court in Simonton v. Lanier, 71 N. C. 498, 501, speaking through Justice Byrd, says: "The wisdom and foresight of our ancestors is nowhere more clearly shown than in this section of the Constitution of 1868. The framers of that instrument were alive to the fact that the individual is entitled, and is entitled to, certain immunities not accorded to those who must, under the law, pay the additional exaction or quit the business. State v. Harris, 216 N. C. 746, 753, 6 S. E. (2d) 24, 854, 128 A. L. R. 837.

Benefits received by State employees under the Retirement Fund are deferred payments of salary for services rendered, and are not therefore income as under the Constitution of 1868. Bridges v. Charlotte, 221 N. C. 472, 20 S. E. (2d) 825.

Public Service Corporations.—The grant of a special charter to a railroad or other like corporation is not in contravention of this section of the Constitution of 1868, provided that the grant is in the interest of the public welfare and is made for the purpose of providing for the public's convenience, comfort, and safety. Kornegay v. Goldsboro, 180 N. C. 441, 451, 103 S. E. 187.

Private Corporations.—A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its warehouse receipt or contract, attempts to confer exclusive privileges and is therefore unconstitutional under this section. Molley v. Warehouse Co., 122 N. C. 347, 30 S. E. J.; Massey v. Finishing Co., 124 N. C. 124, 50 S. E. 479.

A provision in a bank's charter allowing it to charge more than the legal rate of interest is void under this section of the Constitution, where no public services are rendered in consideration of the grant. Simonton v. Lanier, 71 N. C. 498, 501.

A local public law which provides that the provisions of § 44-14, should be read into private construction bonds, is a rewriting of the Constitution, and constitutes an attempt to make the Constitution fail to operate uniformly and equally in giving special privilege to the residents of the particular county, and imposing heavier burdens on certain sureties. Plott Co. v. Ferguson Co., 202 N. C. 446, 163 S. E. 688.

Public Local Law as to Sale of Claims against Closed Banks Held Invalid.—Public Local Laws and § 53-19, providing that depositors of certain closed banks might sell their claims for deposits to persons indebted to the banks at the date of the closing, and that the liquidation agents of such banks should be authorized to sell such claims at an appraised value, or in payment of the purchasers' debts to the banks, were held unconstitutional and void, being in violation of this section, in Edgerton v. Hood, 205 N. C. 886, 172 S. E. 481.

Regulation as to Maintenance of Market House.—It is within the power of a city or town to provide, by contract with the vendors, with reasonable charges for the stalls. State v. Perry, 151 N. C. 661, 65 S. E. 915.

Regulation as to Practice of Medicine.—An act prohibiting the practice of medicine by persons who are not licensed to practice in the State is not an unreasonable or arbitrary restraint of the public liberty or property, but is a regulation of a subject which comes within the police power of the State. State v. St. George, 147 N. C. 88, 60 S. E. 920.

Regulation as to Pilots.—The selection by a commission authorized to conduct examinations for pilots is a matter of public interest and within the power of the State to control. State v. McFadden, 217 N. C. 575, 279, 182 S. E. 453, dissenting opinion of Justice Bynum.

Any law which, purporting to operate on a particular class, places upon those engaged in the business in a portion of the state a burden for the privilege which is exercised freely and without additional charge by those engaged in the business in other parts of the state is arbitrary in classification because it discriminates within the class originally selected and extends to the latter a privilege not accorded to those who must, under the law, pay the additional exaction or quit the business. State v. Harris, 216 N. C. 746, 753, 6 S. E. (2d) 24, 854, 128 A. L. R. 837.
§ 8. The legislative, executive, and judicial powers distinct.—The legislative, executive, and judicial powers of the government ought to be forever separate and distinct from each other. (Const. 1868.)

See § 1-97 and notes. Generally.—Each of these coordinate departments has its appropriate functions, and one cannot control the action of the other, in the sphere of its constitutional power and duty. State v. Jordan, 125 N. C. 378; Person v. Tax Com'rs, 184 N. C. 499, 115 S. E. 336. This section has been said to embody succinctly the judgment of the people of North Carolina in regard to "the great and essential principle of the separation of the powers of the government and the judiciary—the department of trial and judgment—and the legislature is not violative of our Constitution. O'Neal v. Mann, 193 N. C. 153, 136 S. E. 379. The creation of a board or municipal corporation and the conferring upon such board or municipal corporation quasi-judicial and administrative functions does not violate this section. Cox v. Kinston, 217 N. C. 391, 1 S. E. (2d) 232.

Statute authorizing the industrial commission to award compensation for bodily disfigurement is not unconstitutional as a delegation of legislative power incontro—vention of this section. Baxter v. Arthur Co., 216 N. C. 276, 281, 4 S. E. (2d) 621.


The propriety of ordering sales of lands upon petition of the owner is purely a judicial duty and any private act of the General Assembly attempting to regulate the same is void under this section. Miller v. Alexander, 122 N. C. 718, 20 S. E. 125.

Where Office Created by Legislature.—It is competent for the legislature in creating an office, other than purely judicial, to vest the right to call the officer to account in the governor to suspend, the incumbent of the office. Caldwell v. Wilson, 121 N. C. 425, 23 S. E. 554.

Creation of Board with Quasi-Judicial Functions.—The creation by the legislature of a board or municipal corporation and the conferring upon such board or municipal corporation quasi-judicial and administrative functions does not violate this provision. Cox v. Kinston, 217 N. C. 391, 1 S. E. (2d) 232.

Court Practice Regulated by Judicial Department.—Under the present constitution, the supreme judicial power being independent of the other departments, the legislature cannot prescribe rules of practice for the Supreme Court, nevertheless, the courts have copied, almost verbatim, the provisions of the Code. Bird v. Gilliam, 125 N. C. 76, 79, 34 S. E. 196; Hierdon v. Insurance Co., 111 N. C. 384, 16 S. E. 465. And where there is conflict, the rules made by the court will be observed, Cooper v. Com'r, 184 N. C. 615; 113 S. E. 569. However, Art. 4, sec. 12 of the constitution gives to the General Assembly power to regulate proceedings in courts inferior thereto, Art. IV, § 2, a statute declaring that the decisions of the General Assembly shall not be reviewed. State v. Ward, 184 N. C. 658, 113 S. E. 275.

Judicial Power as Aid to Legislative Act.—The judicial power can not be exercised in aid of an unfinished and incomplete act of the legislature, any more than in obstructing legislative action. State v. Robinson, 81 N. C. 409, 436.

Power of County to Apply Formula for Ascertaining Taxable Property.—Plaintiff county ascertained the amount of personal property of defendant nonresident corporation having a "business situs" in this state, and liable for taxation as solvent credits by the county, by ascertaining the total assets of the defendant and the percentage of such assets found in the county, and allowing the same per cent of its total liabilities to be deducted therefrom. Defendant complained that defendant county had made its own rule in ascertaining the solvent credits in the county subject to taxation in violation of this section, but since defendant failed to list its solvent credits for taxation as required by law, it was not prejudiced by the formula used by the county in ascertaining the personal property for taxation as determined by the county. Mecklenburg County v. Sterchi Bros. Stores, 210 N. C. 79, 185 S. E. 779.

The creation of the Mattamuskeet Drainage District by the legislature is not violative of our Constitution. O'Neal v. Mann, 193 N. C. 153, 136 S. E. 379. The creation of a board or municipal corporation and the conferring upon such board or municipal corporation quasi-judicial and administrative functions does not violate this section. Cox v. Kinston, 217 N. C. 391, 1 S. E. (2d) 232.

As to counsel, see § 15-4 and notes.

§ 9. Of the power of suspending laws.—All power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised. (Const. 1868.)

§ 10. Elections free.—All elections ought to be free. (Const. 1868)


§ 11. In criminal prosecutions.—In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty. (Const. 1868.)

As to counsel, see §§ 15-4 and notes. For article discussing the limits to confrontation, see 15 N. C. Law Rev., No. 3, p. 229.
tution does not require that the accused be informed of the charge against him in any special form or particular words, except as required by the constitutional provision. Carpenter, 173 N. C. 767, 92 S. E. 371; State v. Gibson, 109 N. C. 318, 35 S. E. 7. As to necessity for indictment, see N. C. Const., Art. I, sec. 12, and note thereto.

Defendants having been charged with a criminal offense has had sentence suspended upon condition that he appear at certain times in court and show good behavior, it is required that a judgment rendered in his favor or time find the proceedings had and imposed upon the findings of a criminal offense the defendant is found to have committed, in order to show that the defendant is entitled to be proceeded against in coram necessary, and must be present before the jury and accused, so that he may have the right to be informed of the accusation against him. State v. Mickey, 207 N. C. 608, 609, 175 S. E. 220.

Defendants have a constitutional right of confrontation, which cannot lawfully be taken from them, and this includes the right to a fair opportunity to face "the accusers and witnesses with other testimony." State v. Garner, 203 N. C. 361, 166 S. E. 180.

While this section gives to the accused the right to confront witnesses against him, this right does not mean that he shall be able to confront witnesses not only from their own veracity, but only by a duly authenticated copy of a record. State v. Dowdy, 145 N. C. 432, 58 S. E. 1022.

This right guaranteed by this section does not mean that never under any circumstances shall a criminal charge be prosecuted except by the presence of living witnesses. Id. Statute which establishes a form for a bill of indictment for incriminating testimony of defendant's physical condition by witnesses who examined her without his presence in the course of business, upon the books of a railroad company by one at the time an agent of the company, and still living, does not preclude testimony by a witness as to facts incurred during defendant's testimony in the relative position to a witness as the perpetrator was. State v. Greening, 194 N. C. 271, 139 S. E. 436.

A charge to the jury which virtually puts the defendant upon trial for an additional offense to that named in the bill of indictment, and other than that in this section, does not preclude testimony by a witness as to facts incurred during defendant's testimony in the relative position to a witness as the perpetrator was. State v. Gooding, 194 N. C. 271, 139 S. E. 436.

Where a defendant convicted of a criminal offense has been informed of the offense before sentence, the conclusion reached in this state is that the prisoner does not have to accompany the jury when it views the scene of the crime. Apparently the right to have the jury not present is never been raised in this state. 12 N. C. Law Rev., 268.

Same—Deposition.—Depositions taken in the absence of a criminal cannot be read against him. State v. Webb, 2 N. C. 103.

Same—Waiver of Right.—The accused has the right to insist upon the production of his accusers but this is a right which may be waived by a failure to assert it in proper time. State v. Mitchell, 119 N. C. 784, 25 S. E. 783, 1020. The right must be insisted upon in express terms and a general objection to the evidence is not sufficient. Id.

The right of a defendant to confront his accusers includes the right not to be cross-examined on his examinations in their examination-in-chief, and a witness testifying to facts inculpatory defendant in his examination-in-chief does not preclude testimony by a witness as to facts incurred during defendant on the ground that questions asked on cross-examination might tend to incriminate the witness. State v. Perry, 210 N. C. 796, 188 S. E. 619.

Self-Incrimination—Scope of Protection.—For fair interpretation of the clause that "shall not be compelled to give evidence against himself" seems to be to secure one who is or may be accused of crime from making any voluntary revealing which may be given in evidence to convict him, the jury for his trial for the offense. LaFontaine v. Southern Underwriters, 83 N. C. 131, 138.

This immunity extends, not only to one who actually testifies as a witness, but to the defense of the matters charged, even though he decline to testify as a witness in his own behalf. State v. Hollingsworth, 191 N. C. 595, 132 S. E. 667.

As to witness testifying to any unlawful gaming done by himself or others, see section 5-55 and note thereto. Upon the trial of the defendant for violating the prohibition law the introduction in evidence of testimony of the officer making the arrest that he found a half-gallon jar of liquor on the person of the defendant is competent, and is not in violation of the constitutional provision that a defendant may not be compelled to give evidence against himself. State v. Odle, 205 N. C. 592, 173 S. E. 9.

The constitutional guarantee that a defendant shall not be compelled to testify against himself, as provided by this section, does not preclude testimony by a witness as to facts inculpatory defendant in his examination in-chief, and not preclude testimony by a witness as to facts incurred during defendant's testimony in the relative position to a witness as the perpetrator was. Smith v. Riddle, 205 N. C. 591, 172 S. E. 400.

The admission of incriminating testimony of defendant's physical condition by witnesses who examined her without his presence does not violate defendant's constitutional right not to be compelled to give evidence against himself, as provided in this section. State v. Eccles, 205 N. C. 825, 172 S. E. 415.

Whenever the defendant in a criminal action voluntarily testifies in his own defense he assumes the position of a witness and subjects himself to the discovery of the facts upon which a sentence has been imposed and specify the persons upon trial for an additional offense to that named in the bill of indictment, and other than that in this section, does not preclude testimony by a witness as to facts incurred during defendant's testimony in the relative position to a witness as the perpetrator was. State v. O'Neal, 187 N. C. 22, 23, 120 S. E. 436.

In Smith v. Smith, 116 N. C. 386, 21 S. E. 196, it was held that the true intent and meaning of this article is that the witness shall not be compelled to answer any question, the answer to which would disclose a fact which forms an essential link in the chain of testimony which in some manner connects him with the crime, and which tends to prove guilt. State v. Faircloth, delivering the opinion, said: "We think the provision of our Constitution ought to be liberally construed to preserve personal rights and protect the citizen from having the right to be informed of the accusation against him. State v. Mickey, 198 N. C. 45, 46, 150 S. E. 615.

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against himself in denial of his constitutional rights. State v. Neville, 175 N. C. 731, 95 S. E. 55.

Same—Examination of Blood of Accused.—Where defendant expressed the intention of the homicide due to the continued use of liquor and opiates, and the record failed to show any compulsion on the part of the officers in obtaining specimens of defendant's blood and urine in order to determine the presence of any foreign substance, and where defendant's morphine was in his system, it was held that defendant's contention that the obtaining of the specimens compelled him to give evidence against himself, in violation of this section, was untenable. State v. Cash, 219 N. C. 818, 15 S. E. (2d) 277.

Same—Demonstration of Act of Killing.—Upon trial for murder in the first degree when there is other circumstantial evidence to impinge the provisions of this section of the Constitution. State v. Hickey, 198 N. C. 45, 46, 150 S. E. 615.

Same—Forced Production of Incriminating Documents Not Allowed.—The protection afforded to defendants in criminal action by this section is a matter of absolute right to them, and the taking of any incriminating documents by the officer may immediately arrest and search such person, and conceivably on his person and reasonably giving the impres- sion that the obtaining of the specimens compelled him to give evidence against himself, in violation of this section, was untenable. State v. Hickey, 198 N. C. 45, 46, 150 S. E. 615.

Same—Waiver of Privilege.—The defendant waives his constitutional privilege not to answer questions tending to incriminate himself when he voluntarily testifies in his own behalf. State v. Carden, 209 N. C. 404, 183 S. E. 898.

Same—Defendant Voluntarily Taking Stand.—See section 8-54 and notes thereto.

Must Have Opportunity to Prepare and Present Defense. —The constitutional right of a defendant in a criminal prosecution to confront his accusers and adverse witnesses with other testimony, as provided by this section, includes the right to a fair opportunity to prepare and present his defenses, which right must be accorded him not only in formal examinations but in substance as well. State v. Whitfield, 206 N. C. 696, 175 S. E. 93.

Arrest and Search of Person Suspected of Carrying In- criminating Evidence.—In the examination of a person with a mobile with his appearance indicating that he had something concealed on his person and reasonably giving the impression that the person was carrying intoxicating liquor, the officer may immediately arrest and search such person, and where a half-gallon of liquor is found on the person of the defendant the action of the officer does not violate the provisions of this section. State v. Hickey, 198 N. C. 45, 46, 150 S. E. 615.

Payment of Witnesses' Fees Not Placed on Public.—This provision, exempting an acquitted defendant from payment of witnesses' fees by reason of the fact that they shall be paid by the public; the section operates only to deprive the witnesses of their common law right to look to the defendant for payment. State v. Hicks, 124 N. C. 829, 32 S. E. 957.

Private Counsel May Assist Solicitor in Trial of Case.—The trial court has discretionary power to allow private counsel to assist the solicitor in the trial of a case, in being the court of the duty to permit only such assistance as fairness and justice may require, and such power does not impair the provisions of this section of the Constitution. State v. Goff, 203 N. C. 545, 552, 172 S. E. 407.


§ 12. Answers to criminal charges.—No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment, or impeachment. (Const. 1868.)

Generally.—The words "except as hereinafter allowed" have reference to the last clause of section 13, and are intended to harmonize the two sections and let both operate. State v. Crook, 91 N. C. 535, 540.

These principles are dear to every free man; they are held sacred and inviolable by the constitutions of the several states and the Constitution of the United States, and they are the corner-stones of our civil liberty; they are declared to be the rights of the citizens of North Carolina and ought to be maintained with vigilance. State v. Snipes, 165 N. C. 745, 748, 117 S. E. 500.

A justice of the peace has no jurisdiction of an assault with a deadly weapon except to bind the defendant over, and by the provisions of this section, he is not required to try to recite to trial only upon indictment duly found and returned, the words in this section "except as hereinafter allowed" referring to the latter clause of section 13 relating to trial after indictment. State v. Snipes, 185 N. C. 743, 748, 117 S. E. 500.

The word "indictment" means indictment by a grand jury as defined by the common law. State v. Mitchell, 207 N. C. 439, 445, 163 S. E. 91.

Necessity for Order for Grand Jury During Special Term. —Where defendant is tried at a special term of criminal court upon an indictment returned by a grand jury drawn for the special term, but there is no order by the Governor that a grand jury be drawn from such term, as provided by § 7-78, defendant's motion in arrest of judgment, made before the trial, and the order of the court upon an application therefor, was not a true bill when it was made the first time in the Supreme Court upon appeal. State v. Bell, 208 N. C. 90, 179 S. E. 450. See State v. Boykin, 211 N. C. 407, 191 S. E. 18.

The word "indictment" means indictment by a grand jury as defined by the common law. State v. Mitchell, 207 N. C. 439, 445, 163 S. E. 91.

Effect of Invalid Indictment.—When the indictment charging defendant with the commission of crime is invalid, defendant's motion to dismiss the action for want of jurisdiction should be allowed. State v. Beasley, 208 N. C. 318, 180 S. E. 39.


Stated in State v. Shive, 222 N. C. 237, 22 S. E. (2d) 447; State v. Johnson, 220 N. C. 773, 18 S. E. (2d) 358 (dis. op.).

§ 13. Right of jury.—No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal. (Const. 1868.)

For general provisions as to jurors, see sec. 9-1 et seq.

The essential distribution of the jury guaranteed by this section, are the number of jurors, their impartiality and a unanimous verdict, and § 9-21, providing that the jury upon the selection of an alternate juror in those cases which seem likely to be protracted, does not infringe upon this constitutional provision. State v. Dalton, 206 N. C. 775, 171 S. E. 541 (1935).

Unanimous Verdict Required.—A verdict of guilty rendered by a less number than twelve is unconstitutional. State v. Berry, 190 N. C. 363, 130 S. E. 12. The verdict must be considered as a "true bill" only when given by a jury of twelve, even when the judge presides. State v. Bates, 193 N. C. 336, 137 S. E. 172.

The defendant is entitled as a matter of right to know whether each juror asstent to the verdict, announced by the juror who considered the evidence, and whether that end he had the right to insist that a specific question be addressed to and answered by each juror in open court. Whether each juror asstent to the verdict. State v. Boger, 202 N. C. 702, 704, 163 S. E. 877.

Poll of Jury.—The predominant purpose of the poll is
to ascertain if the verdict as tendered by the jury is the "unanimous verdict of a jury of good and lawful men in open court," as prescribed by this section. Lipscomb v. Cox, 195 N. C. 502, 505, 146 S. E. 779. See Art. I, § 12, supra.

Jury Trial Preserved on Appeal.—The right of a trial by jury in a criminal action is preserved to the accused by the statutory provision after entry of a trial de novo in the Superior Court, or appeal from a court of subordinate jurisdiction, and conviction in the Superior Court cannot be had unless upon the verdict of the jury, in accordance with the provisions of this section of our Constitution. State v. Pulliam, 184 N. C. 681, 114 S. E. 394.

Jury Trial Not Waivable.—A jury trial cannot be waived in a criminal action; hence where the facts are of such a nature as to permit him to do so by statute, and where the court, after a plea of "Not Guilty," finds the defendant guilty without a jury trial, the judgment will be stricken out and the cause remanded. State v. Hartsfield, 188 N. C. 516. See also, State v. Mose, 219 N. C. 226, 13 S. E. (2d) 229.

When a defendant in a criminal prosecution in the superior court enters a plea of not guilty he may not, without changing his plea, waive his constitutional right of trial by jury, and the determinative facts cannot be referred to the decision of the court even by consent, but must be found by the jury. State v. Mose, 219 N. C. 226, 13 S. E. (2d) 229.

Miscellaneous Cases.—The North Carolina Workmen's Compensation Act was held not to be unconstitutional for that it impaired the right of trial by jury, guaranteed by this section, in Southern Public Utilities Co. v. 204 N. C. 155, 156, 167 S. E. 560.

For case of emergency, such as illness of juror, see State v. Wheeler, 185 N. C. 670, 673, 116 S. E. 413; denial of partnership, see Southgate Packing Co. v. Ne (C; 1621s S. ees: '205.

Assault and battery is not a petty misdemeanor within the proviso to this section. See State v. Stewart, 89 N. C. 563. As to waiver in civil cases, see section 1-84 and notes thereto.

Jury Trial Can Not Be Waived after Plea of Not Guilty.—A defendant in a criminal prosecution for a felony or a misdemeanor may not waive his constitutional right to trial by jury in the Superior Court after entering a plea of "Not guilty," without changing his plea, nor may the General Assembly permit him to do so by statute, and where the court, after a plea of "Not Guilty," finds the defendant guilty without a jury trial, the judgment will be stricken out and the cause remanded. State v. Hartsfield, 188 N. C. 516. See also, State v. Mose, 219 N. C. 226, 13 S. E. (2d) 229.

Separate Provisions for Petty Misdemeanors.—The very purpose of conferring on the legislative power to provide means of trial other than by jury in the ordinary way, as to petty misdemeanors, is to avoid the inconvenience, expense and delay attendant upon indictment by the grand jury, the trial by the jury where the parties choose to waive it, in the ordinary course of criminal procedure. State v. Crook, 91 N. C. 536, 540. See State v. Boykin, 211 N. C. 407, 191 S. E. 18.

The legislature has power to designate the unlawful possessor of historically prohibited intoxicants a petty misdemeanor and to provide means of trial for the offense other than by indictment and trial by jury. State v. King, 222 N. C. 227, 22 S. E. (3d) 447.

Under this section indictment by grand jury is dispensed with in the trial of petty misdemeanors. State v. Lyle, 138 N. C. 738, 51 S. E. 66.

Same—Right of Appeal.—The right of appeal mentioned in the last section of this section, to the Superior Court, in cases of conviction of petty misdemeanors, is to be held to affect legislative enactments as well. State v. Driver, supra; cited and approved in State v. Reid, 106 N. C. 714, 716, 11 S. E. 315.

It is well settled that when no time is fixed by the statute, an imprisonment for two years or more is cruel and unusual. State v. Farrington, 141 N. C. 844, 53 S. E. 954, citing State v. Driver, 78 N. C. 423; State v. Smith, 174 N. C. 804, 93 S. E. 910.

The effect of punishment is left to the sound discretion of the court, the court is limited only by the prohibition against cruel or unusual punishment in this section. State v. Richardson, 221 N. C. 209, 211, 19 S. E. (2d) 746. See supra.

It is well settled that when no time is fixed by statute, this court will not hold imprisonment for two years cruel and unusual. State v. Moschoures, 214 N. C. 321, 322, 199 N. C. 193, 224 S. E. 137.
Defendant’s contention that he was subjected to cruel and unusual punishment in that the trial court sentenced him to the maximum prison term permitted by statute for the offense of seduction of which he was convicted, and in addition dictated a letter to the parole commissioner in which he requested that no clemency be extended defendant, and also directed the solicitor to institute prosecution against defendant for failure to support his illegitimate child, rests in cases of fraud, section 1-410, par. 4, and notes thereto.

But costs of prosecution against a prosecutor (upon acquittal of the accused or nolle prosequi entered), or against the accused upon a verdict of guilty, or a fine imposed, does not constitute a debt within the meaning of this section of the Constitution, and hence the defendant may be imprisoned for non-payment of the same. State v. Wallin, 89 N. C. 578, 579. See section 4-65. Nor is the duty of maintaining a bastard child imposed upon the father, such a debt as is contemplated by this section. State v. Palin, 63 N. C. 472, 127 S. E. 248, cited and approved in State v. Beasley, 75 N. C. 211, 212.

No Imprisonment Except Where There Is Fraud.—"This section clearly means that there shall at least be no imprisonment enforced on the basis of a process, unless it has been adjudged, upon an allegation duly made in the complaint and a corresponding, issue for trial, that the debt is due and the summons is not an attempt to evade the process. In re Coast Fertilizer Co. v. Hardee, 211 N. C. 653, 657, 191 S. E. 725, quoting from Feddor v. Emerson, 143 N. C. 527, 55 S. E. 599, 10 L. R. A. (N. S.) 562.

Applicable to Tort Actions.—The provision of this section of the constitution has no application to actions for tort; it is confined to causes of action arising ex contractu. Long v. McLean, 88 N. C. 3. See Ledford v. Smith, 147 N. C. 447, 151 S. E. 722. As to arrests for damages arising from tort, see section 4-140, par. 6, and notes thereto.

The Worthless Check Law is a valid exercise by the Legislature under Art. I, § 15 CONSTITUTION OF NORTH CAROLINA of the police powers. State v. Yarbore, 194 N. C. 496, 140 S. E. 516.

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Applicable to Tort Actions.—The provision of this section of the constitution has no application to actions for tort; it is confined to causes of action arising ex contractu. Long v. McLean, 88 N. C. 3. See Ledford v. Smith, 147 N. C. 447, 151 S. E. 722. As to arrests for damages arising from tort, see section 4-140, par. 6, and notes thereto.

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Revival of Barred Claims.—A state statute purporting to revise claim barred by statute of limitations violates due process clauses of state and federal constitutions, whether said limitations are of right or of the contract. Valleyley Tp. v. Women's Catholic Order, etc., 115 F. (2d) 459, reversing 32 F. Supp. 894.

Additional Liability Imposed by Admiralty Act Must Be Proved.—A defendant claiming under a contract, within the meaning of the constitutional prohibition against impairment, includes all the means and assurances available for the enforcement of the contract at the time of its execution. Bateman v. Ster- }

...ity of the defendant in criminal action to cross-examine expert witnesses who have testified their opinion against him is a material one, guaranteed by this section of the Constitution and a denial thereof may not be held merely a technicality and harm-...
law, State v. Willis Barber, etc., Shop, 219 N. C. 709, 15
S. E. (2d) 226.

Eminent Domain by Park Commission.—The exercise of the
effect of a private contract and the prevailing laws. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 226.

Eminent Domain by Park Commission.—The exercise of the
right to the credit of the debtor to enforce payment by action in
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Art. I, § 18

CONSTITUTION OF NORTH CAROLINA

Art. I, § 19


§ 18. Persons restrained of liberty.—Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such restrained person may not be held to answer for any offense until the right to a trial by jury in the matter be determined, and the case is excluded from the administration of the criminal law, and is committed to the superior court for trial, as provided by law. This section guarantees the right of trial by jury in "controversies at law regarding property," in all controversies at law respecting property, and to remove the same, if unlawful; and such restraint of liberty to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such restraining order or any of the rights of the people, and ought to remain sacred and inviolable. (Const. 1868.)


§ 19. Controversies at law respecting property.—In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. (Const. 1868.)

Cross Reference.—As to waiver of jury trial see section 1-128 and note thereof.

This section guarantees the right of trial by jury in "controversies at law regarding property," includes equitable and legal elements involved in the determination of the trial of a cause, but it is not required that a trial by jury be had at each stage of the proceedings when this right has elsewhere therein been properly safeguarded by statute. Commissioners v. George, 180 N. C. 571, 109 S. E. 568.

Every litigant has the constitutional right of trial by jury unless he voluntarily waives it, and, in case of a compulsory reference made to facilitate the trial of a cause, he can require the referee and pointing out the findings so expected to be made a part of the record and to be the basis of the findings. Commissioners v. George, 182 N. C. 414, 417, 109 S. E. 568.

Whenever there is more than a scintilla of evidence to sustain the allegations of the complaint, the case must be submitted to the jury, its sufficiency to warrant a verdict for plaintiff being for the determination of the court, subject merely to disciplinary power of the trial court to set the verdict aside in proper cases, and a strict adherence to this rule is necessary to preserve the right of trial by jury guaranteed under this section. Fox v. Asheville Army Store, 215 N. C. 187, 1 S. E. (2d) 550.

Right to a jury trial is guaranteed by this section, and where the parties do not consent to trial by the court, it may not determine, prior to the introduction of evidence, an issue of fact joined by the pleadings. Horsley Corp. v. Atlantic Coast Line R. Co., 207 N. C. 122, 176 S. E. 265. The refusal of the court to refer the issue involved to the jury by proper authority of this section of the Constitution. McDowell v. Norfolk Southern R. Co., 186 N. C. 571, 511, 120 S. E. 630.

Criminal Cases.—The right to trial by jury is beyond controversy, both in civil and criminal cases. State v. Rogers, 162 N. C. 656, 660, 178 S. E. 293, 46 L. R. A. (N. S.) 30, Ann. Cas. 1914A, 867 (dis. op.).

Proceedings before the judge to remove a prosecuting attorney from office for willful misconduct or maladministration in office, do not require an issue to be submitted to the jury, such office is not a property right under the provisions of this section. State v. Hamme, 180 N. C. 694 (1914 S. E. 77).

Miscellaneous Cases.—In an action for damages for negligently setting fire to plaintiff's woods by sparks from defendant's engine, it was held that this section guarantees as a "sacred and inviolable" right, that the plaintiff might have the case submitted to the jury. Williams v. Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448.

In proceedings before the corporation there is no jury trial provided, and hence if no appeal lies therefrom by the plaintiff he is deprived of this sacred and inviolable right as guaranteed by this section. Walls v. Strickland, 174 N. C. 298, 301, 93 S. E. 857 (dis. op.).

When in proceedings for alimony without divorce the pleadings raise the issues of the validity of marriage between the parties, or whether the husband had separated himself from his wife and failed to provide her suitable or necessary support, the issue of separation to which the pleading is limited for determination by a jury, but it is met if the trial be had according to the settled course of Judicial Proceedings. Caldwell v. Wilson, 112 N. C. 519, 17 S. E. 431.

Polling Jury in Civil Actions.—Under this section the losing party in a civil action may demand a polling of the jury upon the return of the verdict, as a matter of right. Culbreth v. Mfg. Co., 189 N. C. 208, 126 S. E. 419.

Upon the coming in of the verdict in a civil action, either party to the action has the constitutional right to have the jury polled before accepting the verdict as a unanimous one. In re Will of Sugg, 194 N. C. 638, 140 S. E. 604. See note under Art. I, § 13.

Effect of Fourteenth Amendment of Federal Constitution.—As the right to trial by jury is an inherent right guaranteed in the State Courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge, and the requirements of the Federal Constitution are not always applicable to cases of property without due process of law does not imply that all trials in the State Courts affecting property must be by jury, but it is met if the trial be had according to the settled course of Judicial Proceedings. Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554.

Subsistence Pendente Lite.—Provisions of section 50-16 empowering the court to make and carry out orders pendente lite to plaintiffs in an action for a divorce. See note under Art. I, § 14.
of land for taxation, or determination of such value by a jury in a de novo hearing, and will not support resort to certiorari for that purpose. Belk’s Dept. Store v. Guilford County, 222 N. C. 441, 23 S. E. (2d) 897.


Cited in In re Parker, 209 N. C. 693, 184 S. E. 532.

§ 20. Freedom of the press.—The freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but every individual shall be held responsible for the abuse of the same. (Const. 1868.)

Contract Prohibiting Entering into Business.—A contract upon the sale of a newspaper that the seller shall not for a period of ten years be connected with any newspaper in the state without obtaining the consent of the purchaser is void under this section. Cowan v. Fairbrother, 118 N. C. 406, 24 S. E. 212.

This decision is placed on the ground that the framers of the constitution did not intend to restrict the power of any person to dispose of anything of value which, as the creature of his own mental or physical exertions, has become his property.—Ed. Note.


§ 21. Habeas corpus.—The privilege of the writ of habeas corpus shall not be suspended. (Const. 1868.)

See § 17-3 and notes thereto.

Stated in McEachern v. McEachern, 210 N. C. 98, 185 S. E. 684.

§ 22. Property qualification.—As political rights and privileges are not dependent upon, or modified by, property, therefore no property qualification ought to affect the right to vote or hold office. (Const. 1868.)

§ 23. Representation and taxation.—The people of this State ought not to be taxed, or made subject to the payment of any impost or duty, without the consent of themselves, or their representatives in General Assembly, freely given. (Const. 1868.)

§ 24. Militia and the right to bear arms.—A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power.

Nothing herein contained shall in any way impair the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice. (Const. 1868; Convention 1875.)

Editor’s Note.—The last sentence of this section was added by the Convention of 1875.

Generally.—This provision of the constitution plainly expresses the distinction between the “right to keep and bear arms,” and “the practice of carrying concealed weapons.” The first, it is declared, shall not be infringed, while the latter may be prohibited. State v. Spiller, 56 N. C. 697, 700. The framers of this constitution could say that even without this constitutional provision, the Legislature may by law regulate the right to bear arms in a manner conducive to the public peace. Cited in State v. Reams, 121 N. C. 556, 27 S. E. 1004. As to code provision regulating concealed weapons, see sec. 14-269 and notes thereto.

Power of Legislature Limited.—The last clause of this provision metes out an exception to the first and indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons, but no further. State v. Kerns, 181 N. C. 574, 107 S. E. 20.

§ 25. Right of the people to assemble together.—The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the Legislature for redress of grievances. But secret political societies are dangerous to the liberties of a free people, and should not be tolerated. (Const. 1868; Convention 1875.)

The last sentence of this section was added by the Convention of 1875.—Ed. note.

Cited in State v. Lea, 203 N. C. 316, 166 S. E. 292 (con. op.).

§ 26. Religious liberty.—All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience. (Const. 1868.)


§ 27. Education.—The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right. (Const. 1868.)


Stated in Bear v. Commissioners, 124 N. C. 204, 32 S. E. 581; Collie v. Commissioners, 135 N. C. 170, 171, 59 S. E. 44.


§ 28. Elections should be frequent.—For reëxercise of rights, and for amending and strengthening the laws, elections should be often held. (Const. 1868.)

Cited in State v. Yarbrough, 194 N. C. 498, 140 S. E. 216 (con. op.).

Cited in McLean v. Durham County Board of Elections, 222 N. C. 6, 21 S. E. (2d) 842.

§ 29. Recurrence to fundamental principles.—A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty. (Const. 1868.)

Liberal Construction.—The constitution must be construed in the light of its history, and must be liberally construed in aid of progress, but a liberal construction is especially required in interpreting those provisions safeguarding individual liberty. State v. Harris, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 469.

Quoted in State v. Hardy, 189 N. C. 799, 128 S. E. 153, as to conviction, in a criminal action, of defendant except by the law of the land or under a unanimous verdict of guilt by the jury, and as to presumption of innocence upon denial of guilt, with the statutory right to request to go on the stand as a witness in his own behalf, in not exercising which no prejudice shall be created against him, and as to the further right to have counsel for his defense who may argue the matters of law and fact to the jury, and as to defendant’s right to have the trial judge in his instructions to the jury not give his opinion whether a fact is fully or sufficiently proven.


§ 30. Hereditary emoluments, etc.—No hereditary emoluments, privileges, or honors ought to be granted or conferred in this State. (Const. 1868.)

Editor’s Note.—This provision is usually construed in connection with section 31 of this article. Reference is here made to the cases placed under that section.
§ 31. Perpetuities, etc.—Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed. (Const. 1868.)

Cross Reference.—See Art. I, sec. 7.

As to invalidity of a local statute providing that the provisions of G. S. § 44-14 should be read into private contracts under this section see Art. I, § 7 and notes thereon.

Early Vesting of Estates Favored.—Where, by a correct interpretation of the will, it will reasonably be allowed, the law should vest estates against the 21 years of a contingent remainder. Walker v. Trolinger, 192 N. C. 744, 135 S. E. 871.

This section is a fundamental democratic principle of the constitution. "It is one of the cardinal principles of a free society to allow all opportunities to all, and none." Newman v. Watkins, 208 N. C. 675, 679, 182 S. E. not confer exclusive emoluments and privileges on continuers of interest in the state and ought not to be allowed. (Const. 1868.)

Failure to Provide for Successors to Office.—The general assembly having failed to appoint or provide for the election of successors to the highway and sinking fund commissioner of Madison county, who were appointed for a four-year term by ch. 341, Public-Laws of 1921, the general assembly is presumed to acquiesce in their continuance in office, and the general assembly having power to terminate the office, the continuance of the officers in office shall be held that it intended to create perpetuities or exclusive emoluments in violation of any of the provisions of this article, and said commissioners continue to hold office with power to act as successors thereto. Freeman v. Board of Com'rs, 217 N. C. 209, 7 S. E. (2d) 354.


Miscellaneous Cases.—Selection by a commission of persons qualified to act as pilots, St. George v. Hardie, 147 N. C. 89, 60 S. E. 928; ordinance granting the exclusive privilege to construct and maintain water-works within the corporate limits of the city of Elizabeth City, etc., Co. v. Elizabeth City, 188 N. C. 728, 124 S. E. 611, 136 N. C. 963, 137 S. E. 198; 21 Statutes at Large 863; 21 Stat. 592, 55 L. Ed. 619, and United States v. American Tobacco Co., 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663; stipulations in partial restraint of trade were held not to be oppressive to the law unless they were unreasonable and likely to become monopolies, which are obnoxious to this section, Tobacco Growers' Cooperative Ass'n v. Jones, 185 N. C. 263, 273, 117 S. E. 174, 33 A. L. R. 231; North Carolina Fair Trade Act, Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308; police power to regulate those engaged in the business of operating clean-streets, sidewalks, which were begun and which have been concluded without an initial petition, is proper and such act cannot be successfully attacked because it is retroactive or retrospective. Holton v. Mockbee, 192 N. C. 214, 133 S. E. 211. Unemployment Compensation Comm'n v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592; prosecution for willful failure to support illegitimate child born after the passage of the act, although the child was begotten before the effective date of the statute, State v. Mansfield, 207 N. C. 233, 176 S. E. 761.

Unemployment Compensation Taxes.—Taxes levied for the year 1936 under the Unemployment Compensation Act, section 96-1 et seq., are void as violating this section. Unemployment Compensation Comm'n v. Wachovia Bank, etc., Co., 213 N. C. 491, 2 S. E. (2d) 392.


§ 32. Ex post facto laws.—Retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore no ex post facto law ought to be made. No law taxing retrospectively sales, purchases, or other acts previously done, ought to be passed. (Const. 1868.)

See annotations to § 49-2.

Definition.—An ex post facto law is one which either makes that a crime which was not a crime when the offense was committed or which imposes a heavier sentence than that which was prescribed for the offense when the statute was passed or which makes that a crime which was not a crime when the offense was committed or which imposes a heavier sentence than that which was prescribed for the offense when the statute was passed. State v. Broadway, 157 N. C. 598, 72 S. E. 987. But a retrospective statute is not necessarily void. Tabor v. Ward, 83 N. C. 231.

The general rule, subject, however, to some exceptions, is that the courts are not bound to construe any proceeding which might have been authorized in advance in a manner, even though its act may operate to divest a right of action existing in favor of an individual, or subject him to a loss he would otherwise have suffered. Anderson v. Wilkins, 142 N. C. 154, 55 S. E. 272.

Applies only to Criminal Statutes.—An ex post facto statute prohibited by this section relates only to criminal statutes, and though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust estate with the limitation over upon a contingent determinable at some future time as to the persons who take thereunder, the courts are not bound to construe any proceeding which might have been authorized in advance in a manner, even though its act may operate to divest a right of action existing in favor of an individual, or subject him to a loss he would otherwise have suffered. (Const. 1868.)

Whenever a retrospective statute applies to crimes and penalties, it is an ex post facto law. State v. Bell, 61 N. C. 76, 82; State v. Bond, 49 N. C. 9.

Miscellaneous Cases.—Validation of proceedings for the improvement of streets and sidewalks, which were begun and which have been concluded without an initial petition, is proper and such act cannot be successfully attacked because it is retroactive or retrospective. Holton v. Mockbee, 192 N. C. 214, 133 S. E. 211. Unemployment Compensation Comm'n v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592; prosecution for willful failure to support illegitimate child born after the passage of the act, although the child was begotten before the effective date of the statute, State v. Mansfield, 207 N. C. 233, 176 S. E. 761.

§ 33. Slavery prohibited.—Slavery and involuntary servitude, otherwise than for crime, whereof the parties shall have been duly convicted, shall be, and are hereby forever prohibited within this State. (Const. 1868.)

§ 34. State boundaries.—The limits and boundaries of the State shall be and remain as they now are. (Const. 1868.)

§ 35. Courts shall be open.—All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, delay, or delay. (Const. 1868.)


The salutary principle set forth in this section does not prohibit the use of the courts, by the assertion of fanciful rights or by complaints based upon imaginary wrongs to hinder or delay others in the enjoyment of rights founded upon the law and in accord with justice and fair dealing among men. Caton v. Fleming, 158 N. C. 600, 602, 125 S. E. 259.

Delay Caused by Irregular Pleading.—Under the provisions of this section an adversary party ought not to be held in default and adjudged a party plaintiff by the controversy by the fact that the exceptions taken by the opposite party are so drawn as to take two chances, first of a favorable decision by the court, and then of a finding in his favor by the jury. Driller Co. v. Worth, 118 N. C. 746, 747, 748, 24 S. E. 517.
Nor ought be delayed because the demand for a jury trial fails to point out the precise issue as to which testimony must be offered. Id. So also, the rights of the appellate will be protected when the appellant failed to print the record as required by statute. Cowan v. Layburn, 116 N. C. 526, 21 S. E. 965.

A motion for a continuance is addressed to the discretion of the judge or is determined by him. The exercise of his duty to administer right and justice without sale, delay, or denial, or delay; State v. Godwin, 216 N. C. 41, 15 S. E. (2d) 111.

The creation of inferior courts by the legislature has been useful in having justice administered without "delay" in accordance with this section. Albertson v. Albertson, 207 N. C. 541, 194 S. E. 352.

Foreclosure of Mortgages.—This section is not violated by sections 45-32 and 45-33 regulating the sale of real property upon the foreclosure of mortgages or deeds of trust. Woltz v. State, 292 N. C. 174, 234 S. E. 2d 127.

The establishment of a cartway involves the taking of private property by eminent domain, and land therefor may not be taken without giving the owner notice and an opportunity to be heard, with right of appeal according to the due course of law. Waldroup v. Ferguson, 213 N. C. 196, 195 S. E. 675.

Section 34-34 is constitutional and valid, since it recognizes the obligation of the debtor to pay his debt and the right of the creditor to enforce payment by action in accordance with the terms of the agreement, but provides means of correcting any errors in sales under power to the end that the price paid at the sale shall not be conclusive as to the value of the property, and that the creditor may not recover deficiency after sale, or purchase the property at the price without first accounting for the fair value of the property in accordance with well settled principles of equity. Richmond Mfg. Co., Inc. v. Wachovia Bank, etc., Co., 210 N. C. 29, 187 S. E. 485.

And Power to Fix Salary of Judge of County Court.—The establishment of a county court involves the taking of public property by eminent domain, and land therefor may not be taken without giving the owner notice and an opportunity to be heard, with right of appeal according to the due course of law. Waldroup v. Ferguson, 213 N. C. 196, 195 S. E. 675.

§ 36. Soldiers in time of peace.—No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war but in a manner prescribed by law. (Const. 1868.)

§ 37. Other rights of the people.—This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people. (Const. 1868.)

Stated in Nichols v. McKee, 68 N. C. 429, 431; State v. Lewis, 142 N. C. 326, 328, 64 S. E. 600; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 599.


ARTICLE II

Legislative Department

§ 1. Two branches.—The legislative authority shall be vested in two distinct branches, both dependent on the people, to-wit: a Senate and a House of Representatives. (Const. 1868.)

Legislative function cannot be delegated. Cox v. Kinston, 217 N. C. 391, 8 S. E. (2d) 252.

But Legislative May Delegate to Local Political Subdivisions power to fix the Dues or Fees. When the legislature may delegate to political subdivisions the power to fix the dues or fees therefor it may delegate to county commissioners the power to establish a county court when necessary in the public interest, and, a fortiori, it may also delegate to the county commissioners similar authority which shall not be determined by him. State v. Godwin, 216 N. C. 41, 15 S. E. (2d) 111.

And Power to Fix Salary of Judge of County Court.—The fixing of the salary of the judge of a county court is essentially a local matter which the general assembly may delegate to the commissioners of the county in which the court is situated. Sec. 14 of sec. 1, ch. 519, Public-Local Laws of 1939, providing that the board of county commissioners of Forsyth county should have the power to fix the salary of the judge of the county court, is a delegation of legislative power. Edfrd v. Board of Com'r's, 219 N. C. 96, 12 S. E. (2d) 889.

Standards of Public Officers Set Up for Administrative Board.—Chapter 20, Public Laws of 1937, as amended by chapter 337, Public Laws of 1939, providing for the licensing of those engaged in the business of dry cleaning by the commission created in this section, is a delegation of legislative authority, in that the act fails to set up the standards or provide reasonable limitations to guide the administrative board in admitting or excluding persons from the business, but leaves such power to the unlimited discretion of the administrative board. State v. Harris, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 659.

And Industrial Commission May Award Compensation for Bodily Disfigurement.—Section 97-31 authorizing the industrial commission to award compensation for bodily disfigurement is not void as a delegation of legislative authority. Baxter v. Arthur Co., 216 N. C. 296, 4 S. E. (2d) 621.

The North Carolina Fair Trade Act is not unconstitutional as a delegation of legislative authority, since the act is complete in itself and requires no action on the part of any agent to put it into operation. Waldroup v. Ferguson, 213 N. C. 196, 195 S. E. 675.

In the Constitution of 1868 the first clause of this section read as follows: "The Senate and House of Representatives shall meet annually on the third Monday in November, and when assembled shall be denominated the General Assembly. Neither House shall proceed upon public business unless a majority of all the members are actually present. (Const. 1868; 1872-3, c. 82; Constitution 1873.)

In the Convention of 1868, the first clause of this section was changed to: "The Senate and House of Representatives shall meet annually on the third Monday in November, and when assembled shall be denominated the General Assembly. The word "annually" was changed to "biennially" in pursuance of Ch. 82, Public Laws of 1872-73. The Convention of 1873 changed the time of meeting to the first Wednesday after the first Monday in January next after their election."—Ed. note.

§ 3. Number of senators.—The Senate shall be composed of fifty senators, biennially chosen by ballot. (Const. 1868.)

§ 4. Regulations in relation to districting the State for senators.—The Senate districts shall be so altered by the General Assembly, at the first session after the return of every enumeration by order of Congress, that each Senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and Indians not taxed, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a Senate district, unless such county shall be equitably entitled to two or more senators. (Const. 1868; 1872-3, c. 81.)

Editor's Note.—This was formerly section 5 of the Constitution of 1868 which was as follows: "Sec. 5. An enumeration of the inhabitants of the State should be taken under the direction of the General Assembly in the year one thousand eight hundred and seventy-five, and at the end of every ten years thereafter; and the Senate districts shall be so altered by the General Assembly, at the first session after the return of every enumeration taken as aforesaid, or by order of Congress, that each Senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and Indians not
taxed, and shall remain unaltered until the return of an
other enumeration, and shall at all times consist of con-
tiguous territory; and no county shall be divided in the
formation of a Senate district, unless such county shall be
equitably entitled to two or more Senators." Sec. 4 of the
Constitution of 1868, which divided the Senate into Sena-
torial districts pending a division by the first General As-
sembly after 1871, was omitted by the Constitution of 1875.
So was Sec. 8 which made the temporary apportionment for
the House of Representatives.

Reapportionment is a political question and not a judicial
e one. Leonard v. Maxwell, 216 N. C. 89, 3 S. E. (2d) 316.

§ 5. Regulations in relation to apportionment of
representatives.—The House of Represen-
tatives shall be composed of one hundred and
twenty representatives, biennially chosen by bal-
lot, to be elected by the counties respectively,
according to their population, and each county
shall have at least one representative in the
House of Representatives, although it may not
contain the requisite ratio of representation; this
apportionment shall be made by the General
Assembly at the respective times and periods
when the districts for the Senate are hereinbefore
directed to be laid off. (Const. 1868; 1872-3, c. 82.)

See note to the next preceding section of this article.

§ 6. Ratio of representation.—In making the
apportionment in the House of Representatives
the ratio of representation shall be ascertained by
dividing the amount of the population of the State,
exclusive of that comprehended within
those counties which do not severally contain
the one hundred and twentieth part of the pop-
ulation of the State, by the number of repre-
sentatives, less the number assigned to such
counties; and in ascertaining the number of the
population of the State, aliens and Indians not
taxed shall not be included. To each county
containing the said ratio and not twice the said
ratio there shall be assigned one representative;
to each county containing twice but not three
times the said ratio there shall be assigned two representatives,
and go on progressively, and
then the remaining representatives shall be as-
signed severally to the counties having the larg-
est fractions. (Const. 1868.)

Changing Dividing Line of Counties.—An act which
change the dividing line between two counties is not in
conflict with this section. Commissioners v. Ballard, 69 N.
C. 18.

§ 7. Qualifications for senators.—Each member
of the Senate shall not be less than twenty-
five years of age, shall have resided in the State
as a citizen two years, and shall have usually
resided in the district for which he was chosen
one year immediately preceding his election.
(Const. 1868.)

§ 8. Qualifications for representatives.—Each
member of the House of Representatives shall be
a qualified elector of the State, and shall have
resided in the county for which he is chosen for
one year immediately preceding his election.
(Const. 1868.)

§ 9. Election of officers.—In the election of
all officers, whose appointment shall be conferred
upon the General Assembly by the Constitution,
the vote shall be viva voce. (Const. 1868.)

Presumption of Regularity.—Where a certificate shows
that there was a legislative election of an officer and noth-
ing else appearing, the law presumes a quorum and that
the election was regular. Cherry v. Burns, 124 N. C. 761,
766, 33 S. E. 136.

§ 10. Powers in relation to divorce and al-
imony.—The General Assembly shall have power
to pass general laws regulating divorce and al-
mimony, but shall not have power to grant a di-
 reaffirmation or secure alimony in any individual case.
(Const. 1868.)

Cross Reference.—For the legislative enactments passed
pursuant to this section and the constructions thereof, see
§§ 50-1 et seq., and the notes thereto.

Only Limitation on Legislative Power.—The only limita-
tions on the power of the legislature enacting statutes relating
to divorce is found in this section. Cooke v. Cooke, 164 N. C. 275, 80 S.
E. 178; Long v. Long, 206 N. C. 706, 175 S. E. 85.

§ 11. Private laws in relation to names of
persons, etc.—The General Assembly shall not have power
to pass any private law to alter the name of any person,
or to legitimate any person not born in lawful wedlock,
or to restore to the rights of citizenship any person convicted of
an infamous crime, but shall have power to pass
general laws regulating the same. (Const. 1868.)

§ 12. Thirty days' notice shall be given an-
terior to passage of private laws.—The General
Assembly shall not pass any private law, un-
less it shall be made to appear that thirty days' notice of application to pass such a law shall have been given, under such direction and in
such manner as shall be provided by law. (Const.
1868.)

Notice Presumed to Be Given.—The courts will conclu-
sion, ex parte from the ratification of a private act that
the notice required by this section has been given. Math-
iews v. Blowing Rock, 207 N. C. 450, 177 S. E. 429; Gal-

Sec. 6. Notice.—Notice may be given at any time
in the manner provided for in the Constitution, and the
commissioners or other persons may be ordered to
attorn and to execute such acts as may be necessary.
North Carolina v. Commissioners of Pitt County, 146 N.
C. 594, 585, 60 S. E. 515; 16 L. R. A. (N. S.) 235, 35.

When Testimony Heard.—Except in case of bills coming
within the provisions of section 14, the Supreme Court will
not hear testimony for the purpose of showing that the no-
tice required by this section was not given. Brodnax v.
Groom, 64 N. C. 944; Gatlin v. Tarboro, 78 N. C. 119; Wil-
son v. Markley, 133 N. C. 616, 47 S. E. 1025; Bray v. Wil-
liams, 137 N. C. 387, 399, 176 S. E. 746.

No Ground for Collateral Impeachment.—Where an act
granting a charter to a private corporation has been duly ratified, it may not be collaterally impeached in an action
between it and another on the ground that the notice had not agen tly been given, under such direction and in
such manner as shall be provided by law. (Const.
1868.)

The act creating the North Carolina National Park Com-
mission (Laws 1927, ch. 48) is a public act and does not fall
within the purview of this section requiring notice that applicaton to the General Assembly for the passage
of a private act be made. Yarborough v. Park Commis-
sion, 139 N. C. 294, 145 S. E. 567.

Cited in Commissioners v. Snuggs, 121 N. C. 394, 408, 28
S. E. 539.

§ 13. Vacancies.—If vacancies shall occur in
the General Assembly by death, resignation, or
otherwise, writs of election shall be issued by the
Governor under such regulations as may be
prescribed by law. (Const. 1868.)

§ 14. Revenue.—No law shall be passed to
raise money on the credit of the State, or to
pledge the faith of the State, directly or indi-
rectly, for the payment of any debt, or to impose
any tax upon the people of the State, or
to allow the counties, cities or towns to do so, un-
less the bill for the purpose shall have been read
three several times in each house of the General
Assembly and passed three several readings, which
II. GENERAL CONSIDERATION.

Section Mutatory.—This section is mandatory. Commissioners v. Snuggs, 121 N. C. 394, 28 S. E. 539; Union Bank v. Commissioners, 119 N. C. 214, 23 S. E. 966; and must be strictly complied with. Smothers v. Com., 125 N. C. 480, 34 S. E. 455. The adoption of this section, annulled all special powers remaining unexecuted, and not granted in strict conformity with its requirements. Commissioners v. Payne, 123 N. C. 431, 50 S. E. 741.

Burden of Proof.—Parties objecting have the burden of showing that acts had not been passed according to the requirements of this section. Slocumb v. Fayetteville, 125 N. C. 362, 365, 34 S. E. 436.


Applications to Townships.—The restrictions are by necessary implication applicable to townships, as they are constituent parts of the county organization. Wittkowsky v. Commissioners, 150 N. C. 90, 63 S. E. 275; Township Road Commission v. Commissioners, 178 N. C. 61, 100 S. E. 122.

Not Applicable to Necessary County Expense.—It is not necessary to enter the yeas and nays on an act to raise revenue for a necessary county expense. Black v. Commissioners, 129 N. C. 121, 122, 39 S. E. 818.

Issuing bonds for road purposes is a necessary expense to the county. Commissioner v. Commissioners, 176 N. C. 377, 97 S. E. 226.

An act authorizing treasurer to deliver state bonds is not within this section. Battle v. Lacy, 150 N. C. 573, 64 S. E. 905.

A motion to reconsider violates the efficacy of the original passage according to this section; for the act to be valid the final result must comply with this section. Allen v. Raleigh, 181 N. C. 453, 454, 107 S. E. 463.

A statute for the revaluation of property is not in its strict sense a revenue act within the meaning of this section. Ham v. Com., 193 N. C. 106, 134 S. E. 403.

The filing fee required by the primary law, §§ 163-120 et seq., is in no sense a tax within the meaning of this section. McLean v. Davidson County Board of Elections, 222 N. C. 23, 23 E. (Md.) 842.

Changing of County Agencies.—The Legislature has the power and authority to change the county tax agencies with further or different provisions than those required by this section, by reason of the failure to meet the requirements of this section, by reason of the failure to record on the journal on the second reading in one of the branches of the legislature the "no" vote, when it is made to appear from the entries of the names of those voting in the affirmative that a majority of the voters had so voted, the absence of the names of two or more of the members of the body voting in the negative that there were none. Leonard v. Commissioners, 185 N. C. 537, 117 S. E. 300, citing Commissioners v. Trust Co., 163 N. C. 1109, 143 S. E. 580.

Who May Enjoin Bond Issue.—It is competent for a taxpayer, by complaint on behalf of the taxpayers in the State, whereby to enjoin the issue of State bonds under an unconstitutional act of Assembly. Glenn v. Wray, 126 N. C. 78, 46 S. E. 955.

Readings on Same Day.—Where the journal of the state senate affirmatively shows that the first and second readings of a bill took place on the same day of the act is unconstitutional. Storm v. Wrightsville Beach, 189 N. C. 679, 127 S. E. 17.

IV. THE JOURNAL—SPEAKERS’ CERTIFICATES.

See notes under § 23 of this article.

What Journal Must Show.—The journal must show who voted for the bill, and that the requisite number of Senators and members did so, and no other source of evidence can be invoked, and the certificate of the presiding officers that a bill has been read three times does not obviate the necessity of examining the journal. Burlington v. New Bern, 213 Fed. 1014.

Omission of Negative Vote.—Where the journal of the house does not give the names of any members, as voting in the negative, on a bill after having issued state bonds, and it does not affirmatively appear that there were none so voting, the statute is invalid. Debnam v. Chitty, 131 N. C. 457, 44 S. E. 3.

Where the House Journal showed that a certain law, authorizing the issuance of county bonds, was passed by the following votes: Ayes 94, Nays 0; there being no record of any vote, the fact that the negative votes were not recorded, would not invalidate the act, if conforming to this section, with the record as it was shown in the journal. Commissioners v. De Rosset, 129 N. C. 275, 40 S. E. 43.

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The weight of evidence does not preclude the inquiry as to the validity of the bonds. Glenn v. Wray, 126 N. C. 78, 36 S. E. 107.

Estoppel To Deny Invalidity of Bonds.—Where township bonds are invalid because issued without authority, the township is not estopped from asserting such fact by recitals in bonds issued after the same, and they are evidence only of the constitutional and legislative authorities of the State. Debnam v. Chitty, 131 N. C. 457, 44 S. E. 3.

To test the validity of a bond, the Judge who issued the bond, and the parties in interest, shall have the right to introduce evidence as to whether the ayes and nays on a vote on
V. SUBSTITUTED BILLS—AMENDMENTS.

Substituted Bill. — Where a bill, authorizing a levy of taxes for road purposes, has been read, referred to a committee, and the committee has recommended a substitute, resulting in the tabling of the original bill and the passage of the substitute on two separate days in that branch of the Legislature, and otherwise conforming to the requirements of this section, both branches of the Legislature, the substitute, to be adopted by the concurrence of both houses of the Constitution, as an amendment to the original bill introduced, and the act may not subsequently be questioned as not having passed on the several separate days required of a bill of the same character. Edwards v. Commissioners, 183 N. C. 58, 110 S. E. 600.

Effect of Certificate of Ratification. — The usual certificate of ratification is conclusive only of the fact of ratification, but not of a compliance with this section of the Constitution. Smathers v. Commissioners, 125 N. C. 480, 34 S. E. 554.

Certificate of Speakers. — The certificate of the speakers of each house of the Legislature is conclusive as to the facts of a bill when a bill was read and passed and then read a second time in each house. Commissioners v. De Rosset, 129 N. C. 275, 40 S. E. 43.

Certificate of Speaker's Action. — The certificate of the Speaker's action that an act was passed is conclusive as to the facts. Frazier v. Board of Comm'rs, 194 N. C. 49, 138 S. E. 433.

Evidence of Materiality. — A rubber band attached to the cover of the original bill when it was engrossed are not admissible in determining whether an amendment to the act or affect its financial feature, and the failure in the first branch to comply with this section will not alone affect its validity. Brown v. Commissioners, 173 N. C. 598, 92 S. E. 502.

Material Amendment. — A material amendment made by one branch of the Legislature to a bill passed by the other, where the act authorizes a county to pledge its credit in issuing bonds for the improvement of the highways therein, must be con-

ured in accordance to the requirements of this section. Claywell v. Commissioners, 173 N. C. 657, 92 S. E. 481; Clenn v. Wray, 126 N. C. 730, 36 S. E. 167. This rule applies with greater force, when the amendment is by separate act. Guire v. Com'rs, 177 N. C. 516, 99 S. E. 430.

Same. — Amendment to a Bill. — An amendment made by one branch of the Legislature to a bill passed by the other, where the act authorizes a county to pledge its credit in issuing bonds for the improvement of the highways therein, must be construed in accordance to the requirements of this section. Claywell v. Commissioners, 173 N. C. 657, 92 S. E. 481.

Same. — Increasing Interest Rate. — An amendment to an act authorizing a county to issue bonds for road construction, which increases the rate of interest from 5 percent to 6 percent, is valid as to that district to vote on the question of issuing school bonds in a certain amount, and amended at a subsequent session so as to authorize bonds to a larger amount and to run a longer time, does not show the effect of the amendment being to exclude the other districts, it was made to apply only to one district in the State, the amendment is not a material one, requiring the vote of the other districts, and the act being regularly enacted, the original act, when the later act is not likewise passed in accordance with the requirements of this section. Russell v. Troy, 159 N. C. 366, 74 S. E. 1021.

The bonds are invalid even as to the amount authorized to be issued under the valid act, for that amount was only authorized at a less rate of taxation, etc., as to which the voters upon the proposition have not assented. Russell v. Troy, 159 N. C. 366, 74 S. E. 1021.

Same. — Curtailing Territory to Which Applicable. — Where a bill is introduced in one branch of the Legislature for the issuance of bonds, and amendments have been made by the General Assembly, which increase the rate of interest from 5 percent to 6 percent, and the popular townships from the liability for the indebtedness to be created, except under condition requiring the approval of the voters, the amendment is a material one, requiring the vote of the other districts, and the act being regularly enacted, the original act, when the later act is not likewise passed in accordance with the requirements of this section. Claywell v. Commissioners, 173 N. C. 657, 92 S. E. 481.

But an act empowering special school districts of the State to issue bonds which follow the requirements of this section except that upon its last reading, by amendment, it was made to apply only to one district in the State, the act, when the amendment has been passed upon its several readings, with aye and no vote according to this section, an issue of bonds under a still later and similar act for a larger amount and upon a greater rate of taxation is invalid in toto when the later act is not likewise passed in accordance with this section. Russell v. Troy, 159 N. C. 366, 74 S. E. 1021.

Immaterial Amendment. — When an act has been passed in two branches of the Legislature without an act controlling the action of the other branch, which increases the rate of interest from 5 percent to 6 percent, is valid as to that district to vote on the question of issuing school bonds in a certain amount, and amended at a subsequent session so as to authorize bonds to a larger amount and to run a longer time, does not show the effect of the amendment being to exclude the other districts, it was made to apply only to one district in the State, the amendment is not a material one, requiring the vote of the other districts, and the act being regularly enacted, the original act, when the later act is not likewise passed in accordance with the requirements of this section. Claywell v. Commissioners, 173 N. C. 598, 92 S. E. 502.

An amendment which does not increase the amount of the bonded debt or tax for road purposes, or otherwise materially change the original bill, may be adopted by the concurrence of both houses of the General Assembly. Commissioners v. Stafford, 138 N. C. 453, 49 S. E. 822.

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No Change Effected. — Where the Legislature has passed an act authorizing a county to pledge its credit in the issuance of bonds upon its several readings, upon its aye and no vote in accordance with this section, and by an act of ratification on two separate days, and the act has been subsequently amended with respect thereto, but upon condition that the proposition be submitted to the voters, which was never done, and the Legislature attempts to pass a still later law amending the former act but which has not been done in accordance with this section, both branches of the Legislature, the statute required, are valid. Edwards v. Commissioners, 183 N. C. 58, 110 S. E. 600.

No Change Effected. — Where the Legislature has passed an act authorizing a county to pledge its credit in the issuance of bonds upon its several readings, upon its aye and no vote in accordance with this section, and by a later statute passed as the Constitution requires, referring to the former statute, and supplying the omissions, and the bond issues open, under the terms of which the bonds may yet be issued. Cottrell v. Lenoir, 173 N. C. 138, 91 S. E. 827.

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Cited in Fortune v. Commissioners, 140 N. C. 322, 322, 52 S. E. 950; Hinton v. Lacy, 193 N. C. 496, 137 S. E. 669.

§ 15. Entails.—The General Assembly shall regulate entails in such a manner as to prevent perpetuities. (Const. 1868.)

§ 16. Journals.—Each house shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly. (Const. 1868.)

This is in Frazier v. Board of Com’rs, 194 N. C. 49, 138 S. E. 433.

§ 17. Protest.—Any member of either house may dissent from, and protest against, any act or resolution which he may think injurious to the public, or any individual, and have the reasons of his dissent entered on the journal. (Const. 1868.)

§ 18. Officers of the House.—The House of Representatives shall choose their own speaker and other officers. (Const. 1868.)

This is the only express grant of appointing power to the House of Representatives. People v. McKee, 68 N. C. 429, 432.

§ 19. President of the Senate.—The Lieutenant-Governor shall preside in the Senate, but shall have no vote unless it may be equally divided. (Const. 1868.)

§ 20. Other senatorial officers.—The Senate shall choose its other officers and also a speaker (pro tempore) in the absence of the Lieutenant-Governor, or when he shall exercise the office of Governor. (Const. 1868.)

This is the only express grant of appointing power to the Senate. People v. McKee, 68 N. C. 429, 432.

§ 21. Style of the acts.—The style of the acts shall be: “The General Assembly of North Carolina do enact.” (Const. 1868.)

§ 22. Powers of the General Assembly.—Each house shall be judge of the qualifications and election of its own members, shall sit upon its own adjournment from day to day, prepare bills to be passed into laws; and the two houses may also jointly adjourn to any future day, or other place. (Const. 1868.)

Effect of Section.—This section withdraws from the consideration of our courts the question of title involved in a contest for a seat in the General Assembly. State v. Pharr, 179 N. C. 699, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 197 N. C. 731, 179 N. C. 731, 103 S. E. 8; Bouldin v. Davis, 179 N. C. 805.

§ 23. Bills and resolutions to be read three times, etc.—All bills and resolutions of a legislative character shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses. (Const. 1868.)

Necessity of Signature.—The signatures of the presiding officers, by the Constitution, must be affixed to an act of legislation during the session of the general assembly, and are necessary to its completeness and efficacy. Scarborough v. Robinson, 81 N. C. 409.

Where an office was created by an act of the General Assembly but was not signed by the presiding officers until the three days data, an election in the interim to fill such office was void. State v. Meares, 116 N. C. 382, 383, 21 S. E. 973.

The judicial power can not be exercised in aid of an unfinished and inoperative act, so left upon the final adjournment, any more than in obstructing legislative action. Scarborough v. Robinson, 81 N. C. 409.

In the absence of the signature journals are not competent to prove compliance with this section. Frazier v. Board of Com’rs, 194 N. C. 49, 138 S. E. 433.

§ 24. Oath of members.—Each member of the General Assembly, before taking his seat, shall take an oath or affirmation that he will support the Constitution and laws of the United States, and the Constitution of the State of North Carolina, and will faithfully discharge his duty as a member of the Senate or House of Representatives. (Const. 1868.)

§ 25. Terms of office.—The terms of office for senators and members of the house of representatives shall commence at the time of their election. (Const. 1868; Convention 1875.)

Sec. 27 of the Constitution of 1868 was as follows: “The terms of office for Senators and members of the House of Representatives shall commence at the time of their election; and the term of office of those elected at the first election held under this Constitution shall terminate at the same time as if they had been elected at the first ensuing regular election.” The Convention of 1875 omitted the last clause, and the remainder became Sec. 25 of the present Constitution.—Ed. note.

§ 26. Yeas and nays.—Upon motion made and seconded in either house by one-fifth of the members present, the yeas and nays upon any question shall be taken and entered upon the journals. (Const. 1868.)

§ 27. Election for members of the General Assembly.—The election for members of the General Assembly shall be held for the respective districts and counties, at the places where they are now held, or may be directed hereafter to be held, in such manner as may be prescribed by law, on the first Thursday in August, in the year one thousand eight hundred and seventy, and every two years thereafter. But the General Assembly may change the time of holding the elections. (Const. 1868; Convention 1875.)

See Legislative Term of Office, 64 N. C. 785.

This section constituted the first part of Sec. 29 of the Constitution of 1868. The following sentence of Sec. 29 was omitted by the Convention of 1875: “The first election shall be held when the vote shall be taken on the ratification of this Constitution by the voters of the State, and when the General Assembly shall have convened for the first session held under this Constitution shall terminate at the same time as if they had been elected at the first ensuing regular election.” Under authority of this section, the General Assembly changed the time of holding the elections to Tuesday next after the first Monday in November, Ch. 275, Public Laws of 1876-77.—Ed. note.

§ 28. Pay of members and officers of the Gen-
eral Assembly.—The members of the General Assembly, for the term for which they have been elected, shall receive a salary for their services of six hundred dollars each. The salaries of the presiding officers of the two houses shall be seven hundred dollars each: Provided, that in addition to the salaries herein provided for, should an extra session of the General Assembly be called, the members shall receive eight dollars per day each, and the presiding officers of the two houses ten dollars per day each, for every day of such extra session not exceeding twenty days; and should an extra session continue more than twenty days, the members and officers shall serve therefor without pay. (Convention 1875; 1927, c. 203.)

Editor's Note.—Sec. 28 added to the Constitution by the Convention of 1875, as follows: "The members of the General Assembly for the term for which they have been elected shall receive as a compensation for their services the sum of four dollars per day for each day of their session, for a period not exceeding sixty days; and should the session continue longer in said session they shall serve without compensation. They shall also be entitled to receive ten cents per mile, both while coming to the seat of government and while remaining in session, for a period not exceeding sixty days; and should an adjournment be continued more than twenty days, the members and officers shall serve therefor without pay. (Convention 1875; 1927, c. 203.)"


What Are Local Laws.—The interpretation of a statute, as to whether it is a local, private, or special law is based upon the true intention of the General Assembly when it adopted the law. This is a question of fact, and must be determined from the provisions of the act itself, as also from the laws of the General Assembly enacted in aid and support of such act, and from such additional and extraneous considerations as may be necessary to determine the true intent and construction of the law. It is a question of fact, and must be determined from the provisions of the act itself, as also from the laws of the General Assembly enacted in aid and support of such act, and from such additional and extraneous considerations as may be necessary to determine the true intent and construction of the law.

Limitations upon Power of General Assembly.—The General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court; relating to the appointment of justices of the peace; relating to health, sanitation, and the abatement of nuisances; changing the names of cities, towns, and townships; authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys; relating to ferries or bridges; relating to the necessary expenses of the committee while engaged in the investigation, commercial, etc. Bank v. Worth, 117 N. C. 147, 23 S. E. 160. This case was decided prior to the amendment to this section fixing a salary for the members of the general assembly.—Ed. Note.

Cited in Kendall v. Stafford, 128 N. C. 461, 101 S. E. 15 (dis. op.).

§ 29. Limitations upon power of General Assembly to enact private or special legislation.—The General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court; relating to the appointment of justices of the peace; relating to health, sanitation, and the abatement of nuisances; changing the names of cities, towns, and townships; authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys; relating to ferries or bridges; relating to navigable streams; relating to cemeteries; relating to the pay of jurors; erecting new townships, or changing the boundaries of existing townships, or establishing or altering the lines of school districts; remitting fines, penalties, and forfeitures; or refunding moneys legally paid into the public treasury; regulating labor, trade, mining, or manufacturing; extending the time for the assessment or collection of taxes or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability; giving effect to informal wills and deeds; nor shall the General Assembly enact any local, private or special act by the partial repeal of a general law, but the General Assembly may at any time repeal, local, private, or special laws enacted by it. Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section. (1915, c. 99.)

This section is remedial in its nature and was intended not only to free the Legislature of petty detail but also to require uniform and coordinated action under general laws. It was, in this regard, that the power of the General Assembly over matters related to the welfare of the people of the whole State, and the application of the section should not be denied on any unsubstantial distinction which would defeat its purpose. Board of Health v. Board of Health, 193 N. C. 140, 16 S. E. (2d) 677, holding Pub. Laws 1941, chs. 6 and 193 to be local laws relating to health.

Courts Look beyond Form of Statutes.—In determining whether a statute relating to matters enumerated in this section is a "local, private, or special" act inhibited by this section, the question is whether the "power to pass," the courts will look beyond the form of the act and ascertain whether the statute, in fact, is generally and usually applicable throughout the area contemplated by the statute. State v. Dixon, 215 N. C. 161, 15 S. E. (2d) 521.


Establishment of Recorder's Courts.—A general law permitting the establishment of Recorder's courts in the State, excepting certain counties to the number of 44, leaving 56 and two others out of the excepted class enumerated in the general statutes, unconstitutional as a local or special act as to those counties, the effect of this statute being a re-enactment of the general law including the particular counties. In re Harris, 183 N. C. 563, 112 S. E. 425.

Cited in Public Laws 1955, ch. 752, 75 S. E. (2d) 593 for the establishment of township recorder's courts in one specified county is unconstitutional and void as being a local act relating to the establishment of courts inferior to the Superior Court, prohibited by this section. State v. Williams, 209 N. C. 57, 182 S. E. 711.

Increasing Jurisdiction of Certain Court.—An act which authorizes the county commissioners to increase the jurisdiction of a certain recorder's court is void as being a local act relating to the establishment of courts inferior to the Superior Court, prohibited by this section. State v. Williams, 209 N. C. 57, 182 S. E. 711.

Same.—Effect on Emoluments.—Where the Legislature, in contravention of this section of the Constitution of this State, has established a court inferior to the Superior Court, an incumbent judge thereof, duly elected, may not successfully contend that he was deprived of the emoluments of his office by an unconstitutional statute abolishing the court. Queen v. Commissioners, 193 N. C. 821, 138 S. E. 310.

Erection of Hospital.—An act authorizing a certain county to erect a tuberculosis hospital and issue bonds therefor, and providing a tax for its maintenance, upon the approval of the voters, is both a special and local act and void under this section. Armstrong v. Board, 185 N. C. 405, 117 S. E. 388.

National Park Act.—The provisions of the statute (Laws 1927, ch. 48) for the acquisition of lands for a national park are in the nature of an act of local and special character, and though local as to location, is for a public use in contemplation of its acquisition by the State for the purpose outlined in the act. Yarbrough v. Park Commissioners, 181 N. C. 400, 147 S. E. 589.

Extending Limits of School.—It is true that the boundaries of a "district" may be coterminous with those of
a city or town but it does not follow that an act extending the limits of a city or town in which public schools may be maintained is necessarily a special act establishing or changing the lines of school districts in violation of this section. Baile v. Winston-Salem, 196 N. C. 17, 22, 144 S. E. 377.

Sanitary Districts.—An act of the Legislature (Private Laws of 1933, ch. 72, 1933 S. L. 308) establishing a sanitary district within certain lines within a county for the construction and maintenance of sewer and water systems with certain assessments or taxing powers for the purpose of carrying out the provisions of this section. Drysdale v. Prudden, 195 N. C. 722, 143 S. E. 530.

Building Bridges.—A legislative enactment relating to the building of bridges by a county over a navigable stream or river does not necessarily come within the provisions of this section. Mills v. Commissioners, 175 N. C. 215, 95 S. E. 481.

While authority given by statute to a county or other political subdivision to levy taxes to lay out and maintain highways and streets within such limits, since they are essential to the existence of such corporations, such corporation act and does not seem to contravene this section. Matthews v. Blowing Rock, 207 N. C. 450, 452, 177 S. E. 429.

Formation of Sewerage Districts.—A statute authorizing the formation of sanitary sewerage districts within county lines, the boundaries of these to be fixed by certain designated local authorities in a specified manner, and done without previous notice to the voters, the statute is not "local, private or special act relating to health, sanitation, etc." Reed v. Howerton Engineering Co., 188 N. C. 39, 40, 121 S. E. 479.

Drainage District.—A statute creating and designating the boundaries of a drainage district and providing taxation for its construction and maintenance is for a necessary purpose to the district, and as an incident permits the issuance of bonds or the levying of taxes for the purpose, pledging the faith and credit of the State. Day v. Commissioners, 191 N. C. 780, 133 S. E. 763.

Maintenance of Streets within City Limits.—The unlimited power in the General Assembly to provide for the creation and extension of corporate limits of municipal corporations, with the right to vest in such municipal corporations the authority to levy taxes to lay out and maintain highways and streets within such limits, since they are essential to the existence of such corporations, such corporation act and does not seem to contravene this section. Matthews v. Blowing Rock, 207 N. C. 450, 452, 177 S. E. 429.

Establishing or Changing Lines of School Districts.—Since the enforcement of this section, special act of the Legislature to establish or change the lines, etc., of a school district is void under Art. II, § 29, Const. Hence, a statute providing that the roads should be closed and added to the boundaries of a county, as the administrative unit charged with making provisions for necessary capital outlay, may create school districts or special bond tax units in the county, and provides for an issue of bonds upon the approval of the voters therein, for the necessary buildings and maintenance, comes within the provisions of this section. Board v. Mutual Loan, etc., Co., 181 N. C. 306, 107 S. E. 130.

This section prohibits the legislature from passing any special, private or local act which ex proprio vigore undertakes to establish or change the boundaries of a school district, but the section does not prohibit the legislature from setting up machinery under which a county, as the administrative unit charged with making provisions for necessary capital outlay, may create school districts or special bond tax units in the county, and therefore chapter 279, Public-Local Laws of 1937, declared that certain roads dedicated in the county under Public Act 279, which the then governor signed, is not in contravention of this section. Fletcher v. Collins, 218 N. C. 1, 9 S. E. (2d) 666; Hinson v. Board of Com'r's, 218 N. C. 13, 9 S. E. (2d) 64.

Creation of Public School District.—A statute which creates a school district, and as an act of ratifying or approving the issue, upon the approval of voters, for its equipment and maintenance, is a local or special act, prohibited by this section. State v. Dixon, 215 N. C. 306, 107 S. E. 130.

Incorporation of Existing Districts.—Incorporating existing local school districts for all purposes relating to the issuance of payment of bonds upon the approval of the voters of a district, is valid, and not in contravention to this section. Board v. Mutual Loan, etc., Co., 181 N. C. 306, 107 S. E. 130; Paschal v. Johnson, 133 N. C. 129, 110 S. E. 841.

Same.—Increase of Bonds by Existing District.—Where a school district has been defined as to its boundaries, etc., and as an act of ratifying or approving the issue, upon the adoption of the amendment to our State Constitution, this section, and which authorized a bond issue in a certain county, since the adoption of this constitutional amendment authorizing an increase in the amount of bonds to be issued, upon the approval of the voters according to the statutory amendment, does not contravene the provision of that section. Lile v. Emmons, 216 N. C. 470, 120 S. E. 53.

Same.—Recognizing School District in Changed City Limits.—A public-local act that enlarged the city limits and recognized therein the independent existence of a public school district within the former city limits is not contravened by the provisions of our recent amendment to our Constitution, this section, as an attempt to establish a school district, or to change the limits of those already established. Duffy v. Greensboro, 186 N. C. 470, 120 S. E. 53.

Same.—Submitting Question of Taxation.—A statute allowing an existing consolidated school district to submit the question of the issue of bonds for school purposes to the district is not prohibited by this section. Burney v. Bladen County, 184 N. C. 274, 275, 114 S. E. 298.

Creating and Naming County Health Board.—Chapter 322, Public-Local Laws of 1933, which directs the creation and name the members of a county board of health for Madison county alone, which board is charged with the duty to investigate any county outbreak three or more cases of a contagious and sanitary condition, and to select a physician to vaccinate against disease, is a local act relating to health and sanitation prohibited by this section. Sams v. Board of Com'r's, 197 N. C. 290, 143 S. E. 129.

Fair Trade Act.—The North Carolina Fair Trade Act, in limiting its application to commodities bearing a trademark and in exempting from its operation such commodities sold to particular classes of persons, sets up reasonable classifications and applies uniformly to all persons or things coming therein, and therefore is a general act regulating trade and does not contravene this section. Lilly v. Saunders, 216 N. C. 163, 1 S. E. (2d) 528, 125 A. L. R. 1308.

Machinery to Effect Void Acts.—Where an act to create a public school district is, in whole or in part, void, under Art. II, § 29, Const., the provision for bonds and taxation to carry out the purposes of the act are likewise void. Sechrist v. Commissioners, 181 N. C. 511, 107 S. E. 503.

Poll Tax for School Purposes Unconstitutional.—Since the adoption of this section a special school district may not impose a tax upon the polls for school purposes; and where a poll tax and a property tax have both been favorably voted for at an election, held for that purpose, the tax upon the poll will be held unconstitutional and the property tax upheld by the courts. Board v. Bray, 184 N. C. 484, 485, 115 S. E. 47.

Ratifying Ordinance to Issue Bonds.—An act for the purpose of ratifying an ordinance, of county commissioners, to issue bonds and levy taxes for school purposes passed since the adoption of this section is not prohibited by this section; the issuance of such bonds and levy of such taxes, will be permanently enjoined. Wooley v. Commissioners, 182 N. C. 428, 109 S. E. 368.

Trade, in its broadest sense, includes any employment or business engaged in for gain or profit. State v. Dixon, 215 N. C. 161, 1 S. E. (2d) 521.

A statute providing for the licensing and regulations of real estate brokers and salesmen and imposing a license tax on those engaged in the trade in addition to the tax imposed by the Revenue Act for a state-wide license, was held applicable to only a limited territory and specified localities, and the act was therefore a local act regulating trade in contravention of this section. State v. Dixon, 215 N. C. 161, 1 S. E. (2d) 521.

Maintenance of County Highways.—A public-local law applicable to the maintenance of the public highways of a county and authorizing taxation or issuance of bonds for this purpose, which certain classifications and applies uniformly to all persons or things coming therein, and therefore is a general act regulating trade and does not contravene this section. State v. Kelly, 186 N. C. 365, 119 S. E. 755.

Closing Public Roads.—Part of land in a private development was dedicated to the General Assembly, by private act (ch. 72, Private Laws of 1933), declared that certain roads dedicated in the registered plot of the development were no longer needed, and declared that the roads should be closed and added to [23]
the playground space for the school. This act is void as being a private or special act inhibited by this section. Glenn v. Board of Education, 210 N. C. 535, 185 S. E. 781.

Chapter 218, Priv. Laws 1925, is not a special statute relating to roads inhibition, to the General Assembly, to the municipal officers in the transportation of the school children, and the education of the children shall not be allowed in the public schools or in any other school maintained by a public body or shall be required to make certain conditions.

Section 30. Inviolability of sinking funds. — The General Assembly shall not use nor authorize to be used any part of the amount of any sinking fund for any purpose other than the retirement of the bonds for which said sinking fund has been created. (Ex. Sess. 1924, c. 91.)

Sum erroneously placed in sinking fund. — While sinking funds provided for the retirement of municipal bonds may not be diverted from that purpose to other municipal purposes, the legislature may make the provision for the retirement of the bonds of the city in a sinking fund by a clerk without authorization, which sum was actually derived from profits of the municipal enterprise is the same as the provision of the Code of 1869, the words "erredly placed in sinking fund" are stricken out and the act of the legislature is void as a violation of this section. Banton v. Board of Com'rs, 115 N. C. 574, 19 S. E. 554.

The city may not be diverted from that purpose to other municipal purposes. Mewborn v. Board of Com'rs, 121 N. C. 411, 18 S. E. 597.

SECTION 31. Officers of the executive department; terms of office. — The executive department shall consist of a Governor (in whom shall be vested the supreme executive power of the State) a Lieutenant-Governor, a Secretary of State, an Auditor, a Treasurer, an Attorney-General, who shall be elected for a term of four years after the approval of this Constitution by the Congress of the United States, and shall hold their offices for four years and after the first day of January.

See Art. I, § 8 and the note thereto.

Editor's Note. — In this section as found in the Constitutions of 1868, the words "Supervisor of Public Works" are stricken out and the act of the legislature is void as a violation of this section. Wake v. Cordell, 207 N. C. 808, 178 S. E. 594. The words "erredly placed in sinking fund" are stricken out and the act of the legislature is void as a violation of this section. Wake v. Cordell, 207 N. C. 808, 178 S. E. 594.

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The executive department shall consist of a Governor, in whom shall be vested the executive power of the State, a Lieutenant-Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, and a Commissioner of Labor, who shall be elected for a term of four years after the approval of this Constitution by the Congress of the United States, and shall hold their offices for four years and after the first day of January. Wake v. Jordan, 214 N. C. 803, 712 S. E. 139.

§ 2. Qualifications of Governor and Lieutenant-Governor. — No person shall be eligible as Governor or Lieutenant-Governor unless he have attained the age of thirty years, shall have been a citizen of the United States five years, and shall have been a resident of this State for two years next before the election; nor shall the person elected to either of these two offices be eligible to the same office more than four years in any term of eight years, unless the person elected shall have been cast upon him as Lieutenant-Governor or president of the Senate. (Const. 1868.)

§ 3. Returns of elections. — The return of every election for officers of the executive department shall be sealed up and transmitted to the seat of government by the returning officer, directed to the Secretary of State. The return shall be canvassed and the result declared in such manner as may be prescribed by law. Contested elections shall be determined by a joint ballot of both houses of the General Assembly in such manner as shall be prescribed by law. (Const. 1868; 1925, c. 88.)
 tested" read as follows: "to the Speaker of the House of Representatives, who shall open and publish the same in the presence of a majority of the members of both houses of the General Assembly. The persons having the highest number of votes respectively, shall be declared duly elected; but if the votes be equal and highest in votes for the same office, then one of them shall be chosen by joint-ballot of both Houses of the General Assembly." The section was amended to its present form pursuant to Ch. 88, Public Laws of 1925. For the laws governing the canvassing of returns, see §§ 163-93 to 163-106; Ch. 260, Public Laws of 1927.

Where Returns Have Been Acted on.—In a proceeding to compel by mandamus a reassembling of a Board of County Canvassers and a recount of the votes cast in the county for candidates for the House of Representatives, where, subsequent to the canvass of returns received and issued a commission to the person elected on the face of the return, judicial action in the premises would be wholly unavailing, as the matter has passed beyond the jurisdiction of the court. O'Hara v. Powell, 89 N. C. 104.

§ 4. Oath of office for Governor.—The Governor, before entering upon the duties of his office, shall, in the presence of the members of both branches of the General Assembly, or before any justice of the Supreme Court, take an oath or affirmation that he will support the Constitution and laws of the United States, and of the State of North Carolina, and that he will faithfully perform the duties appertaining to the office of Governor, to which he has been elected. (Const. 1868.)

§ 5. Duties of Governor.—The Governor shall reside at the seat of government of this State, and he shall, from time to time, give the General Assembly information of the affairs of the State, and recommend to their consideration such measures as he shall deem expedient. (Const. 1868.)


§ 6. Reprieves, commutations, and pardons.—The Governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to such regulations as may be prescribed by law relating to the granting of such reprieves for pardons. He shall biennially communicate to the General Assembly each case of reprieve, commutation, or pardon granted, stating the name of each convict, the crime for which he was convicted, the sentence and its date, the date of commutation, pardon, or reprieve, and the reasons therefor. (Const. 1868; 1872-73, c. 82.)

For an article on punishment for crime in North Carolina, see 17 N. C. Law Rev. 205.

For the provision, "biennially," "biennially" was substituted for "annually" in this section of the Constitution of 1868, pursuant to Ch. 82, Public Laws of 1872-73.

Power to Pass Amnesty Act.—The power, granted by this section, to exercise clemency after conviction in some particular case and in favor of an individual especially charged with the offense, is an executive act of a quasi-judicial kind, and does not conflict with or exclude the power of the general assembly to pass an amnesty act in abolition or commutation of the offense. State v. Bowman, 145 N. C. 452, 59 S. E. 74; 122 Am. St. Rep. 464.

The governor may grant a pardon upon a condition precedent, to the satisfaction of the court, where the prisoner may be convicted of some other offense, subsequent to his former conviction, and upon condition subsequent, that he remain of good character, and be sober and industrious. In re Williams, 149 N. C. 436, 51 S. E. 93; 122 Am. St. Rep. 464.

Pardon Pending Appeal.—The term "conviction," in this section denotes a verdict of guilty rendered by a jury; therefore, when defendant, after verdict and judgment in the court below, appealed to the supreme court and, pending such appeal, was pardoned by the Governor, such pardon is authorized by this section and is valid. State v. Alexander, 76 N. C. 231; State v. Mathis, 109 N. C. 815, 13 S. E. 917.

Quoted in State v. Casey, 201 N. C. 630, 161 S. E. 81 (dis. op.);

Quoted in State v. Yates, 183 N. C. 753, 111 S. E. 337.


§ 7. Annual reports from officers of executive department and of public institutions.—The officers of the executive department and of the public institutions of the State shall, at least five days previous to each regular session of the General Assembly, severally report to the Governor, who shall transmit such reports, with his message, to the General Assembly; and the Governor may, at any time, require information in writing from the officers in the executive department upon any subject relating to the duties of their respective offices, and shall take care that the laws be faithfully executed. (Const. 1868.)

Applied in Arendell v. Worth, 125 N. C. 111, 34 S. E. 232.


§ 8. Governor-in-chief. — The Governor shall be Governor-in-chief of the militia of the State, except when they shall be called into the service of the United States. (Const. 1868.)

Supremacy of Governor's Control.—Under this section the Governor's control is supreme, in the absence of legislation, "to provide for the organization," etc., of the militia, enacted pursuant to Article XII, section 3 of this constitution. Winslow v. Morton, 118 N. C. 486, 24 S. E. 412.

§ 9. Extra sessions of General Assembly.—The Governor shall have power on extraordinary occasions, by and with the advice of the Council of State, to convene the General Assembly in extra session by his proclamation, stating therein the purpose or purposes for which they are thus convened. (Const. 1868.)

§ 10. Officers whose appointments are not otherwise provided for.—The Governor shall nominate, and by and with the advice and consent of a majority of the senators-elect, appoint all officers whose offices are established by this Constitution and whose appointments are not otherwise provided for. (Const. 1868; Convention 1875.)

Editor's Note.—In the Constitution of 1868 this section prohibited the general assembly from appointing or electing such officers, as herein provided for, but in 1875 this section was amended and this express prohibition removed. For a case decided under the former rule, see State v. Stanley, 66 N. C. 60.

The words "whose appointments are not otherwise provided for," mean provided for by the Constitution. State v. Stanley, 66 N. C. 60.

The correct reading of this section is "not otherwise provided for by law." Nichols v. McKee, 68 N. C. 429, 435.

Filling Vacancy and Appointing for Regular Term.—The Governor never nominates to the Senate to fill vacancies. He does that alone, in all cases. But where officers have to be appointed to fill a regular term, then he nominates to the Senate, unless he is elected by the people, and then he never nominates to the Senate, but fills the vacancy or term by his own appointment (unless there is an officer holding over), until the people can elect. Battle v. McVey, 68 N. C. 467, 470.

The general appointing power is given to the Governor with the concurrence of the Senate; the power to fill vacancies not otherwise provided for is given to the Governor alone and that, whether the Legislature is in session or not, and without calling the Senate. Nichols v. McKee, 68 N. C. 429.

Appointment Limited to Constitutional Affairs.—The in-
herself right of the Governor to appoint is now restricted to constitutional offices and where the Constitution itself so provides; and all offices created by statute, including directorates in State institutions—in this case, the State Hospital at Raleigh—the powers of appointment, or to fill vacancies, is subject to legislative provision as expressed in this section. Salisbury v. Croom, 167 N. C. 223, 83 S. E. 353.

Legislature Cannot Appoint Officers. The Legislature cannot authorize the presiding officers of its two branches to appoint proxies and directors in behalf of the State in corporations in which the State had an interest; nor can the Legislature itself make such appointments, on the reason that it would be an usurpation of executive power. Howerton v. Tate, 68 N. C. 546.

Same—When Legislature Assumes Appointment. The Legislature having assumed to take the appointment of Directors for the State of the Western North Carolina Railroad from the Governor, it thereby dispensed with the necessity of his sending nominations to fill vacancies, and such office so provided; and all offices created by statute, including directors, is subject to legislative provision as expressed in this section. Ewart v. Jones, 116 N. C. 570, 52 S. E. 787.

Transfer of Duties of Office. While the General Assembly has the power to abolish an office created by legislative authority, it cannot by mere transfer to others of the duties connected with an institution, necessary and useful to the public, to be exercised by them, oust the incumbent from an office below him in under a contract with the State. State Prison v. Day, 124 N. C. 362, 32 S. E. 748.

Trustee's of University. Etc.—The trustees of the University, the Directors of the Penitentiary and of the Lunatic Asylum are public officers, not created by legislative appointment, but originally from an office belonging to him under a contract with the State. State Prison v. Bullock, 80 N. C. 132, 135.

Directors of Institution for Deaf, Dumb and Blind.—The Directors of the Institution for the Deaf and Dumb and the Blind are made so by the Constitution and so called. Nichols v. McKee, 68 N. C. 429.

Superintendent of State Prison.—The place of superintendent of the State Prison, with its attendant duties, is a public office, not created by the Constitution but by a statute. State Prison v. Day, 124 N. C. 362, 32 S. E. 748.

Members of Board of Agriculture.—Members of the board of agriculture, are not constitutional officers, but being of legislative creation, are within the power of legislative appointment, and are not exclusively, nor of necessity, within the power of executive appointment. Cunningham v. Sprinkle, 124 N. C. 638, 33 S. E. 138.


§ 11. Duties of the Lieutenant-Governor.—The Lieutenant-Governor shall be president of the Senate, but shall have no vote unless the Senate be equally divided. He shall, whilst acting as president of the Senate receive for his services the same pay which shall, for the same period, be allowed to the speaker of the House of Representatives; and he shall receive no other compensation except when he is acting as Governor. (Const. 1868.)

Proposed Amendment.—Session Laws 1943, c. 57, s. 2, proposed that this section be amended to read as follows: "The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, General Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance shall be prescribed by law. If the office of any of said officers shall be vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed, or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in the first section of this article. (Const. 1868; 1872-73, c. 84.)

Cross Reference.—See Editor's note to art. III, § 1.

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Cited in People v. Watson, 72 N. C. 155, 163; State v. Walker, 80 N. C. 132, 135.

§ 14. Council of State.—The Secretary of State, Auditor, Treasurer, and Superintendent of Public Instruction shall constitute, ex officio, the Council of State, which shall advise the Governor in the execution of his office, and three of whom shall constitute a quorum; their advice and proceedings in this capacity shall be entered in a journal, to be kept for this purpose exclusively, and signed by the members present, from any part of which any member may enter his dissent: and such journal shall be placed before the General Assembly when called for by either house. The Attorney-General shall be, ex officio...
cicio, the legal adviser of the executive department. (Const. 1868; 1872-73, c. 84.)

Proposed Amendment.—Session Laws 1943, c. 27, § 3, proposed that this section be amended to read as follows: "The Secretary from any office, or in the executive of his office, and three of whom shall constitute a quorum; their advice and proceedings in this capacity shall be entered in a journal, to be kept for this purpose, exclusively, signed by the members of which any member may enter his dissent; and such journal shall be placed before the General Assembly when called for by either house. The Attorney General shall, be, ex officio, the legal adviser of the executive department."

Cross Reference.—See Editor's note to Art. III, § 1.

§ 15. Compensation for executive officers.—The officers mentioned in this article shall, at stated periods, receive for their services a compensation to be established by law, which shall neither be increased nor diminished during the time for which they shall have been elected, and the said officers shall receive no other emolument or allowance whatever. (Const. 1868.)

The legislature may designate the compensation of these officials prior to the beginning of their terms and it should follow that the compensation be declared a certain amount less the income tax on that amount. See § 1641. See 11 N. C. Law Rev., 226.

§ 16. Seal of State.—There shall be a seal of the State, which shall be kept by the Governor, and used by him, as occasion may require and shall be called "The Great Seal of the State of North Carolina." All grants and commissions shall be issued in the name and by the authority of the State of North Carolina, sealed with "The Great Seal of the State," signed by the Governor, and countersigned by the Secretary of State. (Const. 1868.)

Countersign Defined.—The verb "countersign" means "to sign on the opposite side" or in addition to the signature of another, and the noun means "the signature of a secretary or other officer to a writing, or writings, added to that by the principal or superior to that which it signifies." Richards v. Ritter Lumber Co., 158 N. C. 54, 73 S. E. 485.

Countersignature Need Not Be in Any Particular Place.—Within the intent and meaning of this section it is not required that the countersignature of the Secretary of State be written or signed in any particular place or position thereon, and when a grant to the land in controversy is put in evidence by one of the parties and in every respect appears to be regular and authentic upon its face, it will not be held to be defective because the countersignature of the Secretary of State appears on the opposite side of the sheet from the signature of the Governor. Richards v. Ritter Lumber Co., 158 N. C. 54, 73 S. E. 485.

§ 17. Department of Agriculture, Immigration, and Statistics.—The General Assembly shall establish a Department of Agriculture, Immigration, and Statistics, under such regulations as may best promote the agricultural interests of the State, and shall enact laws for the adequate protection and encouragement of sheep husbandry. (Const. 1868; Convention 1875.)

Editor's Note.—Sec. 17 in the Constitution of 1868 was as follows: "There shall be established in the State a Department of Agriculture, Immigration, and Statistics, under such regulations as the General Assembly may provide." The section was changed to its present form in the Constitution of 1875. "Mandatory Systems."—This section is not self-executing, but is mandatory upon the Legislature. Cunningham v. Sprinkle, 124 N. C. 658, 33 S. E. 138.

Act Establishing Department of Agriculture.—An act which establishes the number of the board of agriculture, naming the additional members, is not in conflict with this section. Cunningham v. Sprinkle, 124 N. C. 658, 33 S. E. 138.

Cited in Nantahala Power, etc., Co. v. Clay County, 212 N. C. 698, 197 S. E. 603.

§ 18. Department of Justice. The General Assembly is authorized and empowered to create a Department of Justice, and to confer upon the Attorney General, and to enact suitable laws defining the authority of the Attorney General and other officers and agencies concerning the prosecution of crime and the administration of the criminal laws of the State. (1937, c. 447.)

Editor's Note.—The amendment adding this section was proposed by Public Laws 1937, c. 447, and ratified at the next general election. See also, 17 N. C. Law Rev., 375.

ARTICLE IV Judicial Department

§ 1. Abolishes the distinctions between actions at law and suits in equity, and feigned issues.—The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action; and every action prosecuted by the people of the State as a party, against a person charged with a public offence for the punishment of the same, shall be termed a criminal action. Feigned issues shall also be abolished, and the facts in issue tried by order of court before a jury. (Const. 1868.)

Effect of Section.—This section abolished the distinction between actions at law and suits in equity, and the distinction between equitable and legal rights and remedies to be enforced in the one court, which heretofore had administered simply legal rights. Peebles v. Gay, 115 N. C. 38, 39, 41, 20 S. E. 173. See Reynolds v. Endolds, 205 N. C. 578, 182 S. E. 341.

Under this section and Art. IV, § 20 the Superior Courts became the successors of the Courts of Equity, having their jurisdiction and exercising their equitable powers unless restrained by statute. In re Smith, 200 N. C. 272, 274, 156 S. E. 494.

Legal and equitable rights and remedies are now determined in one court, and the distinction between equitable and legal rights and remedies, nor does it merge legal and equitable rights. Scales v. Wachovia Bank, etc., Co., 193 N. C. 722, 725, 143 S. E. 868.

Equitable Rights Enforced by Civil Action.—Since the passage of this section the enforcement of an equitable right, as that of subrogation, can only be maintained by a civil action. Calvert v. Peebles, 82 N. C. 334, 338.

The rights of the inferior officer to which this section does not affect the rights of a prior lienor by a registered chattel mortgage in favor of a judgment creditor who has sold the personal property by execution under a judgment subsequent to the mortgage lien, or give the creditor a right to levy his execution instead of pursuing the equitable remedy. Rowland Hardware, etc., Co. v. Lewis, 173 N. C. 250, 92 S. E. 13.

"Criminal action" and "Indictment" as used in the Constitution, and in the Code are synonymous: Therefore, it would be equally regular to entitle a case upon the records of the Court, either as "the People v. A. B.—Criminal ac-

Defendant's Right to Know Nature of Demand.—The necessity for drawing pleadings in civil actions according to a prescribed or established precedent, ceased when the form of action was abolished by this section. A person who is brought into Court to answer a demand for damages or for specific property, has the same fundamental right to know the nature of the demand sufficiently well to enable him, with the aid of competent counsel, to prepare his defense, that he has to be informed of the accusation for which he has to answer criminally. Conley v. Richmond, etc., Ry. Co., 192 N. C. 392, 136 S. E. 331.

Asking for Ancillary Remedy.—There being but one form of action in civil cases, the fact that a plaintiff asks for one of the many remedies ancillary thereto, to which he is not entitled under the action itself, will go to show, if it is to be entitled to any other of the remedies. Hargrove v. Harris, 116 N. C. 418, 21 S. E. 916.

Pleadings Amended by Court.—Where a good cause of action is shown in the petition by this section, the court may require the pleadings to be made definite and certain by amendment, the distinction between statements in equity and actions at law as to jurisdiction matters being abolished by this section. Green v. Harshaw, 187 N. C. 213, 162 S. E. 756. The court has no application. Makuen v. Elder, 170 N. C. 510, 87 S. E. 545.

Defendant's Right to Know Nature of Demand.—The necessity for drawing pleadings in civil actions according to a prescribed or established precedent, ceased when this form of action was abolished by this section. A person who is brought into Court to answer a demand for damages or for specific property, has the same fundamental right to know the nature of the demand sufficiently well to enable him, with the aid of competent counsel, to prepare his defense, that he has to be informed of the accusation for which he has to answer criminally. Conley v. Richmond, etc., Ry. Co., 192 N. C. 392, 136 S. E. 331.

Asking for Ancillary Remedy.—There being but one form of action in civil cases, the fact that a plaintiff asks for one of the many remedies ancillary thereto, to which he is not entitled under the action itself, will go to show, if it is to be entitled to any other of the remedies. Hargrove v. Harris, 116 N. C. 418, 21 S. E. 916.

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Asking for Ancillary Remedy.—There being but one form of action in civil cases, the fact that a plaintiff asks for one of the many remedies ancillary thereto, to which he is not entitled under the action itself, will go to show, if it is to be entitled to any other of the remedies. Hargrove v. Harris, 116 N. C. 418, 21 S. E. 916.

Pleadings Amended by Court.—Where a good cause of action is shown in the petition by this section, the court may require the pleadings to be made definite and certain by amendment, the distinction between statements in equity and actions at law as to jurisdiction matters being abolished by this section. Green v. Harshaw, 187 N. C. 213, 162 S. E. 756. The court has no application. Makuen v. Elder, 170 N. C. 510, 87 S. E. 545.
§ 6. Supreme Court.—The Supreme Court shall consist of a Chief Justice and four Associate Justices. The General Assembly may increase the number of Associate Justices to not more than six when the work of the Court so requires. The Court shall have power to sit in divisions, when in its judgment this is necessary for the proper dispatch of business, and to make rules for the distribution of business between the divisions and for the ordering of cases by the full Court. No decision of any division shall become the judgment of the Court unless concurred in by a majority of all the Justices; and no case involving a construction of the Constitution of the State or of the United States shall be decided except by the Court en banc. All sessions of the Court shall be held in the city of Raleigh. This amendment made to the Constitution of North Carolina shall not have the effect to vacate any office or term of office now existing under: the Constitution of the State, and filled or held by virtue of any election or appointment under the said Constitution, and the laws of the State made in pursuance thereof. (Const. 1868; Convention 1875.)

Editor's Note.—This section as it appeared in the Constitution of 1868 (Section 8) read as follows: “The Supreme Court shall consist of a Chief Justice and four Associate Justices.” The number of Associate Justices was changed to two by the Convention of 1875, and again to four pursuant to Chapter 212 of the Public Laws of 1887. This section was adopted in its present form pursuant to Chapter 444 of the Public Laws of 1935.

§ 7. Terms of the Supreme Court.—The terms of the Supreme Court shall be held in the city of Raleigh, as now, until otherwise provided by the General Assembly. (Const. 1868; Convention 1875.)

Editor's Note.—Sec. 9 in the Constitution of 1868 was as follows: “The Supreme Court shall hold its sessions at Raleigh, at the seat of government of the State in each year, commencing on the first Monday in January, and the first Monday in June, and continuing as long as the public interests may require.” This section was changed to the present Sec. 7 by the Convention of 1875. Subsequently the General Assembly changed the time of holding the two terms to the first Monday in February and the last Monday in August. Ch. 178, Public Laws of 1881; Ch. 49, Public Laws of 1887; Ch. 600, Public Laws of 1901; Revisal, 1905, s. 1535.


§ 8. Jurisdiction of Supreme Court.—The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over “issues of fact” and “questions of fact” shall be the same exercised by it before the adoption of the Constitution of one thousand eight hundred and sixty-eight, and the court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts. (Const. 1868; Convention 1875.)

Cross Reference.—For a thorough treatment of the appellate jurisdiction of the supreme court, see sections 1-277 and 7-10 and annotations therewith.

Editor's Note.—Sec. 8 of the Constitution of 1868, changed to Sec. 8 of the present Constitution by the Convention of 1875, read as follows: “The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the Courts below, upon any matter of law or legal inference; but no issue of fact shall be tried before this Court; and the Court, shall have power to issue any remedial writs necessary to give it a general supervision and control of the inferior courts.”

What Reviewable.—On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. Merchants Nat. Bank v. Howard, 188 N. C. 543, 125 S. E. 654; See also, Barnes v. Teen, 218 N. C. 346, 157 S. E. 654; Stidham v. N. C. 833, 15 S. E. (2d) 379; McKay v. Bullard, 219 N. C. 589, 14 S. E. (2d) 657.


This section empowers the Supreme Court to review on appeal any judgment of the courts below, upon any matter of law or legal inference; and this is to be presented in accordance with the mandatory rules of the Supreme Court. State v. Bird, 206 N. C. 296, 172 S. E. 299. See State v. Jackson, 211 N. C. 202, 169 S. E. 510.

Theory of Trial in Lower Court Is Adhered to.—The principle that an appeal will be determined in accordance with the theory of trial in the lower court below is adhered to by the Supreme Court because of its limited jurisdiction as an appellate court under this section. Apostle v. Acacia Mut. Life Ins. Co., 208 N. C. 95, 179 S. E. 444. See Ammons v. Fisher, 208 N. C. 712, 182 S. E. 475.

“Issues of Fact” Defined.—Issues of fact has been defined by the Court to mean “such matters of fact as are put in issue by the pleadings, and a decision of which would be inconsistent with the substance of the cause of action” and “issues of fact” by the Court to mean “such matters of fact as are put in issue by the pleadings.” Battle v. Mayo, 102 N. C. 413, 435, 9 S. E. 384.

Review of Issues of Fact.—The jurisdiction of the supreme court over issues of fact, under this section, will be assumed upon two conditions: 1. If the matter be of such an equitable nature as a court of equity under the former system took exclusive cognizance of. 2. If the proofs are written and documentary and in all respects the same as they were when submitted to the judge of the court below passed upon them. Worthy v. Shields, 90 N. C. 192. See Keener v. Finger, 70 N. C. 35.

This prohibition of trials of “issues of fact” by the Supreme Court extends to both civil and criminal cases, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order for a provisional injunction, or for the suppression of a恒名 in criminal cases, or in habeas corpus proceedings.

The Supreme Court cannot consider a paper which, unrelated to the trial, purports upon its face to have raised an issue of facts after the adjournment as to the recitals set forth in the commission given the presiding judge. State v. Graham, 194 N. C. 459, 463, 140 S. E. 26.

Habeas Corpus.—No appeal to the Supreme Court lies upon the refusal of the judge, having jurisdiction, to release the petitionee in habeas corpus proceedings, except in cases concerning the care and custody of children, the remedy being by application for the writ of certiorari which is entertained in the discretion of the Supreme Court to mean “such matters of fact as are put in issue by the pleadings and on appeal the Supreme Court can review only matters of law or legal inference.” State v. Moore, 210 N. C. 686, 188 S. E. 809; State v. Yates, 183 N. C. 763, 111 S. E. 351; State v. Yates, 183 N. C. 753, 111 S. E. 337. In re Blake, 184 N. C. 278, 114 S. E. 294.

A decree in habeas corpus proceedings to determine the custody of a child as between its divorced parents is not appealable, the sole remedy being by certiorari to invoke the constitutional power of the Supreme Court to supervise and control proceedings of inferior courts. In re Ogden, 211 N. C. 100, 185 S. E. 119.

Writ of Certiorari.—Where an application for writ of certiorari in the nature of a writ of error is made for the purpose of bringing up an appeal when the right of appeal is made to the Supreme Court by failure to file statement of case on appeal within the time allowed, applicant must negative lack and show merit. State v. Moore, 210 N. C. 686, 188 S. E. 809.

Cavet to Will.—Under the provisions of this section the Supreme Court on appeal from an issue of devisavit vel non, involved in the trial of a caveat to a will, is confined to a consideration of assignments of error in

Sec. 10. The Supreme Court has not original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action. (Const. 1868.)

See notes under § 7-8.

The claimant against the State is not entitled to the receipt of any fees or compensation for his services, and he shall be dismissed from court when his petition is denied. Calhoun v. State, 201 N. C. 312, 160 S. E. 133.

The jurisdiction of the Supreme Court to hear claims against the State is confined to the powers given by this section and is not enlarged by the rules of procedure prescribed by statute, and where the complaint presents only an issue of fact the proceeding will be dismissed. Calhoun v. State, 201 N. C. 312, 160 S. E. 133.

What Examination Confined To.—The jurisdiction conferred upon the Supreme Court by this section to hear claims against the State is confined to an examination of and adjudication of the legal validity of such claims; no power to enforce its judgment is given the court; its decisions are merely recommendatory to the Legislature, who may provide by law the mode of proceeding, if any, to be pursued in such cases, and this Court does not pass upon conflicting evidence to determine the facts at issue. Dredging Co. v. State, 191 N. C. 243, 131 S. E. 665. See also, Rotan v. State, 195 N. C. 473, 141 S. E. 533.

Kind of Claims Reviewed.—The claim against the State must be such as, against any other defendant, could be resisted by defenses, and enforced by execution. Bain v. State, 86 N. C. 49.

Necessity of Question of Law.—The Supreme Court has not original jurisdiction to hear claims against the State in which no question of law is involved. State v. 134 N. C. 270, 46 S. E. 514; Bledsoe v. State, 64 N. C. 399.

The Supreme Court will not recommend to the Legislature the payment of a claim against the State, if there are no questions of law involved, or when such questions are resolved against the claimant. Dredging Company v. State, 191 N. C. 243, 131 S. E. 665.

A claim against the State is not entitled to the recommendatory jurisdiction of the Supreme Court upon petition presented to it under the provisions of this section; but its recommendatory jurisdiction shall be invoked in the manner prescribed by statute. Warren v. State, 199 N. C. 211, 153 S. E. 654.

Repeal of Statute.—The repeal of statute under which a contract has been made between the plaintiff and the State, by which the plaintiff is deprived of his contract rights, is not original jurisdiction to hear claims against the State.
now twenty-one judicial districts in the State. G. S. §§ 7-68, et seq.

Cited in Reid v. Reid, 199 N. C. 740, 155 S. E. 719.


§ 11. Residences of judges; rotation in judicial districts; and special terms.—Every judge of the Superior Court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts successively, but no judge shall hold courts in the same district oftener than once in four years; but in case of the protracted illness of the judge assigned to preside in any district, or of any other unavoidable accident to him, by reason of which he shall be unable to preside, the Governor may require any judge to hold one or more special terms of said court by exchange with some other judge, and with the sanction of the Governor nor to the holding of special terms under the order contemplated in said provision. State v. Turner, 119 N. C. 531; E. E. 188.

The governor under this section, can require a judge of the superior court to hold a term of the court in a county not within his own district. And when the governor so authorizes the court, he must require the court to hold such court, expressing in the commission that it is done with his consent, and under that authority the judge holds the court, as between the judge and the parties in the court, the consent and authority granted by the governor is equivalent to a command. State v. Watson, 75 N. C. 136.

Appointment upon Death of Judge.—Upon the death of one of the judges of the superior court, the Governor may require any judge to hold the courts under the authority under this section to require one or other of the judges to hold one or more special terms of the courts in the district assigned to the deceased judge. State v. Lewis, 105 N. C. 967, 116 S. E. 495.

When Regular Judge Able to Hold Court.—Objection by the defendant charged with a capital felony to the authority of the judge assigned by the governor of the State to hold a special term of the superior court, upon the ground that the judge assigned to hold the courts of the district was in good health, and holding a term of the court in another county, cannot be sustained. Stated in Reid v. Lipscomb, 122 N. C. 650, 29 S. E. 57; Mott v. Commissioners, 206 N. C. 791, 796, 175 S. E. 478. See also, Collins v. Wooten, 212 N. C. 359, 193 S. E. 785.

No jurisdiction is conferred upon a resident judge of the superior court to hold the same. Dunn v. Taylor, 190 N. C. 341, 130 S. E. 838. Emergency judges, appointed under the provisions of our statute, as to the superior courts, have the power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coordinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; pro-

[31]
vide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so that the same may be done without conflict with other provisions of this Constitution. (Const. 1868; Convention 1875.)

Cross References.—As to jurisdiction of superior courts, see § 7-231; as to jurisdiction of justices, see § 7-121 et seq.; as to criminal jurisdiction of Recorder's Court, see § 7-190; jurisdiction in municipal court, see § 7-233; civil jurisdiction, § 7-246 et seq. As to Constitutional Compromise Act under this section see Art. IV, § 2 and notes thereto.

Editor's Note.—This section was added by the Convention of 1875, replacing Secs. 15, 16 and 17 of the Constitution of 1868 which were as follows:

"Sec. 15. The Superior Courts shall have exclusive original jurisdiction of all civil actions, whereof exclusive original jurisdiction is not given to some other court; and all criminal actions in which the punishment may exceed a fine of fifty dollars or imprisonment for one month."

"Sec. 16. The Superior Courts shall have appellate jurisdiction, and such inferior courts as the General Assembly may create, so that the constitutional powers and jurisdiction of the judicial department, 'which does not per-" interfere with vested rights, or the constitutional rights of the other parties. State v. Webb, 125 N. C. 243, 34 S. E. 430.

"Sec. 17. The General Assembly may create inferior courts to Su-" perior Court, subject to review by the Supreme Court upon any appeal and review only on matters of law. State v. Carolina Scenic Coach Co., 218 N. C. 231, 310 S. E. (2d) 824.

"Sec. 18. In case of waiver of trial by jury.—In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury; in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury. (Const. 1868.)"

For a thorough treatment of waiver of jury trial see sections 1-184 and 1-188 and annotations thereunder.

Waiver of Indictment.—Section 15-140 authorizing the waiver of an indictment in the Superior Court by the defendant and validating the court's proceedings is constitutional and valid. State v. Jones, 181 N. C. 543, 106 S. E. 827.

Waiver by Agreement.—Where the cause on appeal recites that the parties agreed that the court might render judgment out of term and out of the district, and the judgment recites the same, appellant's contention that trial by the court had not been agreed upon cannot be sustained, since trial by jury would be impossible under the agreement that judgment might be rendered out of term and out of the district. Odum v. Palmer, 209 N. C. 93, 182 S. E. 741.


Attachment Proceedings.—In attachment and other ancillary proceedings, is it not necessary to join all the parties or those facts from the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. Passour v. Linbergh, 90 N. C. 139.

Findings of Court Are Conclusive.—Where a jury trial is waived, the findings by the court upon conflicting evidence are conclusive under this section, and are not subject to review upon appeal. Buirringer v. Williamson Sav., etc., Co., 197 N. C. 777, 195 S. E. 159.


§ 14. Special courts in cities.—The General Assembly shall provide for the establishment of special courts, for the trial of misdemeanors, in

[32]
cities and towns, where the same may be necessary. (Const. 1868.)

See sections 7-185 et seq.

In General.—This section was construed with Art. IV, § 2 and 19-2-22, 30 in determining the meaning of "other courts" in the case of Meador v. Thomas, 205 N. C. 142, 170 S. E. 110. The language held to modify Art. IV, § 27 in the cases of State v. Doster, 157 N. C. 634, 72 S. E. 111; Farmers' Cotton Oil Co. v. Blue Ridge Gro. Co., 169 N. C. 521, 86 S. E. 356.

Constitutionality of Act Establishing Court.—A legislative enactment creating a municipal court for an incorporated city or town, and conferring thereon jurisdiction in a territorial area extending one mile beyond its corporate limits over criminal cases concurrently cognizable in a justice's court, is valid and does not contravene this section. State v. Brown, 159 N. C. 467, 74 S. E. 580. See also, Washington v. Hammond, 76 N. C. 33; State v. Collins, 151 N. C. 617; State v. Boyd, 175 N. C. 791, 95 S. E. 161.

Jurisdiction Confined to Misdemeanors.—This jurisdiction of courts established under this Constitution is confined to misdemeanors. State v. Walker, 65 N. C. 461; State v. Barkerville, 141 N. C. 811, 53 S. E. 742.

Appeal.—The legislature cannot give to courts established under this section a right of appeal direct to the Supreme Court, State v. Anderson, 138 N. C. 718, 51 S. E. 66. Quoted in Durham Provision Co. v. Davis, 190 N. C. 7, 129 S. E. 993.


§ 15. Clerk of the Supreme Court.—The clerk of the Supreme Court shall be appointed by the Court, and shall hold his office for eight years. (Const. 1868.)

§ 16. Election of Superior Court clerk.—A clerk of the Superior Court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the General Assembly. (Const. 1868.)

See section 2-2.

When Term Begins.—The term of office of a superior court clerk, elected in August, 1878, began on the first Monday of August, 1878. (Const. 1868.)

Cited in Rodwell v. Rowland, 137 N. C. 617, 621, 50 S. E. 319; In re Styers’ Estate, 202 N. C. 715, 164 S. E. 123.

§ 17. Term of office.—Clerks of the Superior Court shall hold their offices for four years. (Const. 1868.)

See section 2-2.


§ 18. Fees, salaries and emoluments.—The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this article; but the salaries of the judges shall not be diminished during their continuance in office. (Const. 1868.)

See secs. 138-1 et seq., and the notes thereto.

The legislature may designate the compensation of these officials prior to the beginning of their terms and it should follow that the compensation may be declared a tax and the amount less the income tax on that amount. See § 105-141. See 11 N. C. Law Rev., 256.

In General.—The General Assembly may designate the compensation of the officers of the Superior Court, including the justices, after the beginning of their terms and it should follow that the compensation may be declared a tax and the amount less the income tax on that amount. See § 105-141. See 11 N. C. Law Rev., 256.

Legislature May Delimit Power to Fix Salary of County Court Judge.—The fixing of the salary of the judge of a county court is essentially a local matter which the general assembly may delegate to the commissioners of the county, unless otherwise provided by the General Assembly, in accordance with the provisions of sec. 14, ch. 515, Public Local Laws of 1939, providing that the board of county commissioners of Forsyth county should have the power to fix the salary of the judge of the county court, is a constitutional delegation of the power of the legislature. Efrid v. Board of Com’rs, 219 N. C. 29, 21, 899.

Prohibition of Salary Diminution Applies to Constitutional Courts.—The provision of this section that the salaries of judges shall not be diminished during their continuance in office applies only to judges of courts existing by virtue of the constitution and not to those established by legislative enactment. Efrid v. Board of Com’rs, 219 N. C. 29, 21, 899.

Salaries Exempt From Taxation.—Where the constitution provides that the salaries of judges shall not be diminished during their continuance in office, the salaries are exempt from taxation. See § 19 of the Taxation of Salaries of Judges, 131 N. C. 692, 42 S. E. 970.

The constitutional restriction on the legislature not to diminish salaries of the judges during their continuance in office is unaffected by the amendment of 1920, (as to income tax), and though their income from other sources may be taxed, a tax on their salaries during their term of office is in their judgment and from such source in contravention of the express terms of this section. Long v. Watts, 183 N. C. 99, 110 S. E. 765. See Note in 1 N. C. Law Rev. 39.

Same.—When Salaries Increased.—An increase of the salaries of the judges during a term of office is the fixing of their salary by the Legislature in such amount as in its judgment is a proper compensation for their services, and attempting by the agency of the Legislature, either under actual or mistaken authority, to impose a tax thereon is an attempt to diminish these salaries during the term of office. Long v. Watts, 183 N. C. 99, 110 S. E. 765.

Same.—Duty of Supreme Court to Pass upon Rights.—It is the duty of the Supreme Court to pass upon the rights of one of the judges of the State as a citizen thereof, when he, in a case properly presented, in the exercise of the constitutional right of the State or one of its designated agencies, to tax his salary paid to him as one of its judges, being in contravention of this section, prohibiting the Legislature from diminishing the salaries of the judges during their continuance in office. Long v. Watts, 183 N. C. 99, 110 S. E. 765.

Same.—Compensation for Holding Extra Term.—The additional compensation of one hundred dollars given to a Superior Court Judge for services in holding a special term is a part of his salary. Buxton v. Commissioners, 52 N. C. 91.

§ 19. What laws are, and shall be, in force.—The laws of North Carolina, not repugnant to this Constitution or to the Constitution and laws of the United States, shall be in force until lawfully altered. (Const. 1868.)


§ 20. Disposition of actions at law and suits in equity, pending when this Constitution shall go into effect, etc.—Actions at law and suits in equity pending when this Constitution shall go into effect shall be transferred to the courts having jurisdiction thereof, without prejudice by reason of the change; and all such actions and suits commenced before, and pending at the adhesion by the General Assembly of the rules of practice and procedure herein provided for, shall be heard and determined according to the practice now in use, unless otherwise provided for by said rules. (Const. 1868.)

As to Superior Courts becoming the successors of Courts of Equity see § 1 of this Article and notes thereto. Applied in Johnson v. Sedberry, 65 N. C. 1.


§ 21. Elections, terms of office, etc., of justices of the Supreme and judges of the Superior courts.—The justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. The judges of the Superior Courts, elected at the first election under this amendment, shall be elected in like manner as is provided for justices of the Supreme Court, [33]
and shall hold their offices for eight years. The General Assembly may, from time to time, provide by law that the judges of the Superior Courts, chosen at succeeding elections, instead of being elected by the voters of the whole State, as is herein provided for, shall be elected by the voters of their respective districts. (Const. 1868; Convention 1875.)

See section 7-2.

Editor's Note.—To form this section, the Constitution of 1875 combined with some changes Secs. 26 and 27 of the Constitution of 1868, which were as follows:

"Sec. 26. The Judges of the Superior Court shall be elected by qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. The Judges of the Superior Courts shall be elected in like manner, and shall hold their offices for eight years; but the Judges of the Superior Courts elected at the first election under this Constitution shall, after their election, under the superintendence of the Justices of the Supreme Court, be divided by lot into two equal classes, one of which shall hold office for four years, the other for eight years."

"Sec. 27. The General Assembly may by law increase the number of judges of the Superior Courts, instead of being elected by the voters of the whole State, as is herein provided for, shall be elected by the voters of their respective districts."


§ 22. Transaction of business in the Superior Courts. — The Superior Courts shall be, at all times, open for the transaction of all business within their jurisdiction, except the trial of issues of fact requiring a jury. (Const. 1868.)

Does Not Apply to Terms of Courts.—This section must be read in connection with section 11 of this article, and does not apply to the terms of courts and matters connected therewith. Delfield v. Mercer Construction Co., 117 N. C. 21, 20 S. E. 127.

Court of Clerk Not Included.—The phrase "superior court" in this section does not mean the court of the clerk. McAdoo v. Benbow, 63 N. C. 661.

Rendition of Judgment After Term.—Where the issues of fact had been disposed of by a consent verdict, and the court having jurisdiction of the case, clearly, and being always open, there is nothing in this clause of the Constitution which forbids the rendition of a judgment upon verdict after the expiration of the term, as well as during the term. Harrell v. Peebles, 79 N. C. 26, 31. See, also, Shackelford v. Miller, 91 N. C. 161.


§ 23. Solicitors and Solicitorial Districts.—The State shall be divided into twenty-one solicitorial districts, for each of which a solicitor shall be chosen by the qualified voters thereof, as is prescribed for members of the General Assembly, who shall hold office for the term of four years, and prosecute on behalf of the State, in all criminal actions in the Superior Courts, and advise the officers of justice in his district. (Const. 1868; Convention 1875.)

Editor's Note.—Section 29 of Article IV of the Constitution of 1868 read as follows prior to its amendment pursuant to Chapter 2 of the Public Laws of 1941 ratified by vote of the people in November, 1941: "A solicitor shall be elected for each solicitorial district, by the qualified voters thereof, as is prescribed for members of the General Assembly, who shall hold office for the term of four years, and prosecute on behalf of the State, in all criminal actions in the Superior Courts, and advise the officers of justice in his district."

Public Laws 1927, c. 99, Public Laws 1929, c. 140, and Public Laws 1931, c. 367 proposed amendments to this section which were defeated.

Issuance of Capias.—A solicitor is the most responsible officer of the State and has been spoken of as "his right arm." He is a constitutional officer and his duties are presented in the Constitution of 1868 as follows: "The judges of the superior court shall have the power, and the power only, to render judgment upon verdict after the expiration of the term, as well as during the term."


"The phrase "superior court" in this section does not mean the court of the clerk. McAdoo v. Benbow, 63 N. C. 661.


§ 24. Sheriffs and coroners.—In each county a sheriff and coroner shall be elected by the qualified voters thereof as is prescribed for members of the General Assembly, and shall hold their offices for a period of four years. In each township there shall be a constable elected in like manner by the voters thereof, who shall hold his office for a period of two years. When there is no coroner in a county, the clerk of the Superior Court for the county may appoint one for special cases. In case of a vacancy existing for any cause in any of the offices created by this section, the commissioners of the county may appoint to such office for the unexpired term. (Const. 1868; 1937, c. 241.)

As to sheriffs and constables, see sections 162-1, 151-1. As to attorneys, see section 7-2.

Editor's Note.—The effect of the amendment adopted pursuant to Chapter 241 of the Public Laws of 1937 was to change the terms of office of the sheriff and coroner from two years to four years.

A sheriff occupies a constitutional public office, and a sheriff takes office, not by contract, but by commission subject to the power of the legislature to fix fees and compensation for which the Constitution does not provide. Borders v. Cline, 212 N. C. 472, 191 S. E. 836.

The term of office of sheriffs-elect begins on the first Monday in December next ensuing their election, and the constitutional amendment changing the term of office of sheriffs from two to four years, approved by the voters in the election of 1936, being in effect on the first Monday in December, in the date of the beginning of the term of the sheriff elected in the election which is elected in the election, their term of office is four years in accordance with the amendment then in effect. Freeman v. Cook, 217 N. C. 63, 6 S. E. (2d) 894.

County Sheriff.—When the sheriff is provided for by this section, the right of the sheriff to appoint deputies is a common law right and deputies appointed by the sheriff are public officers, but their duties and authority relate only to ministerial duties imposed by law upon the sheriff, in the performance of which they act for the sheriff in his name and right. Gowens v. Alamance County, 216 N. C. 107, 3 S. E. (2d) 175.

Vacancy after Expiration of Term.—Where a constable was elected in 1875 for four years, and no election was had in 1877, a vacancy occurred which the county commissioners had the power to fill under this section. State v. McLure, 81 N. C. 152.

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If, before the expiration of his term a sheriff is re-elected but dies before the expiration of that term, the commissioners are entitled to appoint someone to fill the vacancy for the remainder of the first term, and the officers of justice relate only to ministerial duties imposed by law upon the sheriff, in the performance of which they act for the sheriff in his name and right. Gowens v. Alamance County, 216 N. C. 107, 3 S. E. (2d) 175.

§ 25. Vacancies.—All vacancies occurring in
the offices provided for by this article of the Constitution shall be filled by the appointment of the Governor, unless otherwise provided for, and the appointees shall hold their places until the next regular election for members of the General Assembly, when elections shall be held to fill such offices. If any person, elected or appointed to any of said offices, shall neglect and fail to qualify, such offices shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of said offices shall hold until their successors are qualified. (Const. 1868; Convention 1875.)

Editor’s Note.—This section is Sec. 31 of the Constitution of 1868 as amended by the Convention of 1875 by the addition of the latter portion beginning with the words “for members.”

Limitation on Term Appointed For.—The provisions added to the original section were manifestly made, in view of the decision of the Supreme Court in People v. Wilson, 72 N. C. 155, and were intended to limit the tenure of the appointees from the death or resignation of an incumbent, or by the refusal of a person elected to qualify, to the time intervening between the making of the appointment and the next regular election for members of the General Assembly, together with a reasonable interval for qualification. State v. Jones, 116 N. C. 570, 575, 21 S. E. 787.

Concurrence of the Governor.—The general appointing power is given to the Governor with the concurrence of the Senate; the power to fill vacancies, not otherwise provided for, is given to the Governor alone, and that, whether the Legislature is in session or not, and without calling the Senate. N. C. v. Nichols, 68 N. C. 429.

Meaning of “Until the Next Regular Election.”—The words “until the next regular election,” in this section mean until the next regular election for the office in which a vacancy has occurred. People v. Wilson, 72 N. C. 155.

Refusal of Judge to Accept Office.—Where a person was elected judge of the Superior Court, and refused to accept the office, the Governor was never qualified there was a vacancy within the meaning of this section and the Governor had the power to fill such vacancy by appointing a successor. People v. Wilson, 72 N. C. 155.

Constables Not Included.—The provision in this section that “all incumbents of said offices shall hold until their successors are qualified,” does not embrace the office of constable. State v. McLaurin, 84 N. C. 153.


§ 26. Terms of office of first officers. —The officers elected at the first election held under this Constitution shall hold their offices for the terms prescribed for them respectively, next ensuing after the next regular election for members of the General Assembly. But their terms shall begin upon the approval of this Constitution by the Congress of the United States. (Const. 1868.)

Time of First Election.—The next regular election for members of the General Assembly is to be held on the first Thursday in August 1870. Legislative Term of Office, 64 N. C. 154.


§ 27. Jurisdiction of justices of the peace. —The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions, founded on contract, wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy; and of all criminal matters arising within their counties where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. And the General Assembly may give to the justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars. When an issue of fact shall be joined before a justice, on demand of either party thereto he shall cause a jury of six men to be summoned, who shall try the same. The party against whom the judgment shall be rendered in any civil action may appeal to the Superior Court from the same. In all cases where the criminal nature of the party as regards whom the judgment is given may appeal to the Superior Court, where the matter shall be heard anew. In all cases brought before a justice, he shall make a record of the proceedings, and file the same with the clerk of the Superior Court for his county. (Const. 1868; Convention 1875.)

Cross References.—For a thorough treatment of the civil jurisdiction of justice of the peace, see annotations under sections 7-121 and 7-122 relating to their criminal jurisdiction, see annotations under sections 7-123-7-129.

Editor’s Note.—This section is Sec. 33 of the Constitution of 1868 with the following changes made by the Convention of 1875: Omission of the words “exclusive original jurisdiction” in line 2; omission of “all” before “civil jurisdiction” in line 3; substitution of “thirty days” for “one month”; addition of the sentence beginning with “And” omission of the clauses “and, if the judgment shall exceed twenty-five dollars, there may be a new trial of the whole matter in the Appellate Court; but if the judgment shall be for twenty-five dollars or less, then the case shall be heard in the Appellate Court only upon matters of law” after the phrase “Superior court from the same” in line 15.

Jurisdiction of Justice.—A justice of the peace can only exercise such powers as are conferred upon him by this section of the Constitution, and the statutes in harmony therewith. His jurisdiction is special, not general, and his authority is not to be enlarged by principles of law applicable to courts of general jurisdiction, methods of procedure not strictly allowed by law. State v. Jones, 100 N. C. 438, 5 S. E. 655.

Same.—Jurisdiction Concurrent.—The jurisdiction conferred upon justices of the peace to try civil actions, where the property in controversy does not exceed fifty dollars, is concurrent with that possessed by the superior court. Montague v. Mial, 69 N. C. 127.

Same—Waiver of Objection by Appearance. —Where the defendant is sued on two accounts before a justice of the peace separately stated, each appearing to be in amount coming within the jurisdiction of the justice, and his appearing and acknowledging his liability for the sum total he thereafter waives his right on appeal to set up the defense that in fact the two accounts were but one. Honig v. Hayes, 124 N. C. 108, 109, 36 S. E. 655.

Section Does Not Embrace Damages.—The provisions in this section, authorizing the General Assembly to give the justices of the peace jurisdiction of other civil actions wherein the property in controversy does not exceed fifty dollars, is not a restriction, even by implication, to forbid conferring jurisdiction where damages and not property is given. Criminal Appeals. Marloy v. Fayetteville, 122 N. C. 400, 29 S. E. 880.

Contempt.—The constitutional restriction imposed by this section applies also to the administration of the law in the trial of criminal cases, and were not intended to affect the inherent or statutory powers possessed by these courts and conferred upon them as necessary to enable them to transact business properly and efficiently. State v. Griffin, 133 N. C. 801, 46 S. E. 781; State v. Mclntire, 133 N. C. 733, 46 S. E. 783.


Criminal Appeals.—The clause of this section providing that an appeal from a judgment of the justice of the peace is not to be given to courts of general jurisdiction where damages and not property is given is not overruled. Malloy v. Fayetteville, 122 N. C. 400, 29 S. E. 880.

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§ 28. Vacancies in office of justices.—When the office of justice of the peace shall become vacant otherwise than by expiration of the term, and in case of a failure by the voters of any district to elect, the clerk of the Superior Court for the county shall appoint to fill the vacancy for the unexpired term. (Const. 1868.)

Conferring Authority on Governor.—A statute, conferring authority upon the Governor to fill vacancies in the office of justices, caused by the failure of the appointees authorized to provide for the election of officers and clerks of the various courts, by the presiding officers of the various courts, and the clerks of such courts in inferior courts shall receive notice thereof, accompanied by a copy of the causes alleged for their removal, at least twenty days before the day on which such courts are to hold their sessions. (Constitution of 1875.)

§ 29. Vacancies in office of Superior Court clerk.—In case the office of clerk of a Superior Court for a county shall become vacant otherwise than by expiration of the term, and in case of a failure by the people of any district to elect, the clerk of the Superior Court for the county shall appoint to fill the vacancy until an election can be held in the regular field. (Const. 1869.)

Town of Appointee.—Under this section the appointee of the judge holds only until the next election at which members of the General Assembly are chosen. Rodwell v. Rowland, 177 N. C. 617, 621, 50 S. E. 319.

Cited in Rodwell v. Rowland, 177 N. C. 617, 621, 50 S. E. 319.

§ 30. Officers of other courts inferior to Supreme Court. — In case the General Assembly shall establish other courts inferior to the Supreme Court, the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years. (Constitution of 1875.)

Editor's Note.—This section was added by the Constitution of 1875.

Legislature May Elect Clerk.—Where a criminal court is created the legislature could either elect the clerk itself or devolve his election upon the people, or other constituency. White v. Murray, 126 N. C. 153, 157, 53 S. E. 256.

May Provide for Election of Officers of County Courts.—Under the provisions of this section, the Legislature is authorized to provide for the election of officers and clerks of County Courts established by it, and the courts being "other courts inferior to the Supreme Court" referred to in Art. IV, §§ 2 and 14. Meador v. Thomas, 205 N. C. 142, 170 S. E. 170.

The word "election" does not necessarily import a popular election by the qualified electors, and the delegation of the power of the Superior Court to the county commissioners is not an unlawful delegation of legislative power, this section providing that they "shall be elected in such manner as the general assembly may prescribe." Meador v. Thomas, 205 N. C. 142, 170 S. E. 170.

§ 31. Removal of judges of the various courts for inability.—Any judge of the Supreme Court, or of the Superior Courts, and the presiding officers of such courts inferior to the Supreme Court as may be established by law, may be removed from office for mental or physical inability, upon a concurrent resolution of two-thirds of both houses of the General Assembly. The judge or presiding officer against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the General Assembly shall act thereon. (Constitution of 1875.)

Editor's Note.—This section was added by the Constitution of 1875.

Cited in People v. Smith, 8 N. C. 304.

§ 32. Removal of clerks of the various courts for inability.—Any clerk of the Supreme Court, or of the Superior Courts, or of such courts inferior to the Supreme Court as may be established by law, may be removed from office for mental or physical inability; the clerk of the Supreme Court by the judges of said court, the clerks of the Superior Courts by the judges riding the district, and the clerks of such courts inferior to the Supreme Court as may be established by law by the presiding officers of said courts. The clerk against whom proceedings are instituted shall receive notice thereof, accompanied by a copy of the cause alleged for his removal, at least ten days before the day appointed to act thereon, and the clerk shall be entitled to an appeal to the next term of the Superior Court and thence to the Supreme Court as provided in other cases of appeals. (Constitution of 1875.)

Editor's Note.—This section was added by the Constitution of 1875.

Quoted in Stephens v. Dowell, 208 N. C. 555, 181 S. E. 639, wherein city commissioners were held without authority to dismiss clerk of municipal court without notice and opportunity to be heard.

§ 33. Amendments not to vacate existing of-
Art. V, § 1
CONSTITUTION OF NORTH CAROLINA

§ 1. Capitation tax; exemptions. — The General Assembly may levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which said tax shall not exceed one dollar. No other capitation tax shall be levied. The commissioners of the several counties and of the cities and towns may exempt from the capitation tax any special cases on account of poverty or infirmity. (Const. 1868; Ex. Sess. 1920, c. 93.)

For article on property and poll tax limitations under this section and section 6 of this article, see 18 N. C. Law Rev. 275.

Editor's Note.—This section was changed pursuant to Ch. 93, Public Laws of 1920, extra session, from Sec. 1 in the Constitution of 1868 which was as follows: "The General Assembly may levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each, to the tax on property value at three hundred dollars in cash. The Commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combines shall never exceed two dollars on the head."

Effect of Amendment on Bonds Purchased Prior Thereto. —The amendment will invalidate taxation of the polls in a township which had met the constitutional requirement before the amendment took effect for the first time; but the prohibition will have no effect of impairing vested rights existing under a valid contract. Board v. Bray Bros. Co., 134 N. C. 484, 115 S. E. 47; Hammond v. McKenzie, 182 N. C. 747, 110 S. E. 102.

§ 2. Application of proceeds of State and county capitation tax. — The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cent thereof be appropriated to the latter purpose. (Const. 1868.)

Section Only Applies to General Purposes. — An objection that the tax was not a part of the general revenue for the use of the public roads in violation of this section, which appropriates the State and county poll tax "to the purposes of education and the support of the poor," can not be sustained, as that provision applies to the levy of taxation for general, not special, purposes. Crocker v. Moore, 140 N. C. 429, 53 S. E. 229.

No Limit on Taxation for Payment of Debts. — There is no limit on the power of the State or county, for the payment of their lawful debts, created before the adoption of the Constitution. French v. Board, 74 N. C. 692; Southern R. Co. v. Board, 148 N. C. 220, 61 S. E. 690.

No Limit on Taxation for Payment of Debts. — There is no limit on the power of the present or any future State or county, for the payment of their lawful debts, created before the adoption of the Constitution. French v. Board, 74 N. C. 692; Brothers v. Commissioners, 70 N. C. 725.

When Limitation May Be Exceeded. — Without special legislation a county may not authorize a levy of tax, exceeding the constitutional limitation upon the poll or property, to be provided for a sinking fund to pay the principal and interest on bonds to be issued by it for highway purposes. It is otherwise as to a six months period of public schools required by law, which is less than the constitutional limitation. French v. Board, 74 N. C. 692; Ballou v. Board, 182 N. C. 473, 475, 109 S. E. 628.

The limitation as to the levy on poll tax prescribed by this section, does not apply to the levy of a special tax by a county for road purposes, authorized by the Legislature, submitted to the vote of the electors of the county and duly approved by them. Moore v. Board, 172 N. C. 419, 90 S. E. 673.

Section Does Not Apply to Municipal Corporations. — The restriction that the State and county tax combined shall never exceed $2 on the poll, applies only to State and county taxation, and not to taxation by a city or town, or other than counties. Perry v. Commissioners, 148 N. C. 321, 62 S. E. 608.


§ 3. State taxation. — The power of taxation shall be exercised in a just and equitable manner, and shall never be surrendered, suspended or contracted away. Taxes on property shall be uniform as to each class of property taxed. Taxes shall be levied only for public purposes, and every act levying a tax shall state the object to which it is to be applied. The General Assembly may also tax trades, professions, franchises, and incomes: Provided, the rate of tax on income shall not in any case exceed ten per cent (10%), and there shall be allowed other deductions from the use of the public roads in violation of this section, which appropriates the State and county poll tax "to the purposes of education and the support of the poor," can not be sustained, as that provision applies to the levy of taxation for general, not special, purposes. Crocker v. Moore, 140 N. C. 429, 53 S. E. 229.

Legislature May Diminish Emoluments. — The Legislature has the constitutional power to diminish the emoluments of any officer now existing under the Constitution of the State and filled, or held, by virtue of any election or appointment under the said Constitution and the laws of the State made in pursuance thereof. (Convention 1875.)

Editor's Note.—This section was added by the Convention of 1875.
The tax on income, imposed by the Revenue Acts of this State, is not a tax on property, within the meaning of the requirement of this section that property shall be taxed according to its true value in money. State v. Kent-Col.

The tax must be uniform.—This section imperatively requires that all real and personal property be taxed by a uniform rule. The following cases are decided by this Court:

What "Property" Includes.—It seems that the word "property" is used by the Constitution in a sense to make it embrace "money, credits, investments in bonds," etc. Pullen v. Raleigh, 68 N. C. 451.

The power to levy taxes is the exclusive province of the General Assembly. This section provides that the General Assembly may tax trades and professions; and while this clause does not expressly apply the rule of uniformity to taxes imposed on trades and professions it has been judicially determined that the rule of uniformity does apply to these taxes as to any other property. Roach v. Durham, 204 N. C. 587, 591, 169 S. E. 149.

The police power may be exercised for the purpose of taxation in contravention of this section. Wachovia Bank, etc., Co. v. Maxwell, 221 N. C. 528, 20 S. E. (2d) 640.

Chapter 30, Public Laws of 1937, providing for the licensing of employees for taxation where the Act does not expressly apply the rule of uniformity to taxes on trades and professions, is to be construed in pari materia with chapter 337, Public Laws of 1919, exempting from the provision of the act fourteen counties of the state, is held unconstitutional, whether the license fee therein imposed in addition to the license prescribed by the Revenue Act be considered a state tax or not, since it places a burden upon those engaged in the specified business in a portion of the state which is not placed upon those engaged in the same business in other parts of the state without any reasonable basis of classification, and therefore discriminates within the class and accords a privilege and immunity to some not accorded to others. Bridges v. Charlotte, 221 N. C. 472, 20 S. E. (2d) 825.

Whom Tax on Occupation Must Reach.—A tax upon an occupation must reach all who follow that trade, regardless of whether persons or things. Worth v. Petersburg R. Co. 89 N. C. Law Rev., 255.

The power of the Legislature to classify subjects for the purpose of taxation is flexile, and the reasonableness of any classification will generally be construed with reference to the facts of the particular case, the proportionate limitation on the power to classify being that the classification must be reasonable and not arbitrary and must rest upon some reasonable and substantial difference between such classes, and that the burden must be equal upon all in the same class and a special classification by statute of wholesale grocers operating a cold storage chamber of some character for the preservation of fresh meats, as distinguished from a tax imposed on hotel keepers, which exempts from taxation those whose yearly receipts are less than $1,000, is not unconstitutional. Cobb v. Commissioners, 122 N. C. 307, 39 S. E. 338.

A tax imposed to raise moneys for Employees' Retirement Fund is for a public purpose and the Act provides benefits to thousands of teachers and employees of this State without discrimination, and therefore the tax does not offend this section. Bridges v. Charlotte, 221 N. C. 472, 20 S. E. (2d) 825.

Reasonableness of Classification.—See notes under sections 105-98, 118.

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The classification must not be arbitrary or unjust, but must be based on substantial and reasonable differences between such classes. Great Atlantic & Pacific Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 201.

There must not be complete uniformity, but there must be reasonable uniformity. In substance and scope the classification must be reasonable and must rest upon some reasonable and substantial difference between such classes. Great Atlantic & Pacific Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 201.

The principles of classification are those of substance and not of form, and must be based upon reasonable distinctions and must apply equally to all within each class defined. Snyder v. Maxwell, 217 N. C. 617, 9 S. E. (2d) 19. This rule applies to municipal cor-

[38]
porations taxing trades or professions. Kenny Co. v. Bre- 
Classification of Mechanical Vending Devices.—While the legislature may not classify mechanical vending machines in accordance with the kinds of merchandise sold by such ma-
chines, these machines are real and reasonable, provided the vending devices for the purpose of taxation and make a further classification or sub-classification in accordance with the quantity or kind of commodities sold by such method with the same fair classification as the Excise and Taxation districts.

Classifying Dealers in Different Kinds of Merchandise.—
The requirement of this section that all taxes shall be uni-
form does not prohibit a municipality, which is empowered to tax persons engaged in mercantile business, from classify-
ing dealers in a particular kind of merchandise, separately from those whose business it is to sell other articles falling within the same generic terms. Rosenbaum v. New Bern, 118 N. C. 83, 24 S. E. 1.

Taxing on Volume of Business.—A tax levied quarterly by a town, under authority of an act of the General Assembly, upon all traders doing business in the town, "of $1 for every $1,000 worth of goods sold during the preceding quarter," is uniform and constitutional. Gatlin v. Tarboro, 78 N. C. 119.

Tax Based on Counties in Which a Firm Does Business.—
A tax levied by payment of $100, being levied annually in the State $100 for each county in which such business is carried on is valid. Lacy v. Armour Packing Co., 134 N. C. 567, 71 S. E. 53.

Biasing Taxes on Size of City in Which Business Located.
—in acting imposing an annual graduated license tax on the business of buying and selling fresh meats from offices, stores, vehicles, etc., in cities of 12,000, 6,000, and under 6,000 inhabitants, respectively, is not unconstitutional, as not being uniform and in not imposing a license if the business is carried on outside a city or town; it being uniform and uniform within each class. State v. Carter, 129 N. C. 560, 40 S. E. 11.


Taxing Cotton by Bale.—An act to provide improved mar-
keting facilities for cotton, which enacts that on each bale of cotton ginned in North Carolina for two years, twenty-five cents shall be assessed to compensate the cotton growers for a warehouse system against loss, is not in derogation of this section. Bickett v. State Tax Comm., 177 N. C. 433, 99 S. E. 415.

Tax on Indictments.—A tax on indictments, civil suits, etc., is not a tax within the meaning of this section. State v. Nutt, 79 N. C. 263.

Inheritance Tax.—An inheritance tax is in the nature of a tax on real property, or acquiring property or inheriting from a decedent, and does not come within the prohibition as to taxing an income upon property when the property itself is taxed and its imposition rests with the legislative power. In re Davis, 190 N. C. 338, 130 S. E. 22.

License on Business of Hauling Timber.—An act requir-
ing a license of anyone who carried on the business of haul-
ing timber in a certain county, grading the license with reference to the number of horses driven to the wagon used is not repugnant to this section. State v. Bullock, 101 N. C. 223, 75 S. E. 2.

Zoning Cities.—An act authorizing the division of a city into several zones for the purpose of fixing an ad valorem basis of real estate for taxation, uniform within each zone, but classified in accordance with destiny of population, character of building, etc., violates the mandator-
y provisions of our Constitution that within its corporate limits all taxable property shall be by a uniform rule of taxation. Anderson v. Asheville, 124 N. C. 117, 138 S. E. 715.

Exception of Farm Products.—The exception of "farm prod-
ucts purchased from the producer," used as basis for taxation, farm and ad valorem, is not in conflict with this section. Anderson v. Asheville, 124 N. C. 117, 138 S. E. 715.

Railroad Property May Be Assessed by Corporation Com-
mission.—An act providing for the assessment of railroad

property by the Corporation Commission, is not in conflict with this section. See also section requiring railroads, and other like corporations to pay their State taxes within a shorter period than those to the counties, is a uniform legislative classification ap-
plied equally to all, and does not object to any better investigation as a discrimination or a denial of the equal protection of the laws prohibited by this section. Norfolk Southern R. Co. v. Lacy, 107 N. C. 615, 122 S. E. 763.

Exemptions from Taxation.—The legislature in exempting property from taxation, Art. V, sec. 5, is required to ob-
serve the basic principle of equality, and exemptions al-
though it must be uniform within the class as required by this section, both before and after the amendment in 1936. Sir Walter Lodge, etc. v. Swain, 217 N. C. 632, 9 S. E. (2d) 386.

Exempting Bonds of Drainage District from Taxation.—
Drainage districts are not regarded as municipal corpora-
tions, and a legislative act exempting their bonds from tax-
ation violates the uniform rule as to taxation required by its derivation. Commissioners v. Webb & Co., 160 N. C. 594, 76 S. E. 552.

Exemption of Property and Bonds of Municipality.—A 
legislative provision exempting the property and bonds of a city from taxation is valid when the bonds are to be issued for a public purpose, and certainly the bonds are exempt from taxation if sold to and held by an agency of the Federal government. Miles v. City of New Bern, 201 N. C. 418, 158 S. E. 763.

Taxes Reduced if Assets Returned for Taxes.—An act im-
posing license taxes on the business of selling automobiles 
in the State, requiring the effective date of the act, and upon owners of property, who in respect to such ownership 
and being for the object of reducing the license tax for 
property from taxation, Art. V, sec. 5, is required to ob-
serve the basic principle of equality, and exemptions al-
though it must be uniform within the class as required by this section, both before and after the amendment in 1936. Sir Walter Lodge, etc. v. Swain, 217 N. C. 632, 9 S. E. (2d) 386.

Local Assessment Based on Benefits.—The constitutional 
provision that taxation shall be equal, uniform, and within certain limits, does not apply to local assessments imposed upon owners of property, who in respect to such ownership

Charter Making Taxing District of Each Improved.—Where 
the charter of a city provides that each street or portion of street improved shall be a taxing district, by requiring 
the tax is expended. Cain v. Commissioners, 86 N. C. 8.

Local Assessments on Lands Abutting on Streets Improved 
are not required to be uniform with all other subjects of taxation, and in view of the particular benefits, such must 
be uniform as to all property owners within that class to conform with constitutional requirements. Gastonia v. Clionger, 117 N. C. 765, 123 S. E. 76.

Provision for Collection of Taxes for Past Years.—A law 
to provide for the collection of taxes for past years does 
not violate the provisions of this section in regard to uniformity of taxation. North Carolina R. Co. v. Commissioners, 82 N. C. 575.

The taxing of land under § 105-167, subsec. 13, was held 
not void as discriminatory in amount because of the provision of the section that such tax need not be paid when 
the property is transferred as a consequence of the sale to the effect that the tax has been paid, and that such dealer will be responsible therefor to the Commissioner of Revenue, since the reference to the taxing authority and the 
amount to be paid regardless of whether the car is purchased by a dealer within or outside the state. Powell v. Maxwell, 210 N. C. 221, 146 S. E. 738.

National Licenses—Tax on Real Estate Brokers Discrimina-
tory.—Chapter 241, Public-Local Laws 1927, requiring real 
estate brokers in certain designated counties to be licensed 
by a real estate commission on the basis of moral character and 
aid proficiency in the public interest, and requiring pay-

[ 29 ]
ment of a license fee in addition to the state-wide license required, is unconstitutional as it applies only to the real estate brokers in the designated counties and is therefore discriminatory. State v. Warren, 211 N. C. 75, 189 S. E. 280.

When Lien Attaches.—The lien for the payment of taxes assessed against personal property attaches only from the date of levy thereon. Carstarphen v. Plymouth, 186 N. C. 90, 195 S. E. 231.

Enjoining Collection of Income Tax.—A bill of equity to restrain the assessment and collection of the income tax provided by this section, and the collection and enforcement of certain franchise taxes and their enforcement under this act does not warrant interlocutory injunctions. Southern R. C. v. Watts, 289 Fed. 305.

Lien on personal property.—This section of the Constitution vests exclusive authority in the Legislature to levy taxes, which may not be interfered with by the courts. Person v. Board, 184 N. C. 499, 115 S. E. 336.


§ 4. Limitations upon the increase of public debts.—The General Assembly shall have the power to contract debts and to pledge the faith and credit of the State and to authorize counties and municipalities to contract debts and pledge their faith and credit for the following purposes: To fund or refund a valid existing debt; to borrow in anticipation of the collection of taxes due and payable within the fiscal year to an amount not exceeding five per centum of the amount of such taxes; to provide for a casual deficit; to suppress riots or insurrections, or to repel invasions. For any purpose other than these enumerated, the General Assembly shall have no power, during any biennium, to contract new debts on behalf of the State to an amount in excess of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium, unless the subject be submitted to a vote of the people of the State; and for any purpose other than these enumerated the General Assembly shall have no power to authorize counties or municipalities to contract debts, and counties and municipalities shall not contract debts, during any fiscal year, to an amount exceeding two-thirds of the amount by which the outstanding indebtedness of the particular county or municipality shall have been reduced during the next preceding biennium, unless the subject be submitted to a vote of the people of the particular county or municipality. In any election held in the State or in any county or municipality under the provisions of this section, the proposed indebtedness must be approved by a majority of those who shall vote thereon. And the General Assembly shall have no power, during any biennium, to lend the credit of the State in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, by voting the State's outstanding indebtedness to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon. (Const. 1858; 1923, c. 145; 1933, c. 348.)

As to the purpose of this section, see dissenting opinion of C. J. Clark in Pennington v. Tarboro, 180 N. C. 438, 185 S. E. 199.

Editor's Note.—This section as contained in the Constitution of 1858 was as follows: "Until the bonds of the State shall be at par, the General Assembly shall have the power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing insurrections or disorders, unless the subject be submitted to the people of the State, and be approved by a majority of those who shall vote thereon. For any purpose other than these enumerated, the General Assembly shall have no power, during any biennium, to contract new debts, and counties and municipalities shall not contract debts, during any fiscal year, to an amount exceeding in the aggregate, including the then existing debt recognized by the State, and deducting sinking funds then on hand, the par value of the stock in the Carolina Railroad Company and the Atlantic and Southern Railroad company owned by the State, seven and one-half per centum of the assessed valuation of taxable property within the State as last fixed for taxation." Pursuant to Chapter 145 of the Public Laws of 1923, the first sentence was stricken out and the following inserted in its place: "The General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State to an amount exceeding in the aggregate, including the then existing debt recognized by the State, and deducting sinking funds then on hand, the par value of the stock in the Carolina Railroad Company and the Atlantic and Southern Railroad company owned by the State, seven and one-half per centum of the assessed valuation of taxable property within the State as last fixed for taxation." Pursuant to Chapter 248 of the Public Laws of 1923, the words "taxable property within the State as last fixed for taxation." was added in its present form. For article discussing that amendment, see 16 N. C. Law Rev. 329. Many of the cases cited below were decided prior to the amendment.

The language of this section is unambiguous, and by its plain terms the power of the state to authorize counties and municipalities to contract debts in any biennium or fiscal year, respectively, without submitting the matter to a vote of the people, except for those purposes specifically enumerated in the amendment, is definitely prescribed to two-thirds of the amount by which its outstanding indebtedness was decreased during the prior biennium or fiscal year. Halliburton v. Board, 176 N. C. 33, 196 S. E. 200. Southern R. Co. v. Watts, 289 Fed. 301.

Refunding Bonds.—Defendant county proposed to issue bonds to refund bonds of several of its townships, which bonds constituted a valid existing debt of the county, the county having received the benefit of the proceeds of the bonds and having agreed to assume the indebtedness prior to the adoption of the amendment to this section. Plaintiff contended that the county bonds could not be issued without a vote by mandate of this section as amended. It was held that the proposed county bond issue was to refund a valid existing debt of the county within the meaning of the amendment as amended, and that the section therein provided a vote is unnecessary, nor could the county be held liable for the repayment of the bonds be adversely affected by any constitutional change. Thompson v. Harnett County, 212 N. C. 316, 193 S. E. 468.

During the prior fiscal year defendant county began refunding operations, and during that year issued its refunding bonds, but did not refund any bonds until after the first day of the present fiscal year, whereas the statute provided that bonds must be issued since both the refunding bonds and the bonds refunded were outstanding during the prior fiscal year, there had been an invasion of the rights of the plaintiffs in their debt, and the county's outstanding indebtedness during the prior fiscal year. It was held that the failure of the county, to complete its refunding operations during the prior fiscal years is immaterial, and the refunding bonds should not be included in determining the amount by which the county's outstanding indebtedness was decreased during the prior fiscal year. Halliburton v. Board, 176 N. C. 33, 196 S. E. 200.
May be issued upon the approval of a majority of those who vote, unless the purpose is within the scope of the purpose of the bonds. However, if the purpose is not within this scope, then bonds must be included, except bonds issued by a vote of the people, for a valid existing debt, to supply a casual deficit, to assist in the exercise of statutory authority. The test of bonds being at par also applies here. The statute establishing the North Carolina National Park Commission (Laws 1927, ch. 48) with the certain provisions enumerated is for the benefit of the public and not that of any third person, and does not fall within the provisions of this section, Yarborough v. Park Commission, 196 N. C. 597, 195 S. E. 391.

§ 5. Property exempt from taxation.—Property belonging to the State or to municipal corporations, shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable or religious purposes; also wearing apparel, arms for musters, household and kitchen furniture, the mechanical and agricultural implements of the owner. (Const. 1868; 1872-73, c. 83; 1935, c. 444.)


Editor’s Note.—This article, which was Sec. 6 of the Constitution of 1868, was amended by the insertion of the phrase “or any other personal property,” in pursuance of ch. 84, Public Laws of 1872-73. The amendment, which added the last sentence of this section, was proposed by Public Laws 1955, c. 444, s. 2, and adopted at the general election held in November 1956.

The amendment of 1936 is only permissive in terms and not self-executing. The power of exemption, to the extent herein mentioned, is exercisable only insofar as not at all, as the General Assembly, in its wisdom, shall determine. Nash v. Board of Com’rs, 216 N. C. 301, 304, 190 S. E. 240.

Section Does Not Apply to School System.—This section is not applicable to the General Assembly or to third persons, individual or corporate, and of the kind contemplated in the provision; and cannot be construed to affect the mandatory provisions of Article IX as to the maintenance of schools by local legislative action. Lacy v. Fidelity Bank, 183 N. C. 373, 111 S. E. 612.

Voter of People Necessary to Aid New Railroad.—The General Assembly is not persons necessary to aid a railroad. University R. Co. v. Holden, 63 N. C. 410, 412.

Same—Issuing Bonds to Pay for Stock.—A subscription for stock in a public corporation and issuing bonds to pay for such stock, is a gift of the credit of the State, within the meaning of this section. Galloway v. Jenkins, 63 N. C. 147.

When Counties May Subscribe to Railroad Stock.—This section could not be construed as limited in application to cases where railroads had been commenced and were unfinished at the time the constitution was adopted, and in which the counties, as such, had a direct pecuniary interest, but that it conferred power on counties to subscribe for stock, in the manner prescribed, in any railroad company which had been duly incorporated to build a projected road in the circuit of the county, to the amount of the supposed benefits to be derived from it. Board v. Coler, 113 Fed. 705.

Bonds for Streets and Sewage.—A municipality may not issue bonds for street and sewerage construction or extension without a vote, when during the fiscal year, the purpose of the bonds is to pay for streets and sewers for a purpose other than necessary expense. Board v. Snuggs, 121 N. C. 394, 422, 28 S. E. 539; Williamson v. High Point, 213 N. C. 284, 195 S. E. 387.

Section Does Not Apply to Insuring School Property.—A county board of education has the authority to insure school property in a mutual fire insurance company authorized to transact business in the State, the property being limited to the amount of the cash premium, and the execution of such policy does not lend the credit of the State to a private corporation under this section. Fuller v. Lacy, 206 N. C. 169, 171, 172 S. E. 412.


Bonds of Municipal Power Plant.—A contract of a municipality to construct a municipal electric power plant and to issue its bonds to pay for same, with provision that principal and interest of the bonds should be paid exclusively from the profits of the plant without resort to funds raised by taxation, does not create a “debt” of the municipality, and does not contravene the provisions of the act under which the bonds were issued. (Const. 1868; 1872-73, c. 83.)

The amendment of 1936 is only permissive in terms and not self-executing. The power of exemption, to the extent herein mentioned, is exercisable only insofar as not at all, as the General Assembly, in its wisdom, shall determine. Nash v. Board of Com’rs, 216 N. C. 301, 304, 190 S. E. 240.

The General Assembly may exempt from taxation not exceeding one thousand dollars ($1,000.00) in value of property held and used as the place of residence of the owner. (Const. 1868; 1872-73, c. 83; 1935, c. 444.)


Editor’s Note.—This section, which was Sec. 6 of the Constitution of 1868, was amended by the insertion of the phrase “or any other personal property,” in pursuance of ch. 84, Public Laws of 1872-73. The amendment, which added the last sentence of this section, was proposed by Public Laws 1955, c. 444, s. 2, and adopted at the general election held in November 1956.
Municipal property acquired by tax foreclosure and subsequently rented is liable for county taxes, since it is not used by the city for a governmental purpose, and if one person does not hold the municipal corporation in good faith for the exemption of property from taxation Benson v. Johnston County, 209 N. C. 751, 185 S. E. 6. See also, in this connection, Board of Financial Institutions v. Guilford County, 219 N. C. 6, 16 S. E. (2d) 261; 101 A. L. R. 783.

Excise taxes on municipal property are not prohibited. Stedman v. Winston-Salem, 204 N. C. 263, 167 S. E. 813.

Power of the Legislature to Grant Exemptions.—The power to grant exemptions under authority of the Constitution is perforce limited and restricted by the scope of the constitutional grant of the permissive power of exemption. Rockingham County v. Elon College, 219 N. C. 342, 345, 13 S. E. (2d) 618. See also, Guilford College v. Guilford County, 219 N. C. 347, 13 S. E. (2d) 622.

The power to grant exemptions under authority of the second sentence in this section, which may be exercised in whole, or in part, as the General Assembly shall elect, is limited to property held for one or more of the purposes therein designated. Rockingham County v. Elon College, 219 N. C. 342, 345, 13 S. E. (2d) 618. See also, Guilford College v. Guilford County, 219 N. C. 347, 13 S. E. (2d) 622.

Business property owned by an educational institution and rented for offices and business purposes to private enterprises, the net profit derived therefrom being devoted exclusively to educational purposes, was not within the exemption granted by this section. Rockingham County v. Elon College, 219 N. C. 342, 13 S. E. (2d) 618. See also, Guilford College v. Guilford County, 219 N. C. 347, 13 S. E. (2d) 622.

Property owned by a church and rented by it for commercial purposes, and the rent used for religious purposes, is not exempt from taxation. Sparrow v. Beaufort County, 221 N. C. 222, 19 S. E. (2d) 860.

Statutes Exempting Specific Property Are Construed Strictly.—Statutes enacted by the General Assembly exempting specific property from taxation, because of the purpose to which the property is devoted, was not within the exemption granted by this section. Rockingham County v. Elon College, 219 N. C. 342, 345, 13 S. E. (2d) 618. See also, Guilford College v. Guilford County, 219 N. C. 347, 13 S. E. (2d) 622.

When Exemption Attaches.—The quality of exemption itself, is not possessed as to those persons as it is lawfully acquired and remains with such property so long as it is owned by the municipal corporation, without regard to the purpose for which it was acquired or was held. Andrews v. Clay County, 200 N. C. 268, 263, 156 S. E. 455.

Exemption of Property Used for Religious, etc., Purposes Is Not Self-Executing.—The provision of this section that the property of the State or its political subdivisions, held for educational, scientific, literary, charitable or religious purposes, is a grant of power and is not self-executing, and the power of the legislature to prescribe such exemptions is limited by the language of the grant of power. Salisbury Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265.

Use to Which Property Is Devoted.—Under this section it is not sufficient that the property is devoted to the extent of the interest so dedicated which should control, rather than the title or other tenure by which it is held, and its provisions are broad and comprehensive enough to uphold the legislative exemption in a situation between educational purposes. Corporation Comm. v. Oxford Seminary Constr. Co., 160 N. C. 582, 76 S. E. 640.

A lot purchased by trustee of a church for the purpose of erecting a new church and Sunday school building, was adequate for the needs of the congregation, and, pending the accumulation of sufficient funds to build the new church, used exclusively for open air Sunday school and church meetings. Harrison v. Guilford County, 219 N. C. 347, 13 S. E. (2d) 622.

The power granted the legislature to exempt property from taxation is limited by the language of this section to property held for educational, scientific, charitable or religious purposes, the title to the property held and not the character of the corporation or association holding the property being the basis for the grant of permissive power to exempt, and the legislature has no power to exempt property held by a corporation or organization for business or commercial purposes. Sir Walter Lodge, etc. v. Swain, 217 N. C. 632, 9 S. E. (2d) 365.

Lands in Hands of Trustee.—Where in construing a devise of various property in a city the courts have decreed that the lands be sold within a period of five years and fifty-five per cent of the proceeds distributed among several beneficiaries of the class exempted by this section, the property itself is not held by the beneficiaries designated, but by the trustee in trust for the purpose of sale and distribution of the proceeds of the sale, and the exemption does not apply except to the proceeds of the sale when received by the beneficiaries in accordance with the decree, and the lands in the hands of the trustee are subject to taxation under Art. V, § 5. Latta v. Jenkins, 200 N. C. 255, 156 S. E. 552.

Weight of Fact That Institution Has Not Been Paying.—The fact that in the sale of property in the hands of the trustee there was a long period of time without paying taxes unchallenged by both the legislative and executive department of the Government is deserving of great weight by the court in construing this section. Corporation Comm. v. Oxford Seminary Constr. Co., 160 N. C. 582, 76 S. E. 640.

No Distinction Between Public and Private Institutions.—The provision of this section exempting charitable enterprises and private educational corporations, or between institutions which are in part conducted for the personal profit of the owner and those which are run on a salary basis, using any profits which may arise in the extension of the
(43)

The limitation of art. V, § 4, on the contraction of debt by counties and municipalities is in addition to the limitations prescribed by art. VII, § 7, and this section is for the purpose of preventing local units from creating debts without the consent of the people, for a necessary or unnecessary purpose, or for a special purpose with the special approval of the General Assembly, which may be done by special or general act:

Provided, this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by article nine, section three, of the Constitution: Provided, further, the State tax shall not exceed five cents on the one hundred dollar's value of property. (Const. 1868; Ex. Sess. 1920, c. 93.)

For article on property and poll tax limitations under this section and section 1 of this article, see 18 N. C. Law Rev. 156.

Editor’s Note.—Pursuant to ch. 93, Public Laws of 1920, extra session, this section was substituted for the old Sec. 6 (Sec. 7 of the Constitution of 1868), which was as follows: “The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the amount of the tax, except for a special purpose, and with the special approval of the General Assembly, which may be done by special or general act: Provided, this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by article nine, section three, of the Constitution: Provided, further, the State tax shall not exceed five cents on the one hundred dollar's value of property.” (Const. 1868; Ex. Sess. 1920, c. 93.)

Ordinary Expenses of Holding Courts and Maintaining Jails Are General Expenses.—Only under exceptional circumstances may the expenses of holding courts and maintaining the county jail and caring for jail prisoners be classified as expenses for special purposes, since ordinarily the holding of courts is a general expense recurring in the ordinary course of and as necessary steps in the operation of the county government, and the maintenance of the county jail and the caring for prisoners is a general expense, continuous and ever present, and a tax levy therefor in addition to the 15-cent tax made for general county purposes in another item is invalid, and applicant is entitled to recover the amount paid under the additional levy in his suit therefore in accordance with the statutory procedure.


General or Special Act Sufficient.—The legislative authority to authorize a county to exceed the constitutional limit for county purposes is conferred by special or general act. Atlantic Coast Line R. Co. v. Lenoir County, 200 N. C. 694, 157 S. E. 610.

What is a “special purpose” within the meaning of this section of the State Constitution is a matter for judicial rather than legislative determination, since such purpose for which an unlimited tax may be levied may bebridged with the special approval of the General Assembly must also be a “necessary expense” of the county within the meaning of art. VII, § 7, and which does both questions of law and fact. Nantahala Power, etc., Co. v. Clay County, 213 N. C. 698, 197 S. E. 603.

Levy Beyond Limitation Void.—Defendant county levied taxes up to the 15-cent limitation for general county purposes and in addition thereto levied a tax for “upkeep of county buildings, courthouse, county home, poor and paupers, and public highways” for which an unlimited tax may be levied. Nantahala Power, etc., Co. v. Clay County, 213 N. C. 698, 197 S. E. 603.

A tax to pay the county farm agent’s salary is for a special purpose having the special approval of the legislature, within the meaning of art. E. § 6, and a tax in excess of the 15-cent limitation may be imposed. Nantahala Power, etc., Co. v. Clay County, 213 N. C. 698, 197 S. E. 603.

Supremacy of Legislative Power.—The constitutional power conferred on the Legislature to authorize counties to levy a special tax upon the property and poll for special county purposes is essential to the existence of the State, and in absence of exercise thereof the Legislature is supreme. Moose v. Board, 172 N. C. 419, 90 S. E. 525.

When Vote and Legislative Authority Necessary.—Cities and towns may levy a tax for necessary expenses up to the constitutional limit, but the levy of an additional tax without legislative permission; for necessary expenses they may exceed the constitutional limitation by legislative authority, without the approval of the voters: but for purposes other than necessary, a tax cannot be levied, either within or in excess of the constitutional limitation except with the approval of the voters under special legislative authority. Henderson v. Wilmington, 191 N. C. 269, 132 S. E. 2d.

Levy Beyond Limitation Void.—A levy beyond the limitation is void. County Board v. Commissioners, 107 N. C. 110, 11 S. E. 190.

Levy Partly for Special and Partly for General Purposes.—Where a statute authorizing the levy of a tax beyond the constitutional limit for a special purpose is infra vires, the tax may be collected beyond the exceeding portion of the tax and may be turned into the general fund and used for general purposes, but where the act authorizes the levy partly for a special purpose and partly for general purposes and no part of the levy can be collected, Williams v. Commissioners, 119 N. C. 320, 26 S. E. 150.

Where Act Severeable, Valid Part Effective.—An act that authorizes counties to levy a tax for a special purpose and contain it for general county expenses by special tax beyond the limitations of this section of the Constitution, is in that extent constitutional and valid. E. § 6, and the invalid part of the act is distinctly severable from the invalid part, and may alone be enforced by the methods prescribed, without being affected by the invalid part, the entire statute being declared ultra vires. Folk Southern R. Co. v. Reid, 187 N. C. 320, 121 S. E. 534.

Giving County Commissioners Authority to Issue Bonds.—The authority conferred upon the board of county commis-
sioners to build its road and bridges in any way that may seem practicable, and issue bonds not to exceed the actual cost, and to levy sufficient tax on real and personal property to pay interest, and create a sinking fund, is not necessarily impossible, with this respect differing from the limitation of 15 cents on the $100 valuation of property a levy on county property for "a special purpose, and with the approval of the General Assembly, which may be done by special or general acts.

Section 2. A county has authority, to issue funding and refunding bonds with the approval of the local government commis- sioners, to refund the bonds issued by counties to refund the county which were incurred for necessary county expenses. Brooks v. Avery County, 206 N. C. 840, 175 S. E. 199. See Thomson v. Harnett County, 209 N. C. 662, 184 S. E. 490.

A county has authority, to issue funding and refunding bonds with the approval of the local government commissioners, to refund the bonds issued by counties to refund the county which were incurred for necessary county expenses. Brooks v. Avery County, 206 N. C. 840, 175 S. E. 199. See Thomson v. Harnett County, 209 N. C. 662, 184 S. E. 490.

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The proceeds of the townships of the county. The proceeds of the town-
and hereafter committed shall be deemed an elector, unless such person shall be restored to the rights of citizenship in a manner prescribed by law." Pursuant to ch. 218, Public Laws of 1899, and ch. 2, Public Laws of 1900, the section was amended to read as the present section.

The 19th amendment to the Constitution of the United States, ratified August 26, 1920, provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

The General Assembly of North Carolina provided for the registration and voting of women by ch. 218, Public Laws of 1920, extra session.

Where a person of the right to vote in the precinct, ward or other election district, to which he offers to vote four months next preceding the election, has been convicted of a felony (not infamous), and sentenced to imprisonment, escapee, and before he is recaptured, his term or sentence expired, the right of such person shall be restored to citizenship in the State of North Carolina for two years, in the county six months, and in the precinct, ward or other election district in which he offers to vote, four months next preceding the election. This section requires, is unconstitutional. People v. Canady, 73 N. C. 196.

Section 3. Voters to be registered.—Every person offering to vote shall be at the time a legally registered voter as herein prescribed, and in the manner hereafter provided by law, and the General Assembly of North Carolina shall enact general registration laws to carry into effect the provisions of this article. (Const. 1868; 1899, c. 218; 1000, c. 2, s. 2; Ex. Sess. 1920, c. 93.)

Editor's Note.—Section 2 was amended pursuant to ch. 218, Public Laws of 1899 and ch. 2, Public Laws of 1900. The first sentence read: "He shall have resided in the State of North Carolina for two years, in the county six months, and in the precinct, ward or other election district to which he offers to vote, four months next preceding the election."

Qualifications Same for Municipal Election.—The qualifications for voting in a municipal election are the same as in a general one. State v. Carter, 194 N. C. 293.

Cities and towns, like counties and townships, are parts of the State, organized for the convenience of local self-government, and the qualifications of voters are the same, to-wit, citizenship, twenty-one years of age, twelve months (now two years) residence in the State and thirty days (now six months) in the city or town. People v. Canady, 73 N. C. 198.

A provision in the charter of a municipality limiting the right of suffrage in municipal elections to owners of real property within the city, is unconstitutional. Smith v. Carolina Beach, 206 N. C. 834, 175 S. E. 313.

Residence Defined.—Residence, as used in this section defining political rights, is synonymous with domicile, denoting a permanent dwelling place, in which the party, when absent, intends to return. State v. Gizzard, 89 N. C. 115.

In order to acquire a residence for the purpose of exercising political rights in a county, the "residence" must be of a permanent, and not of a temporary nature, corresponding with the word domicile. State v. Kerr, 114 N. C. 435.

Protracted Residence Abroad.—A protracted residence abroad of one engaged in business and with no home in this state, is not consistent with the idea of a residence here. State v. Grizzard, 89 N. C. 115.

Art. VI, §4

CONSTITUTION OF NORTH CAROLINA

Art. VI, §6

... until he has complied with the requirements of those laws. State v. Scarborough, 110 N. C. 232, 14 S. E. 737.

Act Requiring New Registration.—An act authorizing a bond issue by a county is not objectionable as violating this section, upon the ground that it empowers the county commissioners to order a new registration. Cox v. Commissioners, 146 N. C. 584, 60 S. E. 516.

Act Requiring Proof of Ability to Read and Write Is Void.—The act of 1863, requiring that a person presenting himself for registration shall, before he is registered, prove to the satisfaction of the registrars his ability to read and write any section of the Constitution, was granted the Legislature by this section to enact general legislation to carry out the provisions of this article. Allison v. Sharp, 229 N. C. 477, 184 S. E. 27.

§ 4. Qualification for registration.—Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any State in the United States wherein he then resided, or who is a descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908. The General Assembly shall provide for the registration of all persons entitled to vote without the educational qualifications herein prescribed, and shall, on or before November 1, 1908, provide for the making of a permanent record of such registration, and all persons so registered shall forever thereafter have the right to vote in all elections by the people in this State, unless disqualified under section two of this article. (Const. 1868; 1899, c. 218; 1900, c. 2, s. 4; Ex. Sess. 1920, c. 93.)

Editor's Note.—This section was added in pursuance of ch. 218, Public Laws of 1899 and 1900, Laws of 1900. The following changes were made pursuant to ch. 93, Public Laws of 1900, to make the section read as at present: the clause "and in the county in which he proposes to vote, his poll tax for the previous year," was stricken out; the word ".Prior" was stricken from the end of the Section. The language of this section is mandatory. Allison v. Sharp, 229 N. C. 477, 184 S. E. 27.

Registration Essential.—Registration is essential to the exercise by a citizen, possessed of the other legal qualifications, of his right to vote, and, when duly made, is prima facie evidence of the right. State v. Waldorf, 104 N. C. 453, 10 S. E. 694.

Same.—Act of Public Officer.—The registration of an elector, after he has qualified to vote, must be accepted as the act of a public officer, and entitles the elector to cast his vote. State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

Registrar Is Logical Person to Carry Out Requirements of Section.—The act of 1868, putting this duty on the registrar is unquestionably a reasonable provision, and the registrar is the logical person to carry out the provisions of the Constitution. State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

What Registrars May Ask.—Registrars may ask the elector his age and residence, the township or county from whence he removed, in case he has resided in the State two years, and in the county in which he proposes to vote four months, preceding the election. If, in reply to such questions, the elector answers that he is twenty-one years old, and has resided in the State two years and in the county four months preceding the election, it is the duty of the registrars, upon his taking the prescribed oath, to record his name as a voter; but bystanders may require him to be sworn as to his residence. In re Reid, 119 N. C. 641, 26 S. E. 337.

As to the oath, see State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

Permanent Roll Does Not Dispose with Further Registration.—The fact that a voter is registered on the permanent roll as provided by the Constitution does not dispossess him of the necessity of registration whenever he wishes to become a qualified voter, whenever required by the statutes regulating the registration of voters. Clark v. Statesville, 119 N. C. 444, 20 S. E. 42.

Purpose of Permanent Roll.—The making of a permanent roll of record was intended to be done for the sole purpose of furnishing convenient and easily available evidence of the fact that the person who appears thereon is required to have the educational qualification. Clark v. Statesville, 119 N. C. 490, 52 S. E. 52.

Registration Book Lost.—Where the registration book of an election precinct had been lost, state law required it to be replaced, but the registrar procured a new book, in which he entered the names of such persons as he knew had theretofore been registered, and also the names of those who applied for registration subsequently and it appeared that, at the election following, no one voted whose name did not appear on the registration book, that no one voted who was not entitled to vote, and that the vote was cast upon an invalid registration. State v. Scarborough, 110 N. C. 232, 14 S. E. 737.

Preservation from Registering by Registrars.—Where a voter offers to comply with the laws in reference to registration, but is prevented by the wrongful conduct of the registrar, his vote should be received and counted, but a vote cast upon an invalid registration should be rejected. State v. Scarborough, 110 N. C. 232, 14 S. E. 737.

Necessity of Having Paid Taxes.—Where the validity of a special tax depends upon whether certain persons who had voted paid for their tax, and the violation of the requirements to the requirements of this section the constitutional requirements must be met in order that they may exercise the privilege of voting, though they are permitted to wait until May ist to pay them, if they so choose. Ingram v. Johnson, 172 N. C. 676, 90 S. E. 835.


§ 5. Indivisible plan; legislative intent.—That this amendment to the Constitution is presented and adopted as one indivisible plan for the regulation of the suffrage, with the intent and purpose to so connect the different parts, and to make them so dependent upon each other, that the whole shall stand or fall together. (Const. 1868; 1899, c. 218.)

§ 6. Elections by people and General Assembly.—All elections by the people shall be by ballot, and all elections by the General Assembly shall be viva voce. (Const. 1868; 1899, c. 218.)

How Elector May Vote.—The provisions of this section give the elector the choice to deposit his own ballot secretly, or to declare his choice openly when depositing it, or to have the registrar, or one of the judges of election, deposit it for him. Jenkins v. State Board, 180 N. C. 169, 104 S. E. 346.

Secret Ballot.—The provisions of this section imply that in elections by the people the ballot shall be a secret one. Allison v. Commissioners of Harnett, 196 N. C. 535, 146 S. E. 225.

It is not necessary to show undue influence or intimidation for the courts to declare an election void when the votes have been deprived of their right to a secret ballot. Withers v. Commissioners of Harnett, 196 N. C. 535, 146 S. E. 225.

A voter at an election does not waive his constitutional right to a secret ballot, nor can his right thereto be lost by being made aware of his rights under the facts and circumstances of the balloting. Withers v. Commissioners of Harnett, 196 N. C. 535, 146 S. E. 225.
§ 7. Eligibility to office; official oath.—Every voter disqualfied, shall be disqualified to office, but before entering upon the duties of the office he shall take and subscribe the following oath:

"I, ............, do solemnly swear (or affirm), that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as ........., so help me, God." (Const. 1868; 1899, c. 218; 1900, c. 2, s. 7.)

Editor's Note.—Sec. 4 of the Constitution of 1868 amended to become the present Sec. 7 pursuant to ch. 218, Public Laws of 1899 and ch. 2, Public Laws of 1900, was as follows:

"Every voter, except as hereinafter provided, shall be eligible to office; but before entering upon the discharge of the duties of his office, he shall take and subscribe the following oath: 'I, ............., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as ........., so help me,' God." (Const. 1868; 1899, c. 218; 1900, c. 2, s. 7.)

§ 8. Disqualification for office.—The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God. Second, all persons who shall have been convicted or confessed their guilt on indictment pending, and whether sentenced or not, or under judgment suspended, of any treason or felony, or of any other crime for which the punishment may be imprisonment in the penitentiary, shall become citizens of the United States, or of corruption or malpractice in office, unless such person shall be restored to the rights of citizenship in a manner prescribed by law. (Const. 1868; 1899, c. 218; 1900, c. 2, s. 8.)

Editor's Note.—The last sentence of this section, which was Sec. 5 of the Constitution of 1868, was as follows: "Second, all persons who shall have been convicted of treason, or of any other infamous crime, since becoming citizens of the United States, or of corruption, or malpractice in office, unless such person shall have been legally restored to the rights of citizenship." The section was amended to read as the present Sec. 8 pursuant to ch. 218, Public Laws of 1899 and ch. 2, Public Laws of 1900.

Disqualification Not Part of Judgment.—The disqualification of a person convicted of a felony, or even to dispossess the incumbent, since public office is not a property right. Penny v. Salmon, 217 N. C. 276, 7 S. E. 2d (24d) 559.

Cited in Rhodes v. Lewis, 80 N. C. 136.


§ 9. When this chapter operative.—That this amendment to the Constitution shall go into effect on the first day of July, nineteen hundred and two, if a majority of votes cast at the next general election shall be cast in favor of this suffrage amendment. (1899, c. 218; 1900, c. 2, s. 9.)

Editor's Note.—This section was added pursuant to ch. 218, Public Laws of 1899 and ch. 2, Public Laws of 1900.

ARTICLE VII

Municipal Corporations

§ 1. County officers.—In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the General Assembly, the following officers: A treasurer, register of deeds, surveyor, and five commissioners. (Constitution, 1868.)

Cross References.—As to municipal corporations generally, see section 101-1 et seq.; as to the register of deeds, see section 161-1 et seq.; as to the surveyor, see section 154-2 et seq.; as to the county commissioner, see section 153-1 et seq.

County Commissioners.—Ch. 526, Public-Local Laws of 1935, providing that Cheroke County should be divided into three districts and that one county commissioner should be nominated and elected by the qualified voters of each of the districts, is constitutional as a valid exercise of legislative power over municipal corporations, the General Assembly being given express power by art. VII, § 14, to change and modify the provisions of this section, relating to number and election of county commissioners. Watkins v. Johnson, 210 N. C. 449, 187 S. E. 584.

Registers of Deeds.—The constitutional provision for the election of registers of deeds for a term of two years is subject to modification by statute, and therefore the legislature has the power to make the office appointive rather than elective, to extend the term, or to abolish it altogether, and even to dispossess the incumbent, since public office is not a property right. Penny v. Salmon, 217 N. C. 276, 7 S. E. 2d (24d) 559.

Cited in Rhodes v. Lewis, 80 N. C. 136.


Cited in People v. McKee, 65 N. C. 237; People v. Canada, 73 N. C. 198, 221; Perry v. Franklin County Com'n, 144 N. C. 538, 54 S. E. 649.

§ 2. Duty of county commissioners.—It shall be the duty of the county commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes, and finances of the county, as may be prescribed by law. The register of deeds shall be ex officio clerk of the board of commissioners. (Constitution, 1868.)

See section 151-1 et seq. and notes thereto.

The General Assembly can give almost unlimited power to the counties to carry out this provision. Thomson v. Harnett County, 209 N. C. 662, 184 S. E. 490.

Fiscal Powers Are Subject to Modification.—The general assembly has power to appoint a tax collector or manager for a county of the state, the fiscal powers granted the county commissioners by this section being subject to modification or abrogation by statute by express provision of Art. VII, sec. 13. Freeman v. Board of Com'rs, 217 N. C. 490, 68 S. E. 2d (23rd) 331.

Supervision and Control of Roads.—Under this section the county commissioners of a county have the duty to exercise a general supervision and control of the roads and levying of taxes as provided by law in respect thereto. Thomson v. Harnett County, 209 N. C. 662, 184 S. E. 490.

Authorization to Borrow from General County Fund.—The board of county commissioners, having the supervision and control of roads, bridges, and the levying of taxes and the finances of the county, have the authority by proper res-
oblation to borrow from the general county fund moneys with which to pay maturing bonds of the county when due, being necessary to preserve the credit of the county, and to issue refunding bonds for the purpose of repaying this loan. The act creating the loan must provide for the establishment of a special fund and declaring itself to be a special statute validating and legalizing the transaction. Barron v. Wake County, 197 N. C. 314, 315, 148 S. E. 470.

§ 5. School Fund Disbursed.—This section gives the “supervision of schools” to the county commissioners; they keep the school fund, and their treasurer disburses the fund, upon the order of the school committee. Lane v. Stanly, 65 N. C. 153, 156. See note to § 153-9, par. 2.

When Commissioners Fail to Qualify.—If from any cause the board of county commissioners does not qualify at the time prescribed by law, the old board, as de facto officers, have the power to qualify a county treasurer-elect and induct him into office; or upon his default in filing the required oath, the clerk of the county court may declare the vacancy and fill the same by appointment. State v. Jones, 80 N. C. 127.

General Assembly May Authorize Ferry.—This section does not deprive the general assembly of the power to pass an act authorizing the establishment of a public ferry at a certain point. In re Spease Ferry, 138 N. C. 219, 59 S. E. 625.

As to the power of General Assembly to abrogate the provisions of the section, see section 34 of the article and annexed notes thereunder.

Cancellation of Official Bond.—In the absence of a statute specifically authorizing the board of commissioners of a county to cancel an official bond, the bond is not necessarily void. Winn v. Courville, 166 N. C. 383, 149 S. E. 476; Crocker v. Moore, 140 N. C. 429, 51 S. E. 229; Southern Audit Co. v. McKensie, 147 N. C. 461, 61 S. E. 283; Bunch v. Randolph County Comm'n, 139 N. C. 335, 76 S. E. 1046; Commissioners v. Ross Com'r, 155 N. C. 612, 64 S. E. 1003; Wilson v. Holding, 170 N. C. 352, 86 S. E. 1043; Holmes v. Bullock, 178 N. C. 376, 378, 100 S. E. 530; Lenoir County v. Taylor, 190 N. C. 336, 130 S. E. 25; Day v. Commissioners, 191 N. C. 780, 133 S. E. 164.

§ 3. Counties to be divided into districts.—It shall be the duty of the commissioners first elected in each county to divide the same into convenient districts, to determine the boundaries and prescribe the name of the said districts, and report the same to the General Assembly before the first day of January, 1869. (Const. 1868.)

Alteration of Township after First Division.—The creation or adoption of a new form of government in several counties of the State, after the first division by the county commissioners under this section is left with the Legislature. Grady v. County Comm'r, 74 N. C. 101. See § 153-9, par. 2, and notes thereto.

Cited in Wilson v. Board, 74 N. C. 748, 754; Wallace v. Board, 84 N. C. 164; Wittkowsky v. Board, 150 N. C. 90, 94, 63 S. E. 175; Board v. Commissioners, 178 N. C. 61, 100 S. E. 122.

§ 4. Townships have corporate powers.—Upon the approval of the reports provided for in the foregoing section of the General Assembly, the said districts shall have corporate powers for the necessary purposes of local government, and shall be known as townships. (Const. 1868.)

Township Powers Must Be Conferred.—Townships are corporate bodies and have no corporate powers when not specially conferred by statute. Wittkowsky v. Board, 150 N. C. 90, 117, 63 S. E. 174. See notes to §§ 2-9 et seq., par. 33.

Municipality Subject to Legislative Control.—The municipality, such as a city, town or county, is subject to the control of the General Assembly even in respect to necessary purposes. Jones v. New Bern, 152 N. C. 64, 65, 67 S. E. 173.

Township Trustees Not a Municipal Corporation.—The board of township trustees has no existence as a municipal corporation, and cannot be a party to a suit. Wallace v. Board, 84 N. C. 164.

Townships Not Given Power of Taxation.—This section does not give townships the power of taxation for school purposes either through their trustees or committees. Lane v. Stanly, 65 N. C. 153. See section 160-56 and notes thereto.

Cited in Mann v. Allen, 171 N. C. 219, 88 S. E. 235; Road Comm. v. Commissioners, 178 N. C. 61, 64, 100 S. E. 122.

§ 5. Officers of townships.—In each township there shall be biennially elected, by the qualified voters thereof, a clerk and two justices of the peace, who shall constitute a board of trustees, and shall, under the supervision of county commissioners, have control of the taxes and finances, roads and bridges of the township as may be prescribed by law. The General Assembly may provide for the election of a larger number of justices of the peace in cities and towns, and in those townships in which cities and towns are situated. In every township there shall also be biennially elected a school committee, consisting of three persons, whose duty shall be prescribed by law. (Const. 1868.)

Cross References.—As to the election, powers and duties of the clerk generally, see section 2-1 et seq. As to the justices see section 7-112 et seq.

Editor’s Note.—The act of 1877, c. 141, passed in pursuance of Art. VII, sect. 13, amended this section so as to deprive the board of township trustees of its existence as a municipal corporation and establish new methods of selecting and appointing justices of the peace. See Wallace v. Trustees, 84 N. C. 164.

Justice Elected.—This section requires that justices of the peace be elected by townships. Edenton v. Wool, 65 N. C. 579.

Same.—Power Cannot Be Conferred.—An attempt to confer the power of a justice of the peace on the Judge of a Special Court cannot avail, for this section requires justices of the peace to be elected by the several townships, and the Legislature cannot change the mode of their appointment. Wilmington v. Davie, 63 N. C. 37.

Justices Members of Board of Trustees.—Where an act of the General Assembly authorized the election, in townships containing cities and towns, of a larger number of justices than two, all such justices are members of the Township Board of Trustees. Conley v. Harris, 64 N. C. 662.

Trustees without Authority to Build Bridges.—Township trustees have no authority to contract for building bridges; when such a contract is entered into without the sanction and supervision of the County Commissioners, it is a nullity. Paine v. Caldwell, 65 N. C. 176.

Creation of Highway Commission.—The Legislature has the constitutional authority to create a highway commission for a county, and give it control over its bridges and highways, their maintenance and supervision, and the power to maintain and subdivide this agency into several parts over defined territory. Ellis v. Greene, 191 N. C. 761, 133 S. E. 395.

Cited in Wallace v. Board, 84 N. C. 164; Jones, etc., Co. v. Commissioners, 85 N. C. 278, 282; Road Comm. v. Commissioners, 178 N. C. 61, 64, 100 S. E. 122.

§ 6. Trustees shall assess property.—The township board of trustees shall assess the taxable property of their townships and make the same report to the county commissioners for revision, as may be prescribed by law. The clerk shall also be, ex officio, treasurer of the township. (Const. 1868.)

Assessment by Mayor and Commissioners.—An assessment of the property subject to taxation by a municipal corporation, made by the mayor and commissioners of such corporation, is valid. Such assessment, under the provisions of the Constitution, must be made by the township board of trustees. Cobb v. Corporation, 75 N. C. 1.

When Appeal Lies From Commissioners Decision.—The Commission of the Peace has no authority to grant relief against excessive valuation of property for taxation; and from their decision, upon a petition for that purpose, there is no appeal, unless it appears from the facts charged in the petition, that the assessment has been made upon some erroneous principle; for the reason that the statute gives no appeal. Wade v. Commissioners, 74 N. C. 81.

Legislative Power when Section Abrogated.—The general assembly, during the abrogation of this section could consti-
The term "municipal corporation" should not be construed narrowly to include only cities, towns, counties and school districts, as the Constitution contemplates a broader construction of the term, and in its broader sense the term includes all entities, both public and private, exercising governmental functions within the constitutional limitations. Wells v. Housing Authority, 213 N. C. 744, 197 S. E. 693.

The State is not a municipality within the meaning of the Constitution, and since a city or county, in the operation of public schools within its territory, is not a municipality for the purposes of the Constitution, and since such administrative units, in imposing taxes necessary to the maintenance of public schools, is not required to submit the question to the votes of the qualified persons residing within the city or county. Bridge v. Charlotte, 231 N. C. 472, 55 S. E. 2d 1.

Although an administrative unit of the State public school system is a taxpaying unit for the purposes of the Constitution, the voters the question of supplementing State funds to conduct schools of higher standards and longer terms, the provision for a vote is not in deference to this section and the establishment of such supplement is left to the word in construing this section since the legislature in framing the amendment must have had in mind the construction of the word as used in this section. Sessions v., Columbus County, 214 N. C. 634, 219 S. E. 416. See also, McGuinn v. High Point, 219 N. C. 56, 13 S. E. 2d 48.

Majority of Qualified Voters Necessary.—An issue of county bonds, which was not approved by the majority of the qualified voters, was held invalid by this court. Sprague v. Board, 165 N. C. 603, 81 S. E. 915; Long v. Commissioners, 181 N. C. 146, 106 S. E. 481.

By this section, bonds for other than necessary purposes must be approved by a majority of the qualified voters of the taxing unit. Voting v. Wilmington, 214 N. C. 635, 200 S. E. 416; Sessions v., Columbus County, 214 N. C. 634, 219 S. E. 416.

Even within the exercise of its powers a municipality may not bind itself by a contract which incurs a debt, except for necessary expenses, unless by a vote of the majority of its qualified voters as provided by this section. Madry v. Scotland Neck, 214 N. C. 461, 399 S. E. 638.

This section and art. V, § 4, of the State Constitution are not in conflict, and bonds for other than necessary expenses which are also in excess of two-thirds of the amount by which the taxing unit exceeded the maximum needed during the prior fiscal year, must be approved not only by a majority of those voting in the election under article V, § 4, but also by a majority of the qualified voters of the taxing unit. Voting v. Wilmington, 214 N. C. 635, 200 S. E. 416.

Debt.—This section and the amended art. V, § 4, will be considered in pari materia, and the word "debt" in art. V, § 4, will be given the same construction as has been given to the word "voting unit" in this section. Wells v. Housing Authority, 213 N. C. 744, 197 S. E. 693.

Act and Not State Necessity of Majority Vote.—An issue of bonds for a school district will not be declared invalid because the special act under which they were approved by the voters did not expressly require for their validity that a majority of the qualified voters of the district must vote in their favor, when it appears that such majority, as ascertained from a valid register, was cast in favor of the issue. Hammond v. McRae, 182 N. C. 747, 110 S. E. 102.

General Districts Debts Voted for in One Ballot Box.—An issue of municipal bonds, when approved by the majority of the qualified voters of the taxing unit, must not only be approved by a majority of those voting in the election under article V, § 4, but also by a majority of the qualified voters of the taxing unit. Voting v. Wilmington, 214 N. C. 635, 200 S. E. 416.

Art. VII, § 7

CONSTITUTION OF NORTH CAROLINA

Art. VII, § 7
When Funds Are Already on Hand.—This provision, has no application where, the funds to be applied are already on hand and the proposed expenditure will impose no further debt. For the peremptory requirement of further taxation upon it Adams v. Darham, 189 N. C. 233, 126 S. E. 611, 612. See note of this case under section 160-1 of the code.

Endorsement of Township Bonds by County.—Where townships are permitted to call an election for the purpose of voting upon the issuance of township bonds for the roads of the township, the proceeds to be turned over to the sole care of its floating indebtedness, it will be assumed on appeal that the acquisition of the land for a municipal airport from surplus funds was not beyond the power of the city and it in no way offended the provisions of this section. Gwosz v. Darham, 211 N. C. 547, 549, 191 S. E. 728.

Whenmandamus.—The first part of this section forbidding the levy of any taxes by a municipal corporation except for necessary expenses, unless by a vote of the majority of the qualified voters in the territory affected, the debtedness has not been submitted to a vote of the people. Charlotte v. Shepard & Co., 122 N. C. 602, 29 S. E. 842.

Where a city sells land used for recreation purposes without the approval of the qualified voters therein. Ketchie v. the use or disposition of a chamber of commerce of a city, without the approval of a majority of the qualified voters in the territory affected, the debtedness has not been submitted to a vote of the people. Charlotte v. Shepard & Co., 122 N. C. 602, 29 S. E. 842.

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ern R. Co. v. Reid, 187 N. C. 520, 117 S. E. 574) even though the bridge is interstate (Emery v. Commissioners, 181 N. C. 668, 110 S. E. 106). Accordingly, the imposition of a tax for the sale of custom tobacco is not a necessary municipal expense and the town may not issue its notes for the purchase price of such platform without a vote of its electors. Walker v. Paison, 202 N. C. 163, 161 S. E. 267.

Where a vote of the qualified electors is not necessary to the validity of the bonds proposed to be issued if an ordinance imposing a tax for the sale of custom tobacco is not a necessary municipal expense and the town may not issue its notes for the purchase price of such platform without a vote of its electors. Webb v. Port Comm., 205 N. C. 665, 172 S. E. 377.

The construction of an annex to a county hospital, to be used principally for the care of the indigent sick of the county, is not a necessary expense within the intent and meaning of this section, and may be validly authorized by general law, whether or not approved by the county thereunder without submitting the question of their issuance to the approval of the voters of the county. Barbour v. Wake County, 197 N. C. 314, 148 S. E. 470.

Editor's Note.—It has been held in several cases that the section of school buildings is not a necessary expense within the purview of this section, and therefore a county cannot be brought under this indebtedness without the approval of the qualified voters. Jones v. Board, 185 N. C. 303, 117 S. E. 37; Davis v. Board, 186 N. C. 227, 119 S. E. 372. However, these cases did not involve an indebtedness incurred by legislative authority in carrying on the public school system of the state and the necessary maintenance of a six months' supply of medicines for the school children. The Constitution, and it has been held that the question of taxation for this purpose need not be submitted to the voters. Sing v. Board, 192 N. C. 316, 135 S. E. 336; Hartsfield v. Craven County, 194 N. C. 358, 139 S. E. 48.

The better reason advanced for this distinction is that each part of the Constitution is of equal weight and merit and the validity of any section of the Constitution is not to be measured by the weight or merit assigned by courts or legislative bodies to any other portion of the Constitution. In Lacy v. Fidelity Bank, 183 N. C. 373, 111 S. E. 612, the court said: "The reasonable construction of this section is that a county in carrying out its legislative functions cannot be required to stand to refer to the debts and taxes in furtherance of local measures and do not extend to a state-wide measure . . . undertaken in obedience to a separate provision of the Constitution, and the court expressly recognized the governmental units through which the general purpose may be made effective." See annotations under sec- tion 15-59.

As to estoppel of taxpayers to deny the invalidity of a special school tax, see Carr v. Little, 188 N. C. 100, 123 S. E. 625.
The limitations of this section are not applicable to bonds or notes issued by a county, city, town, or other municipal corporation, whenever the proceeds therefrom are applied to the payment of the public debts of the United States. (Const. 1868.)

This section applies to local matters relating to the affairs of the county separately considered, and not to a State or to any other public corporation, or to any other public corporations, neither in the United States. Hall v. Commissioners, 194 N. C. 768, 770, 140 S. E. 739.

Editor's Note.—The present Section 10 was originally Section 11, but was renumbered pursuant to Chapter 248 of the Public Laws of 1935. See note under Article VII, Section 9.


§ 11. Charters to remain in force until legally changed.—All charters, ordinances, and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this Constitution. (Const. 1868; 1935, c. 248.)

Editor's Note.—The present Section 11 was originally Section 12, but was renumbered pursuant to Chapter 248 of the Public Laws of 1935. See note under Article VII, Section 9.

§ 12. Debts in aid of the rebellion not to be paid.—No county, city, town, or other municipal corporation shall assume or pay, nor shall any tax be levied or collected for the payment of any debt, or the interest upon any debt, contracted directly or indirectly in aid or support of the rebellion. (Const. 1868; 1935, c. 248.)

Editor's Note.—The present Section 12 was originally Section 13, but was renumbered pursuant to Chapter 248 of the Public Laws of 1935. See note under Article VII, Section 9.


§ 13. Powers of General Assembly over municipal corporations.—The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article, and substitute other provisions in their place, except sections seven, nine and thirteen. (Const. 1868; 1935, c. 248.)

Editor's Note.—The present Section 13 was originally Section 14, which was added by the Convention of 1875, but was renumbered pursuant to Chapter 248 of the Public Laws of 1935. See note under Article VII, Section 9.

Municipality Subject to Legislative Control.—A municipality, such as a city, town, or county, is subject to the control of the General Assembly even in respect to necessary expenses. Jones v. New Bern, 152 N. C. 64, 65, 67 S. E. 173.

And the General Assembly may, at its discretion, abolish municipal as well as other corporations. Ward v. Elizabeth City, 91 N. C. 511, 512, 57 S. E. 725.

Control of Municipal Contract.—The power conferred by its charter upon a city to provide water and lights, and to contract for the same, provides for the cleaning and repairing the streets, regulating the market, taking proper means to prevent and extinguish fires, is subject to the police power of the state, with respect to rates to be charged under such contracts as the city may make under its charter with a public service corporation. Corporation Comm. v. Henderson Water Co., 190 N. C. 76, 128 S. E. 465.

Dividing County into Three Districts.—Chapter 526, Public Laws of 1935, providing that Cherokee County be divided into three districts and commissioners elected from each district falls well within the full power given the General Assembly by this section. Watkins v. Johnson, 210 N. C. 469, 49 S. E. 2d 162. See §§ 7-112 et seq., of the code.

Act Need Not Be General.—It is not required that the power conferred in this section should be general in its operation, or that it should in terms formally abrogate any given section therein, and substitute another in its stead, for the
act making such change, local in its operation, must be
given effect under its provisions, if otherwise valid. Tyrrell
County v. Holloway, 182 N. C. 64, 108 S. E. 337; Smith v.
School Trustees, 141 N. C. 143, 53 S. E. 524.

Creation of Highway Commission.—The Legislature has
authority under this section to create a highway commission
for a county, and give it control over its roads and high-
ways, the maintenance and supervision, etc., or subdivide
this agency into several parts over defined territory. Ellis v.
Greene, 191 N. C. 761, 133 S. E. 395; Commissions v. Road
Commissioners, 121 N. C. 172, 28 S. E. 269.

The powers given to county commissioners over public
highways, may be taken away from them and conferred by
statute upon other political agencies of the State. Day v.
Commissioners, 191 N. C. 730, 133 S. E. 269.

Appointing City Alderman.—The delegation by the legisla-
ture to the Governor of the State of the power of appointing a
commissioner of a city with the scope of the power entrusted
to the discretion of the Legislature by this section. Harris v. Wright, 121 N. C. 172, 28 S. E. 269.

Compelling County to Issue Bonds.—The Legislature has
power to pass an act compelling a county to issue bonds to
fund its existing indebtedness incurred for necessary ex-

Establishment of School District.—The establishing of a
school district at the option of the people, which may be
done by special legislative enactment under this section.
Dickson v. Brewer, 180 N. C. 403, 104 S. E. 887.

Creating County Board of Audit and Finance.—The
Legislature has constitutional power to provide a board of audit
and finance for a particular county and to direct that pay-
ment of an expert accountant authorized thereunder be made
by the county treasurer as a charge against the county's
public funds, upon an order made by said board in a certain
prescribed manner, Southern Audit Co. v. McKenzie, 147 N. C.
151, 67 S. E. 289.

Quoted in Board of Trustees v. Webb, 155 N. C. 376, 71 S.
E. 520; Penny v. Salmon, 217 N. C. 276, 7 S. E. (2d) 559.

Cited in Rhodes v. Hampton, 101 N. C. 629, 612, 8 S. E. 297;
Cerrone v. Commissioners, 111 N. C. 573, 16 S. E. 297; Dissenting opinion of J. Clark in Gatts v. Griffin, 125 N. C.
332, 34 S. E. 429; In re Spease Ferry, 138 N. C. 219, 220, 50
S. E. 625; Crocker v. Moore, 140 N. C. 429, 433, 53 S. E. 229;
Faulke v. Commissioners, 15 N. C. 335, 45 S. E. 1046; Mamo
v. Allen, 171 N. C. 219, 88 S. E. 285; Township Road Comm.
Board v. Board, 178 N. C. 61, 100 S. E. 122.

ARTICLE VIII
Corporations Other Than Municipal

§ 1. Corporations under general laws.—No corporation
shall be created nor shall its charter be extended, altered, or
amended by special act, except corporations for charitable,
educational, penal, or reformatory purposes that are to be and
remain under the patronage and control of the State; but the
General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation. (Const. 1868; 1915, c. 99.)

Editor’s Note.—Sec. 1 in the Constitution of 1858 was as
follows: "Corporations may be formed under general laws,
but shall not be created, except for municipal purposes, and in cases where, in the judgment of the Legislature, the object of corporations cannot be attained under general laws. All general laws and special acts passed under this section that are altered, extended or repealed, shall be by special act amended, extended, or repealed." This section was stricken out and the present Sec. 1 substituted therefor pursuant to ch. 99, Public Laws of 1915, ratified by the people in November, 1916.

In General.—Except for purposes of absolute repeal which is retained throughout as essential to the proper exercise and enforcement of the police powers of Government, and except, also, in the instances expressly designated in this section, this section withdraws from the General Assembly any and all power by special enactments to create, extend, alter, or amend the charter of all private business corporations, and all quasi-public corporations, such as railroads, inter-
connected telephones, or telephone companies, or what are like, and also those corporations which while having at times
and to some extent powers appertaining to government are in
fact and in truth business corporations for the purpose prin-
cipally of profit, operating privilege, etc., such as Lenoir, etc., Turnpike Co., 181 N. C. 129, 135, 106 S. E. 497.

The title of this section, which must be read into the text to give the intended classification, signifies, refers to "corporations other than municipal." Classifying all public corporations as municipal. Wells v. Housing Au-
thority, 213 N. C. 744, 750, 197 S. E. 693.

Power to Extinguish Corporations.—The General Assembly may lawfully exercise all powers conferred upon it in order to private or business corporations; and where the Legis-
latue by special act amending the charter of a city authorizes it to purchase electricity and resell it to its inhab-
itants and others, within the city, the power to sell to such individuals and corporations does not detract from the public service or destroy the public char-
acter of the municipality, nor does it impair the sovereign power given the city by general statute also, the exercise of the power thus conferred will not be enjoined. Holmes v. Fay-
ettville, 197 N. C. 740, 741, 150 S. E. 624.

A commission created as an agency of the State to per-
form functions of a governmental character, or to regulate
activities for the commerce of the State in the public interest, and not for private gain, is a public corporation, and the
Legislature is not prohibited from creating such corpora-
tion by this section, nor is the act creating it a special act within the meaning of this section, and the Commission may lawfully exercise all powers conferred upon it in order to perform its duties as prescribed by the act. Webb v. Port Comm., 205 N. C. 663, 172 S. E. 377.

Power to Extinguish Corporations.—The General Assembly may at its discretion, and for just cause, alter, amend, or
abolish municipal as well as other corporations, because they are all alike creatures of its will, and exist only at its pleasure. Ward v. Elizabeth City, 121 N. C. 1, 3, 277 S. E. 995.

Right of Alteration as a Part of Every Charter.—The provi-
sions of this section, affecting the organization of corpora-
tions, and specifically providing that all "such laws or special
acts may be altered from time to time or repealed," etc., is to be given effect and control extends to every charter, thereunder, and any such corporation may not complain when a statutory repeal or amendment has been made, on the ground that it was inserted in the charter in contemplation of its property, unless vested rights have been prior acquired by it which have been impaired or destroyed by the repeal-
or amendatory act complained of. Elizabeth City Water, etc., Co. v. Elizabeth City, 188 N. C. 278, 124 S. E. 611; Smith v.
Cantwell, 142 N. C. 604, 55 S. E. 820; Power Co. v. Whit-
ney Co., 150 N. C. 31, 63 S. E. 188.

"Special Act" Only Prohibited.—This section only prohib-
its the enactment of a special act and an act which relates
to all municipal corporations of a county, including cities, town, townships, and school districts is not a special act within its meaning and intent. Kornegay v. Goldsboro, 180 N. C. 441, 446, 105 S. E. 187.

No Alteration of Charter Not Forbidden.—This section does not apply, an act of the Legislature authorizing an assessment not void because it does not prescribe all of the particulars relating to such assessment. It is sufficient if it authorizes a fair and equitable method of ascertaining the peculiar benefits or advantages in the assessment. Fakie v. Mocksville, 189 N. C. 144, 149, 125 S. E. 356.

County is a Corporation.—A county is but the state's instrumentalities for the administration of local government; and when this restriction is thus placed upon them, or it is required of them to submit the question of a bond issue to popular vote, and an issue of bonds is made without compliance therewith, the issue is invalid. Murphy v. Webb & Co., 156 N. C. 402, 72 S. E. 460, and cases cited therein.

Effect of Dissolution upon Corporate Property.—Upon the dissolution or extinction of a corporation under this section for any cause, real property conveyed to it in fee does not escheat to the state; and this is so whether or not the duration of the corporation was limited by its charter or general statute. Wilson v. Leary, 120 N. C. 90, 26 S. E. 630, overruling Fox v. Horah, 36 N. C. 358.

The legislature may restrict or limit the power of incorporated towns or cities to tax or contract debts for purposes which fall within the class of necessary expenses, for, they are but the state's instrumentalities for the administration of local government, and the state has the right to control the finances of such corporations as it may think proper, due regard being had to the extinction of such corporations as originally formed under legislative enactment, and to restrict their power of taxation, assessment and in contracting debts by such corporations as it may think proper, due regard being had to the extinction of such corporations as originally formed under legislative enactment. Wadsworth v. Concord, 133 N. C. 587, 45 S. E. 948. It is said by the court in this case: "Even if it did not amount to a necessary expense in the cases mentioned in Art. VII, section 7, without submitting the question to the qualified voter, it may not be deemed as the right of the municipality to levy a tax as a necessary expense in the cases mentioned in Art. VII, section 7, and must be construed therewith. One court has said that this section properly belongs in Art. VII, Kornegay v. Goldsboro, 180 N. C. 441, 105 S. E. 187. The searcher is therefore referred to the note placed under that article.

In General.—The court in Pullen v. Raleigh, 68 N. C. 451, 454, said: "This (section) seems to give a general control to the Legislature on the subject of municipal corporations, and the Legislature may, under it, restrict the power of taxation by corporations as it may think proper, due regard being had to other parts of the constitution. Although a municipality may ordinarily levy a tax as a necessary expense in the cases mentioned in Art. VII, section 7, without submitting the question to the qualified voter, it may not be deemed as the right of the municipality to levy a tax as a necessary expense in the cases mentioned in Art. VII, section 7, and must be construed therewith. One court has said that this section properly belongs in Art. VII, Kornegay v. Goldsboro, 180 N. C. 441, 105 S. E. 187. The searcher is therefore referred to the note placed under that article.

Editor's Note.—The setting up of a municipal corporation by the legislature at any place, under this section, is left to legislative discretion. Starmount Co. v. Ohio Sav. Bank, etc., Co., 55 F. (2d) 649, 652.

Counties, cities and towns are governmental agencies of the state, created by the legislature for administrative purposes, and the legislature retains control and supervision over both classes of municipal corporations, limited only by this section. Saluda v. Polk County, 207 N. C. 180, 176 S. E. 299.

Not Applicable to Special Assessments.—It seems that this section does not apply to special assessments for local municipal improvements, Raleigh v. Peace, 110 N. C. 32, 14 S. E. 11, overruling Islander v. Southern R. Co., 138 N. C. 351, 50 S. E. 450. It is said by the court in this case: "Even if it did not amount to a necessary expense in the cases mentioned in Art. VII, section 7, without submitting the question to the qualified voter, it may not be deemed as the right of the municipality to levy a tax as a necessary expense in the cases mentioned in Art. VII, section 7, and must be construed therewith. One court has said that this section properly belongs in Art. VII, Kornegay v. Goldsboro, 180 N. C. 441, 105 S. E. 187. The searcher is therefore referred to the note placed under that article. Wadsworth v. Concord, 133 N. C. 587, 45 S. E. 948. It is said by the court in this case: "Even if it did amount to a necessary expense in the cases mentioned in Art. VII, section 7, without submitting the question to the qualified voter, it may not be deemed as the right of the municipality to levy a tax as a necessary expense in the cases mentioned in Art. VII, section 7, and must be construed therewith. One court has said that this section properly belongs in Art. VII, Kornegay v. Goldsboro, 180 N. C. 441, 105 S. E. 187. The searcher is therefore referred to the note placed under that article. Wadsworth v. Concord, 133 N. C. 587, 45 S. E. 948. It is said by the court in this case: "Even if it did amount to a necessary expense in the cases mentioned in Art. VII, section 7, without submitting the question to the qualified voter, it may not be deemed as the right of the municipality to levy a tax as a necessary expense in the cases mentioned in Art. VII, section 7, and must be construed therewith. One court has said that this section properly belongs in Art. VII, Kornegay v. Goldsboro, 180 N. C. 441, 105 S. E. 187. The searcher is therefore referred to the note placed under that article. Wadsworth v. Concord, 133 N. C. 587, 45 S. E. 948.


ARTICLE IX

Education

§ 1. Education shall be encouraged.—Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. (Const. 1868.)

Editor's Note.—This section constitutes the corner-stone in the foundation on which rest the provisions of the following sections, the courts in practically all the cases referring to the provisions hereof and using them as a supplemental basis for deciding other cases, in addition to more of the subsequent sections. Reference, therefore, is here made to the notes placed under the sections following in this article.

This and the following sections are mandatory in their provisions; it is the duty of the courts, in holding cases arising in the administration of the provisions of the following sections, the courts in practically all the cases referring to the provisions hereof and using them as a supplemental basis for deciding other cases, in addition to more of the subsequent sections. Reference, therefore, is here made to the notes placed under the sections following in this article.
§ 2. General Assembly shall provide for schools; separation of the races.—The General Assembly, at its first session under this Constitution, shall provide for taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race. (Const. 1868; Convention 1875.)

Cross Reference.—See Art. IX, sec. 3.

In General.—It was said by the court in Lane v. Stanly, 65 N. C. 153, 157: “It will be seen that the Constitution contemplates a uniform system of public schools, and the General Assembly provides for it, by its own taxing power, and by the taxing power of the counties, and by the State Board of Education, by the establishment and continuation of such schools. It will be seen that it is to be a ‘system’; it is to be ‘general’, and it is to be ‘uniform’. It is not to subject to the caprices of localities, but every locality, yea, every child, is to have the same advantages, and to be subject to the same rules and regulations.”

The requirement of this section of the Constitution, that our public-school system shall be uniform by legislative authority, relates to the uniformity of the class or kind of the “schools;” and thus qualifying the word “class,” it is sufficiently complied with where, by statute or authorized regulation of the public-school system, the schools of one class or kind are established and maintained, and the schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support. Board v. County Com’rs, 174 N. C. 153, 157: “It will be seen that the Constitution establishes the public school system, and the General Assembly provides for it, by its own taxing power, and by the taxing power of the counties from the proceeds of a bond issue to be voted upon therein, ‘for the whites’ in that district, violates the plain mandate of this section, and a purchaser of these bonds, though issued according to all other legal requirements, may refuse to accept them on the ground of their being invalid. Williams v. Bradford, 158 N. C. 36, 73 S. E. 154.

Separate Buildings, Teachers, etc.—This section commands that the children of both races are to be educated in separate buildings and by separate teachers. Lowery v. School Trustees, 140 N. C. 33, 52 S. E. 267.

Under this section the school building now provided for the colored children cannot be taken for use of white children. Lowery v. School Trustees, 140 N. C. 33, 52 S. E. 267.


County Need Not Assume Bonds of Unnecessary School Buildings.—Where a special charter school district and a county school district coterminous with its corporate limits shall provide for a separate school district for the minimum constitutional term of six months, the city and special charter school district are not entitled to compel the county to assume such bonds upon the taking over by the county of the buildings as a part of the general system of public schools. Greensboro v. Guilford County, 209 N. C. 855, 184 S. E. 473.


This and the following section of the Constitution require that at least one elementary school be maintained in each district, but the constitutional mandate does not extend to high schools. Elliot v. Board of Equalization, 203 N. C. 749, 166 S. E. 918.


This section contemplates that the general assembly shall provide a state system of public schools to the end that every child between the ages of six and twenty-one shall have an opportunity to attend a school in which stand-ard standards are maintained and wherein tuition shall be free of charge, and it is the duty of the commis-sioners of each county, when such state system has been provided, to maintain in each district of the county one or more schools for the constitutional school term. Marshburn v. Moore, 210 N. C. 99, 146 S. E. 265.

Same—Mandatory.—The provisions of our Constitution, Art. IX, secs. 1, 2, 3, are mandatory that the legislature provide for taxation and otherwise for a general and uniform system of public schools wherein tuition shall be free of charge, to all of the children of the State from six to twenty-one years,” etc., and for the continuance of the school term in the various districts for at least six months each. Under this section the counties of the State and designating them as the governmental agencies through which the Legislature may act in the performance of this duty and in making its measure ef-fective. Board v. Commissioners, 174 N. C. 149, 192 S. E. 578. See Mebane Graded School Dist. v. Alamance County, 231 N. C. 213, 189 S. E. 873. See also, Collie v. Franklin County Com’rs, 145 N. C. 170, 25 S. E. 262.

Distribution of Excess Allowance.—County high schools are entitled to have a special allowance made to them in the yearly estimate of the county board of education for a four-months term (now six); but it is otherwise as to a school which is in strictness one of a town or city governed by local authority and accessible only to the school population of the specified district, for such is not a part of our public-school system; and this class of high schools may only receive their per capita or pro rata share of the estimate according to a change and not to the continuance of the statute or authoritative regulations applicable. Board v. County Commissioners, 174 N. C. 469, 93 S. E. 1001.

All of the funds raised in the state for common school pur-pose should be distributed on the basis of the state system and not be retained in the counties where it is raised. School Com’nsioners v. Board, 169 N. C. 196, 85 S. E. 138: Board v. State Board, 114 N. C. 313, 19 S. E. 277. And in the distribu-tion of the funds the General Assembly may not divide the state in favor, or to the prejudice of either the white or col-ored races. Hooker v. Greenville, 130 N. C. 472, 42 S. E. 141.

Racial Discrimination.—An act of the legislature which provides for the continuance of the school term in the various districts for at least six months each, and not be retained in the counties where it is raised. School Com’nsioners v. Board, 169 N. C. 196, 85 S. E. 138: Board v. State Board, 114 N. C. 313, 19 S. E. 277. And in the distribution of the funds the General Assembly may not divide the state in favor, or to the prejudice of either the white or colored races. Hooker v. Greenville, 130 N. C. 472, 42 S. E. 141.

Editor’s Note.—This section was amended by the substitution of “six” for “four” pursuant to § 192, Public Laws of 1917, ratified by the people in November, 1918.
at least six months in the year. Bridges v. Charlotte, 221 N. C. 472, 477, 20 S. E. (2d) 825.

This section is mandatory, but the mode of performance is prescribed by statute. Hickory v. Catawba County, 206 N. C. 165, 189 S. E. 873; Piney Grove Graded School Dist. v. Alamance County, 211 N. C. 218, 189 S. E. 873.

Counties May Be Directed to Provide Funds.—By reason of this constitutional mandate it is within the power of the General Assembly, in each of its school districts, and to the discretionary power of the courts, to compel performance of the duties of this section by mandamus when indictment of the violation is brought.

Assumption of Indebtedness.—When necessary to maintain the six-months term of public schools required by this section it is within the legislative authority in establishing its school system, to assume an indebtedness of a school district therefor, including the cost of necessary buildings and direct that it be provided for by the respective counties as an administrative agency of the state. Mebane Graded School Dist. v. Alamance County, 211 N. C. 213, 189 S. E. 873.

Discretion of General Assembly Rules as to Financing Public Schools.—Under this section it is within the discretion of the General Assembly, in establishing its school system, to establish, divide, and consolidate school districts in accordance with a county-wide plan. Elliott v. State Board of Equalization, 203 N. C. 749, 166 S. E. 918.

The proceeds of all sales of the swamp lands belonging to the State, and not otherwise specially appropriated, shall be operated upon the terms of the grant, gift or devise, shall be paid into the General School Fund of the state, and the proceeds of all moneys that shall be paid as an equivalent for estrays, or from fines, penalties, and forfeitures; also, the proceeds that may accrue the State from sales of estrays, or for the State, or for the State fund for purposes of education; also the net proceeds of all sales of the swamp lands belonging to the State, and not otherwise specially appropriated by the State, or by the terms of the grant, gift or devise, shall be paid into the State treasury, and, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining in this State a system of free public schools, and for no other uses or purposes whatsoever. (Const. 1868; Convention 1875.)
and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State: Provided, that the amount collected in each county shall be annually reported to the Superintendent of Public Instruction. (Constitution of 1868; Convention of 1875.)

Editor's Note.—This section was added by the Convention of 1875.

In General.—This section appropriates all fines for violation of the criminal laws of the state for establishing and maintaining free public schools in the several counties. The fines are for violation of town ordinances made misdemeanor by statute or other criminal statutes. Board v. Helzeron, 127 N. C. 604, 36 S. E. 158. Fines, etc., Must Be Given by Law.—Under this section penalties and forfeitures belong to the state for free school purposes only when given by law to the state. Carter v. Wilmington, etc., R. Co., 126 N. C. 437, 446, 36 S. E. 14, and cases cited.

And Municipal Clerk Is Not Entitled to Fees from Fines.—By provision of this section, the clear proceeds of fines collected by the clerk of a municipal court belong to the county school fund, and the clerk is not entitled to retain a percentage thereof as his fees, regardless of the provisions of public-local laws relating to his compensation. County Board of Education v. High Point, 213 N. C. 636, 197 S. E. 191.

Parties.—A suit to compel a city to pay fines and penalties to the county board of education should be brought against the city or the board of aldermen, and not against the chief of police. Bearden v. Fullam, 129 N. C. 477, 40 S. E. 204.

§ 6. Election of trustees, and provisions for maintenance, of the University.—The General Assembly shall have power to provide for the election of trustees of the University of North Carolina, in whom, when chosen, shall be vested all the privileges, rights, franchises and endowments thereof in anywise granted to or conferred upon the trustees of said University; and the General Assembly may make such provisions, laws, and regulations from time to time, as may be necessary and expedient for the management and direction of said University. (1873-9, c. 86.)

Editor's Note.—Pursuant to ch. 86, Public Laws of 1872-73, this Sec. 6 was substituted for Sec. 5 of the Constitution of 1868, which was as follows: "The University of North Carolina, with its lands, endowments, and other property, is under the control of the State, and shall be held to an inseparable connection with the free public school system of the State."

§ 7. Benefits of the University.—The General Assembly shall provide that the benefits of the University, as far as practicable, be extended to the youth of the State free of expense for tuition; also, that all the property which has here-tofore accrued to the State, or shall hereafter accrue, from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons, shall be appropriated to the use of the University. (Constitution of 1868.)


§ 8. State Board of Education. — The general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, shall, from and after the first day of April, one thousand nine hundred and forty-three, be vested in a State Board of Education to consist of the Lieutenant Governor, the Superintendent of Public Instruction, and one member from each Congressional District to be appointed by the Governor. The State Superintendent of Public Instruction shall have general supervision of the public schools and shall be secretary of the board. There shall be a comptroller appointed by the Board, subject to the approval of the Governor as director of the institution, who shall receive such duties and compensation as the Board, and who, under the direction of the board, shall have supervision and management of the fiscal affairs of the board. The appointive members of the State Board of Education shall be subject to confirmation by the General Assembly in joint session. A majority of the members of said board shall be persons of training and experience in business and finance, who shall not be connected with the teaching profession or any educational administration of the State. The first appointments under this section shall be members from odd numbered Congressional Districts for two years, and members from even numbered Congressional Districts for four years and, thereafter, all appointments shall be made for a term of four years. All appointments to fill vacancies shall be made by the Governor for the unexpired term, which appointments shall not be subject to confirmation. The Board shall elect a chairman and a vice-chairman. A majority of the board shall constitute a quorum for the transaction of business. The per diem and expenses of the appointive members of the board shall be provided by the General Assembly. (Constitution of 1868; 1941, c. 151.)

Editor's Note.—Pursuant to Chapter 151 of the Public Laws of 1941, the former Sections 8 and 9 of the Constitution of 1868 were repealed and the present Section 8 substituted in lieu thereof. Those former sections read as follows: "§ 8. The Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Instruction, and Attorney-General shall constitute a State Board of Education." "§ 9. The Governor shall be president and the Superintendent of Public Instruction shall be secretary of the Board of Education."
ART. IX, § 9

CONSTITUTION OF NORTH CAROLINA

§ 9. Powers and Duties of the Board.—The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the textbooks to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly. (Const. 1868; 1941, c. 151.)

Editor’s Note.—Pursuant to Chapter 151 of the Public Laws of 1941, Section 10, Article X, and 13 of the Constitution of 1868 were repealed and the present Section 9 substituted in lieu thereof. Former sections read as follows:

"§ 10. The Board of Education shall succeed to all the powers and trusts of the president and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; but all acts, rules and regulations of said board may be altered, amended, or repealed by the General Assembly, and when so altered, amended, or repealed they shall not be re-enacted by the board.

"§ 11. The first session of the board of Education shall be held at the capital of the State within fifteen days after the organization of the State government under this Constitution; the time of future meetings may be determined by the board.

"§ 12. A majority of the board shall constitute a quorum for the transaction of business.

§ 10. Agricultural department.—As soon as practicable after the adoption of this Constitution, the General Assembly shall establish and maintain, in connection with the University, a department of agriculture, of mechanics, of mining, and of normal instruction. (Const. 1868; 1941, c. 151.)

Editor’s Note.—This section, formerly Section 14 of Article IX of the Constitution of 1868, was renumbered to become Section 10 pursuant to Chapter 151 of the Public Laws of 1941.

The Board a Department of State Government.—The Board of Agriculture is a department of the State Government, and an action against it to recover money alleged to have been wrongfully paid out as a license tax cannot be maintained, the state not having given its consent to be sued in that respect. Chemical Co. v. Board, 111 N. C. 135, 136, 15 S. E. 560.

 Levy of Tax for Farm Agent’s Salary.—The encouragement of agriculture is a fundamental objective of the State government, and a levy of a tax by a county to pay the county agent’s salary is a tax paid on the special approval of the Legislature, within the meaning of Art. V, § 6, for which a tax in excess of the 15-cent limitation may be imposed. Nantahala Power, etc., Co. v. Clay County, 213 N. C. 698, 197 S. E. 601.

§ 11. Children must attend school.—The General Assembly is hereby empowered to enact that every child, of sufficient mental and physical ability, shall attend the public schools during the period between the ages of six and eighteen years, for a term of not less than sixteen months, unless educated by other means. (Const. 1868; 1941, c. 151.)

Editor’s Note.—This section, formerly Section 15 of Article IX of the Constitution of 1868, was renumbered to become Section 11, pursuant to Chapter 151 of the Public Laws of 1941.


ARTICLE X

Homesteads and Exemptions

§ 1. Exemptions of personal property.—The personal property of any resident of this State, to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or other final process of any court, issued for the collection of any debt. (Const. 1868.)

Editor’s Note.—It is thought more proper to place the main annotations regarding the homestead and personal property exemption under this section rather than place them elsewhere together with the references compose a comprehensive treatment of the subject.—reference to which is here made. The note found under this section is meant to embrace only direct construction of the provisions hereof, and may be of aid to the practitioner in dealing with the sections above mentioned.

Section Liberally Construed.—Hyman v. Stern, 43 F. (2d) 60.

The Marital Duty of Husband.—The husband’s duty to protect and provide for his wife is more than a debt in its ordinary meaning of the word, within the contemplation of this and the following section of the constitution. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863.

A husband’s obligation to support his wife during the existence of the marital relation is more than a debt in its ordinary meaning of this and the following section of the constitution. Barber v. Barber, 217 N. C. 422, 427, 8 S. E. (2d) 204, citing White v. White, 179 N. C. 592, 193 S. E. 216.

A Constitutional Right.—The right to the personal property exemption exists not by virtue of the allotment, but by virtue of the Constitution which confers it and attaches the protection of the Constitution which confers it and attaches the protection of the Constitution which confers it and attaches the protection to the debtor before the allotment or appraisal. Lockhart v. Bear, 117 N. C. 283, 23 S. E. 454. See Crow v. Morgan, 210 N. C. 153, 185 S. E. 660.

This and the following section are explicit in guaranteeing the personal property exemption of the value fixed—"to the debtor by the owner thereof." McKeithen v. Blue, 142 N. C. 360, 61 S. E. 55.

Meaning of “Final Process.”—A debtor may legally demand his personal property exemption at any time and to the last moment before the appropriation thereof by the court, and the order of court directing a payment of the money derived from the sale is such as to destroy the meaning of the Constitution, giving the creditor such right until execution or other final process. Befarra v. Spell, 178 N. C. 231, 100 S. E. 121.

Diminution in Value of Property.—In the well considered opinion in Campbell v. White, 95 N. C. 344, it was said: “Though the debtor’s personal property exemption has been duly allotted, whenever it has been diminished by use, loss, or other cause, he has a right to have any other personal property he may have exempted up to the prescribed limit,” meaning of the Constitution, giving the creditor such right until execution or other final process. Befarra v. Spell, 178 N. C. 231, 100 S. E. 121.

Set-Off.—A party may not demand that his claim be allowed him as his personal property exemption has been duly allotted, whenever it has been diminished by use, loss, or other cause, he has a right to have any other personal property he may have exempted up to the prescribed limits. It is plainly meant that when any final process against the debtor’s estate is to be enforced, that much of his estate must be allowed to remain with him as not liable to sale. Gardner v. McConnaughey, 127 N. C. 481, 483, 23 S. E. 152.

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in this cause on defendant's counterclaim should be offset by a judgment subsequently obtained by plaintiff against defendant in a separate action, contending that defendant is in this cause on defendant's counterclaim should be offset judgment in his favor on the counterclaim be allowed him offset would amount to "final process" within the meaning of section 1-370. Edgerton v. Johnson, 218 N. C. 300, 10 S. E. (2d) 918.

Exemption Ceases at Death of Claimant.—The personal property exemption provided for by this section and the laws passed pursuant thereto, exist only during the life of the homesteader and after his death passes to his personal representative, to be disposed of in a due course of administration. Johnson v. Cross, 66 N. C. 167.

It is to be noted that by sections 3 and 5, after the death of the owner of a homestead, the exemption is continued on the benefit of his children or widow; but there is no such provision in regard to the "personal property exemption."—Ed. Note.

Forfeiture of Exemption.—A bankrupt who conceals assets exceeding in value his statutory exemption forfeits his right to such exemption. Hyman v. Stern, 43 F. (2d) 666.

One who is a fugitive from justice, though leaving his family here, may remain in the state where his whereabouts are unknown, and the object of whose absence is to avoid serving a criminal sentence imposed by our courts, is not a resident of the state within the meaning of this exemption, and no private execution or process may be served on him, or judgment be rendered against him, or any of the exemptions here in the absence of evidence or finding on the question of his animus revertendi. Cromer v. Sell, 169 N. C. 164, 62 S. E. 885, 128 Am. St. Rep. 658.

Debtor Entitled to Exemption at All Times.—The five hundred dollar personal property exemption prescribed by this section of the constitution entitles a judgment debtor to the amount of the exemption at all times, and may be set apart for the comfort and support of the judgment debtor as often as the judgment debtor may be pressed with execution. Commissioner of Banks v. Yelverton, 294 N. C. 441, 186 S. E. 505, commented on in 12 N. C. L. Rev. 228.

A debtor may legally demand his personal property exemption at any time and to the last moment before the appropriation thereof by the commencement of execution. All rights to directing a payment of the money derived from the sale of such property is final process within the meaning of the Constitution giving the creditor such right until execution or other final process obtained on any debt. Crow v. Morgan, 210 N. C. 153, 185 S. E. 668.


§ 2. Homestead.—Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises. (Const. 1868.)

Cross Reference.—See section 1-369 et seq. and notes placed thereunder.

Homestead and Personal Property Exemptions Distinguished.—The homestead exemption is permanent unless there is a reallocation by reason of an increase in value in the manner provided for by section 1-369. But personal property exemptions are not increased, whenever the value of the property exceeds the statutory limit, by the levy of executions. Gardner v. McConnaughey, 157 N. C. 481, 483, 73 S. E. 125.

In view of this section the doctrine of estoppel cannot deny that a person may homestead lands which were subject to his debts. In selecting the land for his homestead exemption, he is not restricted to the tract on which he lives. In re Hamrick, 56 F. (2d) 246, 247.

The right to claim homestead may be lost by failure to assert it in apt time, by waiver, or by estoppel. Cameron v. McCord, 216 N. C. 712, 12 S. E. (2d) 815.

Right May Be Sold or Assigned.—The homestead right or estate is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors, as against his own personal property, or in lieu thereof, at the foreclosure sale a sum more than sufficient to pay the mortgage debt, the excess remaining to the Constitutional limit of one thousand dollars is to be regarded as realty to which the homestead right attaches when the same has been wont. Farris v. Hendricks, 196 N. C. 439, 146 S. E. 73, 77.

A mortgage on land with the dwelling and buildings therewith, not exceeding in value one thousand dollars, to be sequestered in the hands of the commissioner. New Amsterdam Cas. Co. v. Dunn, 209 N. C. 428, 196 S. E. 314.

Where a judgment debtor is a bankrupt, the exemption in his equity of redemption as against the liens of judgment creditors, and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. Cheek v. Walden, 195 N. C. 752, 143 S. E. 485.

There is no lien for purchase money in North Carolina, and while the judgment debtor cannot claim homestead as against a judgment for purchase money, the lien of a mortgage executed to a third person has priority over the judgment lien, and the judgment creditor cannot recover the amount of judgment obtained prior to the rendition of the judgment and prior to an amendment putting the title to the property in issue. Jarrett v. Holloway, 213 N. C. 196, 194 S. E. 731.

A duly docketed judgment is a lien on the lands on the judgment debtor but is subject to the homestead interest in the lands as provided by this section. Farris v. Hendricks, 196 N. C. 439, 146 S. E. 73, 77.

The right to the homestead exemption is not forfeited by a fraudulent conveyance, and the judgment was properly modified by order directing that defendant be allotted his homestead in the land which should be exempt from sale by the commissioner. New Amsterdam Cas. Co. v. Dunn, 209 N. C. 736, 184 S. E. 498.

Exemption Allowed in Mortgaged Lands.—A debtor may have his homestead exemption allotted to him but mortgaged to a third person, but in ascertaining the value thereof the mortgage debt should be disregarded, and the land appraised as though the debtor owned the unrestricted fee. Crow v. Morgan, 210 N. C. 153, 185 S. E. 668.

Or Vacant Lots.—Where the only real property owned by the judgment debtor is his homestead, and he is a bankrupt, his homestead therein, since he may thereafter build a habitable structure thereon. Equitable Life Assur. Soc v. Hensler, 219 N. C. 121, 128 S. E. 239.


Cited in Vannoy v. Green, 206 N. C. 77, 80, 173 S. E. 277.

§ 3. Homestead exemption from debt.—The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt

[59]
during the minority of his children, or any of them. (Const. 1868.)

See Editor's Note to section 5.

Other Inheritance Incidents.—An heir twenty-one years old is not entitled to a homestead in the lands of his ancestor, his right thereto ceased as soon as he attained his majority. Saylor v. Powell, 90 N. C. 202.

The provisions of section 5 are too plain for construction, that in speaking of children the instrument refers to children of the deceased owner. Simmons v. Respess, 151 N. C. 561, 56 S. E. 534.

Same.—Where Only One Minor.—Where the owner of a homestead dies, leaving children, some of age and one a minor, the homestead estate vests alone in the minor child until his or her majority. Simpson v. Wallace, 83 N. C. 397. The homestead dies, leaving children, some of age and one a minor, the homestead estate vests alone in the minor child until his or her majority. Simpson v. Wallace, 83 N. C. 397.

Pecuniary Standing of Children Not Considered.—The right to a homestead is given to the minor children of an insolvent father, regardless of their pecuniary circumstances, 72 N. C. 694; Spence v. Goodwin, 128 N. C. 273, 38 S. E. 859.

Right Not Waivable by Guardian Ad Litem.—A guardian ad litem cannot waive the homestead rights of infant heirs, especially when there is, as in this case, a strong consideration that such waiver would affect the substantial rights of the infants. Spence v. Goodwin, 128 N. C. 273, 38 S. E. 859.

Debts Contracted for Labor, Work, and Service.—A mechanic's lien construing § 6 of this article in connection with this section the conclusion is sustained that for all debts contracted for work and labor done, a lien is given upon the property of a married woman. Ball v. Paquin, 140 N. C. 63, 52 S. E. 410, 3 L. R. A. (N. S.) 307.

The debt referred to in this section means the debt of the owner of the homestead, and not the debt of the infant children. Bruton v. McAte, 125 N. C. 206, 207, 210, 34 S. E. 397.

Right Not to Be Sold for Assets.—In a proceeding to sell land for assets, the executor cannot sell the homestead interest of an infant, and the executor can not sell the homestead estate of an infant. Bruton v. McAte, 125 N. C. 206, 207, 34 S. E. 397.

§ 4. Laborer's lien.—The provisions of section one and two of this article shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming such exemption, or a mechanic's lien for work done on the premises. (Const. 1868.)

Cross References.—See section 44-1 et seq. and notes thereeto. For other exceptions to the exemptions, see note of Melanie v. Layton, 89 N. C. 396, under section 1-369.

Definition of Terms.—A "laborer's lien" is solely for labor performed and is not "mechanic's lien," which includes the "work done," i. e., the "building built" or superstructure put on the premises. Broyhill v. Gaither, 119 N. C. 232, 13 S. E. 764.


Quoted in Roper Lumber Co. v. Lawson, 195 N. C. 340, 344, 147 S. E. 477.

§ 5. Benefit of widow.—If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right. (Const. 1868.)

Cross References.—See section 1-369, analysis line "Who Entitled to Homestead and Exemptions," II, B. As to allotment after death of homesteader, see section 1-369 and notes thereto; as to right of widow whose deceased husband leaves a homestead under a mechanic's lien, see note of Simmons v. Respess, 151 N. C. 5, 65 S. E. 516, under section 3 of this article.

Editor's Note.—It is to be noted that the widow's right to the homestead provided for by this section is expressly conditioned upon her not being the owner of a homestead in her own right. Such a clause is not contained in section 3 which gives the right to the children during minority. On this point it was said in Spence v. Goodwin, 128 N. C. 273, 277, 38 S. E. 859: "This — emphasizes by direct implication the unconditional right of exemption given to the children by this section." Ownership at Death Essential.—It is only in the continuity that the husband is the owner of a homestead at the time of his death that the exemption from debts inures to the benefit. Thomas v. Bunch, 158 N. C. 175, 178, 73 S. E. 899.

A widow is not entitled to take action for the preservation of the right to a homestead in the lands of her deceased husband under provisions of this section, and before the land can be validly sold by the personal representatives to make assets for the payment of the debts of the deceased the homestead must first be assigned. Fulp v. Brown, 153 N. C. 531, 67 S. E. 602.

Heirs Prior to Widow Where There Are No Creditors.—A widow is not entitled to homestead against the heirs at law where there are no creditors, but only to dower. Caudle v. Morris, 160 N. C. 168, 75 S. E. 17. See also, Tucker v. Tucker, 103 N. C. 170, 7 S. E. 299.


§ 6. Property of married women secured to them.—The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried. (Const. 1868.)

See notes to § 5-21.

Editor's Note.—To give effect to the provisions of the organic law as embodied in this section, the legislature from time to time has enacted statutes whose essence may be boiled down in substance to what is contained in this section. In fact some of those statutes are a verbatim confirmation of these provisions, while others are corollaries therefrom, directly or indirectly offsprings, or satellites to, this section.

By virtue of the community of source of these statutes, the instances are rare where this constitutional section has been so construed from the fact that the construction placed upon the latter is not applicable to the former, or vice versa. These constructions have been placed under the respective subordinate sections to which they refer, and all of them radiate a light upon the provisions of the organic law contained in this section. To the end that repetition may be avoided the counsel is urged to refer to those sections. There is no less need for such constructions of this section than the sections under which they are placed, we will find hereunder the more or less independent constructions of this section which do not appear under its subordinates:

"There is no 'Constitution' which throws additional shackles around women in the management of their separate property. The provision of the Constitution is in exactly the opposite direction in accordance with the spirit of the age, and with the universal trend of legislation the world over. Its purpose is not to further assimilate married women to the condition of infants, but to make free women of them, to emancipate them from the plagues that have been existing. Strouse v. Cohen, 113 N. C. 349, 353. 18 S. E. 321.

General Policy of Section.—This section is intended to emancipate married women, secure to them the same rights as property rights are concerned, on a par with men and females of the age. McLeod v. Williams, 122 N. C. 475, 454, 30 S. E. 129.

Common Law Rule Changed.—The common-law rule giving to the husband the actual or potential ownership of the separate choses in action belonging to his wife by reducing them into possession is now changed by this section giving
to the wife the sole ownership of her separate estate. Turlington v. Lucas, 186 N. C. 283, 119 S. E. 471.

In Ethridge v. Cochran, 196 N. C. 681, 146 S. E. 711, referring to this section, it is said by Adams, J.: "By virtue of these and other provisions the relation which married women have to their separate estates has been materially modified. Unity of person in the strict common-law sense no longer exists, and many of the common-law doctrines which governed the acquisition by one husband only of his real estate in the joint tenancy or tenancy in common with his wife has been destroyed. Tiddy v. Graves, 126 N. C. 650, 36 S. E. 127.

The purpose of requiring the written assent is to afford the wife the counsel and protection of her husband, and to notify him of the estate in the realty. When he signs it under her signature and then acknowledges the execution of the deed as one of the grantors, but one inference can arise, and that is that he was giving his required written assent to her conveyance. Joiner v. Firemen's Ins. Co., 6 F. Supp. 103, 104.

Sufficiency of Husband's Written Assent.—Since the deed of conveyance is revocable by the husband, the deed and the written assent thereto, if given, must be recorded in the county where the land or thing conveyed is located. Joiner v. Firemen's Ins. Co., 6 F. Supp. 103, 104.

No Formal Conveyance to Transfer Note or Bond.—No formal conveyance is necessary under the requirement of this section where a matrimonial bond to satisfy the constitutional requirement is given. Coffin v. Martin, 138 N. C. 253, 55 S. E. 564.

Legislative Power to Declare Wife Free Trader.—There is no constitutional inhibition on the power of the legislature to declare where and how the wife may become a free trader, this section being intended to protect instead of disabling her. Hall v. Walker, 118 N. C. 377, 24 S. E. 6.

A married woman who has been abandoned by her husband is a free trader, and she may execute a valid conveyance of her lands without his joinder. Nichols v. York, 126 N. C. 620, 36 S. E. 93.

Legislative Control over Capacity to Make Will.—This section conferring upon married women the right to make a will, etc., "as if she were unmarried," was designed chiefly to remove the common-law restriction on married women to prevent them from being able to give or dispose of their personal property by will, other than as a testator. Tiddy v. Graves, 126 N. C. 650, 36 S. E. 127.

Vested curtesy rights of the husband at the time of the adoption of the constitution were not impaired by this section. Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510.

Devises of Equitable Separate Estate.—She may devise her equitable separate estate, and such devisees, as are provi- sionally in the instrument creating it, where the trustee is a passive trustee; and, whether the trust be passive or active, where the trust is to terminate with her life, and the estate to become absolute thereafter. Freeman v. Lide, 176 N. C. 434, 97 S. E. 402.

Same—Provisions of Instrument Creating the Estate Still Controls.—Married women have no greater estates, by opera- tions of this section of the Constitution, than those vested by the terms of the deed under which they derive title; nor are the properties and incidents belonging to estates as later declared by that instrument. Long v. Barnes, 87 N. C. 329, 330.

The constitution imposes no limitation upon the right of a grantor or devisee to restrict or enlarge, by the terms of the instrument through which the estate was disposed of. Kirby v. Boyette, 118 N. C. 244, 24 S. E. 18.

Not Applicable to Obligations of Wife as Surety to Her Husband.—This section, providing that the separate property of the wife shall not be liable for the debts of the husband, has no application to the obligation of the wife as surety of her husband, such obligation being regarded as a direct one between the creditor and herself. Royal v. South- erland, 168 N. C. 405, 48 S. E. 708.

Extent of Veto Power of Husband.—The veto power of the husband does not extend to devises and bequests, nor to any other disposition of the separate property by the wife, even by will and deprive him of his interest therein as tenant by the curtesy. Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510.

Liability of Husband for Rents Paid Wife after Foreclosure.—Where lands belonging to the separate estate of a wife have been foreclosed under a deed of trust thereon duly delivered of the husband, the husband is liable for the rents paid the wife after the foreclosure. Martin v. Lewis, 187 N. C. 258, 70 S. E. 935.

May Bar Husband's Curtesy by Devising the Property.—By marriage, before the adoption of the Constitution of 1868, the husband acquired no vested rights in the lands of his wife. Penton v. Martin, 126 N. C. 661, 47 S. E. 784. See Martin v. Bundy, 212 N. C. 437, 193 S. E. 817.

Bogen v. Bogen, 219 N. C. 51, 12 S. E. (2d) 649.

Property to be Deemed Separate Property as if Sole.—Under the provisions of this section, and as later declared by our statute, married women have no greater estates, by operation of this section, and as later declared by our statute, than those vested by the terms of the deed under which they derive title; nor are the properties and incidents belonging to estates as later declared by that instrument. Turlington v. Lucas, 186 N. C. 283, 119 S. E. 471.

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tiff excepted. The juror owned no land, but his wife was

Prohibitions of Sections 52-5, Not Inhibited by This Section.—The provisions of section 52-5, dispensing with the necessity of the written consent of the husband to the con

Conveyance by Submitting Title to Arbitrators.—If a mar-

Assignment of Insurance Policy.—The signature of the hus-

Estates by entireties are not changed or affected by this secti

Constitution of North Carolina was adopted in 1835, it in-

The husband may insure his life for the bene-

§ 7. Husband may insure his life for the benefi-

Editor's Note.—The amendment proposed by Public Laws

Cited in Peoples Building & Loan Assn. v. Swim, 198 N. C. 14, 150 S. E. 668; Russell v. Owen, 203 N. C. 262, 165 S. E. 667; In re Reiter, 38 N. C. 147, 150 S. E. 668; In re Reiter, 58 F. (2d) 631.

§ 8. How deed for homestead may be made.—Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead

[62]
shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law. (Const. 1868.)

Cross Reference.—See section 39-7 et seq. and notes thereto. As to form of private examination, see sections 47-39, 47-40.

Section Applies only to a conveyance of the homestead after it has been laid off. Mayho v. Cotton, 69 N. C. 289, 292, cited supra.—Ed. Note.

For article on punishment for crime in North Carolina, see 17 N. C. Law Rev. 205.

Editor's Note.—All of this section after the first sentence was added by the Convention of 1875. This section of the constitution constitutes the basis for the legislative enactments regulating the punishment of violation of the criminal law found in the specific sections in the General Statutes. It sets down infinite boundaries within which the General Assembly may exercise the power to prescribe the punishment for the various crimes, cannot transgress. The cases placed in the notes found under the specific sections in the chapter. Crimes and punishment of prisoners are provided for by section 1875, which necessarily throw some light on this section of the constitution. This fact renders it needless to repeat, at this point, a citation of those cases, and it is only necessary to refer the counsel to the sections of the above mentioned chapter.

Working Convicts—Section Not Basis of Disciplinarian Rules.—This constitutional provision has no direct application to the discipline required in our jails and penitentiaries, for if so it would prevent any confinement, restriction or restraint; and, other reasonable punishments that are in customary use in prisons and penitentiaries. State v. Nipper, 116 N. C. 222, 224, 81 S. E. 164. But officers are civilly and criminally liable for an abuse or oppression of the adopted regulations under which the convicts are kept. State v. Young, 138 N. C. 571, 575, 59 S. E. 213.


\[ \text{Art. XI, §1} \]

CONSTITUTION OF NORTH CAROLINA

\[ \text{Art. XI, §3} \]

Punishments, Penal Institutions, and Public Charities

§ 1. Punishments; convict labor; proviso.—The following punishments only shall be known to the laws of this State, viz: death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State. The foregoing provision for imprisonment; with hard labor shall be construed to authorize the employment of such convict labor on public works or highways, or other labor for public benefit, and the farming out thereof, where and in such manner as may be provided by law; but no convict shall be farmed out who has been sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson: Provided, that no convict whose labor might be farmed out shall be punished for any failure of duty as a laborer, except by a responsible officer of the State; but the convicts so farmed out shall be at all times under the supervision and control, as to their government and discipline, of the penitentiary board or some officer of this State. (Const. 1868; Convention 1875.)

§ 2. Death punishment.—The object of punishments being not only to satisfy justice, but also to reform the offender, and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact. (Const. 1868.)

Cross Reference.—See editor's note to section 1 of this article. As to punishment for murder, see section 14-7 and notes thereto; as to punishment for arson, see section 14-56 and notes thereto; as to burning of buildings other than dwelling houses, see sections 14-59 et seq., and note thereto; as to punishment for burglary, see section 14-52 and note thereto; as to punishment for rape, see section 14-21 and note thereto.

Power of Legislature.—The punishment to be inflicted for any crime is left entirely to the general assembly, which can in its discretion affix lesser punishments, even for the four crimes, mentioned in this section, which are now visited with capital punishment. State v. Lyle, 138 N. C. 738, 744, 41 S. E. 66.

Under the discretionary power given by the constitution, the legislature has divided the crimes murder and burglary into two degrees and has affixed thereto the punishment for each enumerated offense. See specific cross references.—Ed. Note.


§ 3. Penitentiary.—The General Assembly shall, at its first meeting, make provision for the erection and conduct of a State's prison or pen-
intend, at some central and accessible point within the State. (Const. 1868.)

Legislative Duties.—This provision imposes upon the Legis-

lature the duty of attending to the details as to the ero-

tion of the necessary buildings, the purchase of such proper-

ty, real and personal, as may be necessary for the uses

of the prison; and also to form such regulations for the

government and conduct of the prisoners as will provide

that the officers or placement, their salaries and the distribution

of their duties are all left with the General Assembly. State


As to the powers of the directors of the penitentiary and

filling vacancies, see N. C. Const., Art. III, section 10.

Referred to in Railroad v. Holden, 63 N. C. 410, 436; Sed-


§ 4. Houses of correction.—The General As-

sembly may provide for the erection of houses of

correction, where vagrants and persons guilty of

misdemeanors shall be restrained and usefully

employed. (Const. 1868.)

Cross Reference.—See section 134-1 et seq. See also sec-

tions 134-203 et seq.

Definition.—A house of correction, "as the name indicates,

is designed for the reformation of youthful criminals, those

who have not yet become hardened in crime." Ex parte

Moffitt mature the duty of attending to the details as to the ero-

tion of this section, the care of the indigent sick and af-

flicted poor is a proper function of the state government,

and also the General Assembly may require that all the

counties, as administrative agencies of the state, to per-

form this function, at least within their territorial limits.

Moody v. Board of Com'rs, 208 N. C. 354, 180 S. E. 777.

There is no contractual duty on the part of the State to
care for and maintain insane persons, the State Hospital
being a charitable institution of the State, maintained vol-

unteer, in which the philanthropic Christian principles, as set out in

this section. See § 141-120 et seq. State v. Security Nat.

Bank, 207 N. C. 697, 178 S. E. 487.

Referred to in Board v. Commissioners, 113 N. C. 379, 383,

18 S. E. 661; Board v. Commissioners, 137 N. C. 310, 315, 49

S. E. 353.

§ 8. Orphan houses.—There shall also, as soon as practicable, be measures devised by the State
to establish institutions of one or more orphan houses, where destitute orphans may be cared for,
educated, and taught some business or trade. (Const. 1868.)

§ 9. Inebriates and idiots.—It shall be the
duty of the Legislature, as soon as practicable, to
device means for the education of idiots and ineb-

riates. (Const. 1868.)

§ 10. Deaf-mutes, blind, and insane.—The General Assembly may provide for the indigent
deaf-mute, blind, and insane of the State shall be
cared for at the charge of the State. (Const. 1868; 1879, cc. 254, 268, 314.)

Cross Reference.—As to construction of the term "in-

dulgent," see note of In re Hybart, 119 N. C. 359, 25 S. E. 901, under section 122-38. See also, Hospital v. Fountain,

128 N. C. 23, 38 S. E. 34. As to statutory provision for in-

dignant patients in hospital for the insane, see section 122-38 et seq.

Editor's Note.—This section was inserted, pursuant to chs.

254 and 314, Public Laws of 1879, in lieu of Sec. 10 of the Constitution of 1868 which was as follows: "The General

Assembly shall, at its first session, appoint and define the duties of a board of public charities, to whom

shall be entrusted the supervision of all charitable and penal State institutions, and who shall an-
nually report to the Governor upon their condi-
tion, with suggestions for their improvement. (Const. 1868.)

Cross Reference.—As to corporate powers of a county
government, as exercised by the board of commissioners, see section 151-9; as to limitation on county indebtedness, see section 151-2; as to the corporate powers of a municipal corporation, see section 160-2; as to maintenance of the county poor, see section 153-152 and notes thereto; as to allowance of pensions, see section 153-157.

Editor's Note.—This section of the constitution has been
the source of numerous legislative enactments, some of the
most important of which are referred to in this section. Many
laws have been enacted under these sections of the General Statutes contain
many cases which will throw an illuminating light on the

substantive law embodied in this section of the constitution.

It is believed to be more helpful and beneficial to the prac-
titioner to make reference to these specific sections of General

Statutes, and the notes placed thereunder, where the con-

structions of the code sections are given in connection

with basic constitutional provisions, than to segregate them

and leave it to the searcher to find the connecting links.

Erection of County Home—Issuing Bonds.—The building

of a county home is for a class of citizens without a place

of residence, and beneficient provision for whom is recom-

mended by this section, "as one of the first duties of a

civilized and Christian State;" therefore, providing for such

a home being included in the idea of their support, a county

may pledge its faith and credit and issue valid bonds for

that purpose, as a necessary expense, without the approval


Care of Indigent Sick Is Proper Function of State Government.—In accordance with express constitutional declara-

tion of this section, the care of the indigent sick and af-

flicted poor is a proper function of the state government,

and the General Assembly may require that all the

counties, as administrative agencies of the state, to per-

form this function, at least within their territorial limits.

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There is no contractual duty on the part of the State to
care for and maintain insane persons, the State Hospital
being a charitable institution of the State, maintained vol-

unteer, in which the philanthropic Christian principles, as set out in

this section. See § 141-120 et seq. State v. Security Nat.

Bank, 207 N. C. 697, 178 S. E. 487.

Referred to in Board v. Commissioners, 113 N. C. 379, 383,

18 S. E. 661; Board v. Commissioners, 137 N. C. 310, 315, 49

S. E. 353.

§ 6. The sexes to be separated.—It shall be re-

quired, by competent legislation, that the struc-

ture and superintendence of penal institutions of the

State, the county jails, and city police prisons

secure the health and comfort of the prisoners,

and that male and female prisoners be never con-

fined in the same room or cell. (Const. 1868.)

The word "superintendence," as used in this section, was

intended to impose upon the governing officials of municipal

corporations the duty of exercising ordinary care in procur-

ing articles essential for the health and comfort of prisoners,

and of employing such agents and appropriating such

moneys as may be necessary to keep the prison in such

condition as to replenish the supply of the prisoners,

with articles essential for the health and comfort of prisoners,

in this section. See § 143-120 et seq. State v. Security Nat.

Bank; 207 N. C. 697, 178 S. E. 487.
should be made as nearly self-supporting as is consistent with the purposes of their creation. (Const. 1868.)


ARTICLE XII

Militia

§ 1. Who are liable to militia duty.—All able-bodied male citizens of the State of North Carolina, between the ages of twenty-one and forty years, who are citizens of the United States, shall be liable to duty in the militia: Provided, that all persons who may be averse to bearing arms, from religious scruples, shall be exempt therefrom. (Const. 1868.)

Stated in Hinton v. Lacy, 193 N. C. 496, 137 S. E. 669.

§ 2. Organizing, etc.—The General Assembly shall provide for the organizing, arming, equipping, and discipline of the militia, and for paying the same, when called into active service. (Const. 1868.)

Cross Reference.—For the numerous legislative enactments on the subject, see the chapter "Militia", section 127-1 et seq. As to support of families of indigent militiamen, see section 127-3 et seq.

By Whom Militia Paid.—The legislature may provide, if it think proper to do so, how and by whom the militia shall be paid. Worth v. Commissioners, 118 N. C. 112, 120, 24 S. E. 778. And in the absence of any special provision, they are to be paid by the state—the "power" that calls them out. Id. See section 127-80 and the note thereto.


§ 3. Governor Commander-in-chief.—The Governor shall be commander-in-chief and shall have power to call out the militia to execute the law, suppress riots or insurrections, and to repel invasion. (Const. 1868.)

Governor May Call Out Militia.—In the absence of legislation, the governor, as commander-in-chief, has the power to call out the militia, and the state guard being made a part of the militia, he has the power to call them out. This constitutional power may be regulated by legislation providing what shall amount to sufficient evidence of the existence of the causes mentioned in this section of the constitution. Worth v. Commissioners, 118 N. C. 112, 120, 24 S. E. 778.

Same.—Not Subject to Legislative Restriction.—The legislature has no authority to restrict the power of the governor to call out the militia. Worth v. Commissioners, 118 N. C. 112, 124, 24 S. E. 778.


§ 4. Exemptions.—The General Assembly shall have power to make such exemptions as may be deemed necessary, and to enact laws that may be expedient for the government of the militia. (Const. 1868.)

ARTICLE XIII

Amendments

§ 1. Convention, how called.—No convention of the people of this State shall ever be called by the General Assembly unless by the concurrence of two-thirds of all the members of each house of the General Assembly, and except the proposition, convention or no convention, be first submitted to the qualified voters of the whole State, at the next general election, in a manner to be prescribed by law. And should a majority of the votes cast be in favor of said convention, it shall assemble on such day as may be prescribed by the General Assembly. (Const. 1868; Convention 1875.)

See 11 N. C. Law Rev., 242, for discussion as to whether the provisions of this section apply to the calling of a convention to consider a proposed federal amendment. This question was said to perplex the legislature and served to divide the Supreme Court.

Editor's Note.—The Convention of 1875 added the word "ever" after "shall" in line 2 and all of the section after the words "General Assembly" in line 4.

General Assembly may call convention to consider proposed amendment to the U. S. Constitution either under the provision of the Constitution of the plebiscitary powers. See "Opinions of the Justices," 204 N. C. 806, 172 S. E. 474.

§ 2. How the Constitution may be altered.—No part of the Constitution of this State shall be altered unless a bill to alter the same shall have been agreed to by three-fifths of each house of the General Assembly. And the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in three parts, the votes of which shall be separately taken, and may be prescribed by law. And in the event of their adoption by a majority of the votes cast, such amendment or amendments shall become a part of the Constitution of this State. (Const. 1868; Convention 1875.)

Editor's Note.—Sec. 2 of the original Constitution of 1868, before it was amended by the Convention of 1875 to read as the present Sec. 2, was as follows: "No part of the Constitution of this State shall be altered, unless a bill to alter the same shall have been read three times in each House of the General Assembly and agreed to by three-fifths of the whole number of members of each House respectively; nor shall any alteration take place until the bill, so agreed to, shall have been published six months previous to the election of members to the General Assembly. If, after such publication, the alteration proposed by the preceding General Assembly shall be agreed to, in the first session thereafter, by two-thirds of the whole representation in each House of the General Assembly, it shall become valid and effective; but this provision shall not extend to any alteration of the provisions of the section, so far as relates to the election of members to the General Assembly. If, after publication, such alteration shall be approved by a majority of the voters voting thereon, it shall become valid and effective on the 20th day after the proposition for such alteration shall have been made, and if the alteration be so approved the same shall be added to the Constitution as part of the Constitution. Upon the alteration of the Constitution as aforesaid, the General Assembly shall prescribe a mode by which the amendment or amendments may be submitted to the qualified voters of the House of Representatives throughout the State; and if, upon considering the votes given in the whole State, it shall appear that a majority of the voters voting thereon have approved them, and, not otherwise, the same shall become a part of the Constitution." Public Laws 1931, c. 104, proposed an amendment to this section whereby the submission could be at a special election called for the purpose which was defeated.

Generally.—While to amend the Constitution of the State it is necessary for the voters to approve the proposed amendments to be submitted to them, it is likewise necessary to the validity of the election that the Legislature enact the proposition to amend into a statute by a three-fifths vote of each branch; and the constitutional provision that they be submitted "in such manner as may be prescribed by law" includes within its intent and meaning the time at which the amendments will be effective, if approved, the Constitution being silent on this point. Reavis v. Durham, 173 N. C. 659, 91 S. E. 712. See also, Freeman v. Cook, 217 N. C. 63, 6 S. E. (2d) 894.

Applied in University v. McIver, 72 N. C. 76.

ARTICLE XIV

Miscellaneous

§ 1. Indictments.—All indictments which shall have been found, or may hereafter be found, for any crime or offense committed before this Constitution takes effect, may be proceeded upon in the proper courts, but no punishment shall be inflicted which is forbidden by this Constitution. (Const. 1868.)

Cross References.—See sections 15-140 to 15-155 and the
§ 2. Penalty for fighting duel.—No person who shall hereafter fight a duel, or assist in the same as a second, or send, accept, or knowingly carry a challenge therefor, or agree to go out of the State to fight a duel, shall hold any office in this State. (Const. 1868.)

§ 3. Drawing money.—No money shall be drawn from the treasury but in consequence of appropriations made by law; and an accurate account of the receipts and expenditures of the public money shall be annually published. (Const. 1868.)

Editor’s Note.—This section is an exact repetition of the United States Constitution, Art. I, section 9, cl. 7.

Legislative Authority Required.—This section means that there must be legislative authority in order for money to be validly drawn from the treasury. In other words, the legislature must make appropriations over the public purse. White v. Hill, 125 N. C. 194, 200, 34 S. E. 432, citing Garner v. Worth, 122 N. C. 250, 29, S. E. 364.

Section as Bar to Judicial Action.—This section effectively gives the judicial authority to enforce collection of liabilities against the state, and the courts cannot direct the state treasurer to pay such claims, however just and unquestioned, when there is no legislative appropriation to pay the same. Garner v. Worth, 122 N. C. 250, 252, 29 S. E. 364.

When Mandamus Will Lie.—It is only when the legislative department has appropriated a certain fund to the payment of a liability incurred or to be incurred and the Auditor or Treasurer refuses to obey the legislative mandate that the Court can issue its mandamus to compel him to comply. Garner v. Worth, 122 N. C. 250, 253, 29 S. E. 364.

The state treasurer may refuse to pay a warrant of the auditor if it appear that the law under which it is issued is unconstitutional or the claim is not within the terms of the statute under which it is brought. Martin v. Clark, 90 N. C. 143, cited and approved in Kuhlman v. R. R. Co., 143 N. C. 534, 535, 59 S. E. 305.

Editor’s Note.—Sec. 7 of the Constitution of 1868, amended pursuant to ch. 88, Public Laws of 1872-73, to read as follows: No person shall hold more than one lucrative office under the State, at the same time: Provided, That officers in the militia, justices of the Peace, Commissioners of Public Charities, and Commissioners appointed for special purposes shall not be considered officers within the meaning of this section.

Proposed Amendment.—Session Laws 1943, c. 432, proposed that this section be amended by rewriting the provision to read as follows: "Provided, that nothing herein contained shall extend to officers in the militia, notaries public, justices of the peace, commissioners of public charities, or commissioners for special purposes.

Purpose.—The manifest intent is to prevent double office-holding—that offices and places of public trust should not accumulate in any single person—and the superadded words of the second sentence were added or written in giving too technical a meaning to the preceding words. Doyle v. Raleigh, 89 N. C. 133, cited and approved in Groves v. Borden, 169 N. C. 8, 84 S. F. 1042.

Effect of Acceptance of Similar Office.—Where one holding an "office or place of profit" accepts another such office or position in contravention of this section of the Constitution, the first is vacated eo instanti, and any further acts done by him in connection with the first office are without color, and cannot be de facto. Whitehead v. Pittman, 165 N. C. 89, 80 S. E. 976.

Editor’s Note.—Under the power given by this section of the constitution the legislature has passed numerous enactments, affording the choice between the offices so that the acceptance of a second office by holding a public office operates ipso facto to vacate the first. White v. Tidwell, 170 N. C. 493, 29 S. E. 720, it is said: "The acceptance of a second office by holding a public office operates ipso facto to vacate the first. The officer has a right to elect which he will retain, his election is deemed, and foreclosed, and made when he accepts the other office, and qualifies for the second." The acceptance of the second office is of itself a resignation of the first. Cited with approval in Whitehead v. Pittman, 165 N. C. 89, 80 S. E. 976.

§ 5. Governor to make appointments.—In the absence of any contrary provision, all officers of this State, whether heretofore elected or appointed by the Governor, shall hold their positions only until other appointments are made by the Governor, or, if the officers are elective, until their successors shall have been chosen and duly qualified according to the provisions of this Constitution. (Const. 1868.)

Cited in Markham v. Simpson, 175 N. C. 135, 95 S. E. 106; Freeman v. Board of Com’rs, 217 N. C. 209, 7 S. E. (2d) 354.

§ 6. Seat of government.—The seat of government in this State shall remain at the city of Raleigh. (Const. 1868.)

§ 7. Holding office.—No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes. (Const. 1868; 1872-73, c. 88.)

Cross Reference.—As to what constitutes a public office and numerous illustrations thereof, see note to section 1-515. As to form and nature of this section, see sections 1-515 et seq., and the notes there placed.

Editor’s Note.—Section 7 of the Constitution of 1868, amended pursuant to ch. 88, Public Laws of 1872-73, to read as the section now stands, as follows: No person shall hold more than one lucrative office under the State, at the same time: Provided, That officers in the militia, justices of the Peace, Commissioners of Public Charities, and Commissioners appointed for special purposes shall not be considered officers within the meaning of this section.

Actions for Removal Where One Accepts Second Office.—When a person holding an office or place of trust accepts and qualifies for a second office, within the meaning of this section, the first office ipso facto becomes vacated, and an action of ejectment may be brought against him in the name of the state on the relation of the attorney-general, by any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise the powers of the second office, but such an action may not be maintained except it appears that the leave of the attorney-general has been obtained either before the commencement of the action or within ten days thereafter pending the proceedings. Midgett v. Gray, 158 N. C. 133, 73 S. E. 791.

A statute providing that the incumbent of one public office should also fill another public office is unconstitutional as violating this section; and cannot be upheld as merely affording the choice between the offices: that the acceptance of the second office would ipso facto vacate the office of the first office. In re Barnes, 212 N. C. 735, 194 S. E. 791.
first, since incumbency in the first is essential to incumbency in the second. But a statute which creates no new office and appoints no additional, but merely attaches new duties to offices already existing, to be performed by the incumbents therein, does not violate this section. Brigm-an v. Baley, 213 N. C. 119, 195 S. E. 617.

Where one holding an office as county commissioner accepts a commission from the Governor as a notary public his position as county commissioner is eo instanti vacated, and where he continues to exercise the duties of county commissioner he may be removed therefrom in an action in the nature of a quo warranto. Harris v. Watson, 201 N. C. 601, 191 S. E. 285.

Recorder May Also Be Justice of Peace.—This section does not forbid one to hold the position of recorder of a town and the office of justice of the peace at the same time. State v. Lord, 145 N. C. 479, 59 S. E. 655.

Imposition of Additional Duties.—Chapter 341, Public-Local Laws of 1931, providing that the chairmen of certain county boards of Madison county should elect a tax manager for the county, merely imposes additional duties ex officio upon the said chairmen, and does not provide that any one of them should hold two public offices in violation of this section. Freeman v. Board of Com'rs, 217 N. C. 209, 7 S. E. (2d) 354.

Delegation of Duties.—A statute which places the affairs of a municipal corporation in the hands of a city council and a city manager and provides that in the event of a vacancy in the office of city manager, by sickness or otherwise, the council may delegate the duties of this office to one of its members, to be performed ex officio as mere auxiliary duties with such compensation as the council may determine, but shall receive no salary as a member of the council, is held not to contravene this section. State v. Holmes, 207 N. C. 293, 176 S. E. 746.

Applied in McCueIler v. Commissioners, 158 N. C. 75, 73 S. E. 816; Barnhill v. Thompson, 122 N. C. 493, 29 S. E. 720.

§ 8. Intermarriage of whites and negroes prohibited.—All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation, inclusive, are hereby forever prohibited. (Convention 1875.)

Editor's Note.—This section was added by the Convention of 1875. It constitutes the first clause of section 14-181. Reference is therefore made to the note placed under that section.
We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I

§ 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

§ 2. [1.] The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

[2.] No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state in which he shall be chosen.

[3.] Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bond to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

The first sentence of this clause (art. I, sec. 2, cl. 3) is amended by amendment XIV, § 2 and amendment XVI.

[4.] When vacancies happen in the representation from any state, the executive authority thereof shall issue writs or election to fill such vacancies.

[5.] The house of representatives shall chuse their speaker and other officers; and shall have the sole power of impeachment.

§ 3. [1.] The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Art. I, s. 3, cl. 1, is superseded by amendment XVII.

[2.] Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes.

The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

[3.] No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

[4.] The vice president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

[5.] The senate shall chuse their other officers, and also a president pro tempore, in the absence of the vice president, or when he shall exercise the office of president of the United States.

[6.] The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present.

[7.] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

§ 4. [1.] The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof: Lut the congress may at any time by law make or alter such regulations, except as to the places of chusing senators.

[2.] The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

§ 5. [1.] Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute issue writs or election to fill such vacancies.

[2.] Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.

[3.] Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the
members of either house on any question shall, at the desire of one-fifth of those present, be
entered on the journal.

[4.] Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

§ 6. [1.] The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

[2.] No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

§ 7. [1.] All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

[2.] Every bill which shall have passed the house of representatives and the senate shall, before it become a law, be presented to the president of the United States. If he approve, he shall sign it; but if not, he shall return it with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

[3.] Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

§ 8. The congress shall have power [1.] To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[2.] To borrow money on the credit of the United States;

[3.] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

[4.] To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5.] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[6.] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[7.] To establish post offices and post roads;

[8.] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[9.] To constitute tribunals inferior to the supreme court;

[10.] To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

[11.] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

[12.] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[13.] To provide and maintain a navy;

[14.] To make rules for the government and regulation of the land and naval forces;

[15.] To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

[16.] To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress;

[17.] To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;— and

[18.] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

§ 9. [1.] The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress prior to the year one thousand
eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

[2.] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3.] No bill of attainder or ex post facto law shall be passed.

[4.] No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

[5.] No tax or duty shall be laid on articles exported from any state.

[6.] No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

[7.] No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

[8.] No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince, or foreign state.

§ 10. [1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender for debts; pass any bill of attainder, ex post facto law, and emit bills of credit; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

ARTICLE II

§ 1. [1.] The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice president, chosen for the same term, be elected, as follows:

[2.] Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[3.] The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately chuse by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner chuse the president. But in chusing the president, the votes shall be taken by states, the representation from each state having one vote: a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice president. But if there should remain two or more who have equal votes, the Senate shall chuse from them by ballot the vice president.

Art. II, s. 1, cl. 3, is superseded by amendment XII.

[4.] The Congress may determine the time of chusing the electors and the day on which they shall give their votes; which day shall be the same throughout the United States.

[5.] No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who has not attained to the age of thirty-five years, and been fourteen years a resident within the United States.

[6.] In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

[7.] The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

[8.] Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I
will faithfully execute the office of president of the United States, and will to the best of my ability preserve, protect and defend the constitution of the United States."

§ 2. [1.] The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

[2.] He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

[3.] The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

§ 3. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

§ 4. The president, vice president and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

§ 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

§ 2. [1.] The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

See amendment XI, as to suits against a state by citizens of another state or citizens or subjects of a foreign state.

[2.] In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

[3.] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

§ 3. [1.] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession of guilty.

§ 8. [1.] Treason against the United States shall consist in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession of guilty.

ARTICLE IV

§ 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

§ 2. [1.] The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[2.] A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

[3.] No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

§ 3. [1.] New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of
states, without the consent of the legislatures of the states concerned as well as of the congress.

[2.] The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

§ 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI

[1.] All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation.

[2.] This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the legislature, or of the executive (when the legislature cannot be convened), any domestic violence.

[3.] The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty-seven and of the Independence of the United States of America the Twelfth. In Witness whereof we have hereunto subscribed our names.

Go. WASHINGTON
Presidt. and deputy from Virginia.

New Hampshire.
John Langdon and Nicholas Gilman.

Massachusetts.
Nathaniel Gorham and Rufus King.

Connecticut.
Wm. Saml. Johnson and Roger Sherman.

New York.
Alexander Hamilton.

New Jersey.
Wil: Livingston, David Brearly, Wm. Patterson and Jona: Dayton.

Pennsylvania.

Delaware.

Maryland.

Virginia.
John Blair—James Madison, Jr.

North Carolina.

South Carolina.
Charles Pinckney, J. Rutledge, Charles Cotesworth Pinckney and Pierce Butler.

Georgia.
William Few and Abr. Baldwin.

Attest: William Jackson, Secretary.

The states ratified the Constitution in the following order:

Delaware ..................................December 7, 1787
Pennsylvania ................................December 12, 1787
New Jersey ................................December 18, 1787
Georgia ...................................January 2, 1788
Connecticut ................................January 9, 1788
Massachusetts .............................February 6, 1788
Maryland ..................................April 26, 1788
South Carolina ............................May 23, 1788
New Hampshire ...........................June 21, 1788
Virginia ..................................June 26, 1788
New York ..................................July 26, 1788
North Carolina ...........................November 21, 1789
Rhode Island .............................May 29, 1790

AMENDMENTS

Articles in addition to, and amendment of, the constitution of the United States of America, proposed by congress, and ratified by the legislatures of the several states, pursuant to the fifth article of the original constitution.

The first ten amendments were proposed by congress on September 25, 1789, and became effective on December 15, 1791.
AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT II.

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

AMENDMENT III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the assistance of counsel for his defense.

AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

AMENDMENT XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

AMENDMENT XII.

The electors shall meet in their respective states, and vote by ballot for president and vice president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate;—the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice president shall be the vice president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice president of the United States.
AMENDMENT XIII.

§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state. excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

§ 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV.

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

§ 2. The congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI.

The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

AMENDMENT XVII.

The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution.

AMENDMENT XVIII.

§ 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

§ 2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission thereof to the states by the congress.

AMENDMENT XIX.

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX.

§ 1. The terms of the president and vice president shall end at noon on the 20th day of January, and the terms of senators and representatives at noon on the 3d day of January, of the
years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

§ 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

§ 3. If, at the time fixed for the beginning of the term of the president, the president elect shall have died, the vice president elect shall become president. If a president shall not have been chosen before the time fixed for the beginning of his term, or if the president elect shall have failed to qualify, then the vice president elect shall act as president until a president shall have qualified; and the congress may by law provide for the case wherein neither a president elect nor a vice president elect shall have qualified, declaring who shall then act as president, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a president or vice president shall have qualified.

§ 4. The congress may by law provide for the case of the death of any of the persons from whom the house of representatives may choose a president whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the senate may choose a vice president whenever the right of choice shall have devolved upon them.

§ 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

§ 6. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

The twentieth amendment was declared in a proclamation of the Secretary of State, dated February 6, 1933, to have been ratified by thirty-nine of the forty-eight States.

AMENDMENT XXI

§ 1. The eighteenth article of amendment to the constitution of the United States is hereby repealed.

§ 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by conventions in the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

The twenty-first amendment was declared in a proclamation of the Acting Secretary of State, dated December 5, 1933, to have been ratified by thirty-six of the forty-eight States.

By his proclamation of December 5, 1933, the President proclaimed that the eighteenth amendment to the Constitution was repealed on December 5, 1933.
STATE OF NORTH CAROLINA

IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND FORTY-THREE

A BILL TO BE ENTITLED

AN ACT

REVISING AND CONSOLIDATING THE PUBLIC AND GENERAL STATUTES OF THE STATE OF NORTH CAROLINA

The General Assembly of North Carolina do enact the following named chapters, subchapters and sections, to be known as the GENERAL STATUTES OF NORTH CAROLINA, that is to say:
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<th>Chap.</th>
<th>Topic</th>
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<td>1</td>
<td>Civil Procedure</td>
<td>81</td>
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<td>2</td>
<td>Clerk of Superior Court</td>
<td>401</td>
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<tr>
<td>3</td>
<td>Commissioners of Affidavits and Deeds</td>
<td>417</td>
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<td>4</td>
<td>Common Law</td>
<td>419</td>
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<td>5</td>
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<tr>
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</tr>
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</tr>
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</tr>
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<td>Notaries</td>
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</tr>
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<td>594</td>
</tr>
<tr>
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<td>Statutory Construction</td>
<td>600</td>
</tr>
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</table>
Chapter 1. Civil Procedure.

SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.

Art. 1. Definitions.

Sec. 1-1. Remedies.
1-3. Special proceedings.
1-5. Criminal action.
1-6. Civil action.
1-7. When court means clerk.

Art. 2. General Provisions.

1-8. Remedies not merged.
1-10. Plaintiff and defendant.
1-12. Feigned issues abolished and substituted.

SUBCHAPTER II. LIMITATIONS.

Art. 3. Limitations, General Provisions.

1-14. When action commenced.
1-15. Statute runs from accrual of action; pleading.
1-16. Defenses deemed pleaded by insane party.
1-17. Disabilities.
1-18. Disability of marriage.
1-20. Disability must exist when right of action accrues.
1-21. Defendant out of state; when action begun or judgment enforced.
1-22. Death before limitation expires; action by or against executor.
1-23. Time of stay by injunction or prohibition.
1-24. Time during controversy on probate of will or granting letters.
1-25. New action within one year after nonsuit, etc.
1-26. New promise must be in writing.
1-27. Admission by partner or co-maker.
1-28. Undisclosed partner.
1-29. Cotenants.
1-30. Applicable to actions by state.
1-31. Action on open account.
1-32. Not applicable to bank bills.
1-33. Actions against bank directors or stockholders.
1-34. Aliens in time of war.

Art. 4. Limitations, Real Property.

1-35. Title against state.
1-36. Title presumed out of state.
1-37. Such possession valid against claimants under state.
1-38. Seven years possession under color of title.
1-39. Seizin within twenty years necessary.
1-40. Twenty years adverse possession.
1-41. Action after entry.
1-42. Possession follows legal title.
1-43. Tenant's possession is landlord's.
1-44. No title by possession of right of way.
1-45. No title by possession of public ways.

Art. 5. Limitations, Other Than Real Property.

1-46. Periods prescribed.

Sec. 1-47. Ten years.
1-48. Actions to recover deficiency judgments limited to within one year of foreclosure.
1-49. Seven years.
1-50. Six years.
1-51. Five years.
1-52. Three years.
1-53. Two years.
1-54. One year.
1-55. Six months.
1-56. All other actions, ten years.

SUBCHAPTER III. PARTIES.

Art. 6. Parties.

1-57. Real party in interest; grantees and assignees.
1-58. Suits for penalties.
1-59. Suit for penalty, plaintiff may reply fraud to plea of release.
1-60. Suit on bonds; defendant may plead satisfaction.
1-61. Payment into court of sum due discharges penalty of bonds.
1-62. Action by purchaser under judicial sale.
1-63. Action by executor or trustee.
1-64. Infants, etc., sue by guardian or next friend.
1-65. Infants, etc., defend by guardian ad litem.
1-66. Appointment of guardian ad litem in actions begun by publication.
1-67. Guardian ad litem to file answer.
1-68. Who may be plaintiffs.
1-69. Who may be defendants.
1-70. Joinder of parties; action by or against one for benefit of a class.
1-71. Persons severally liable.
1-72. Persons jointly liable.
1-73. New parties by order of court.
1-74. Abatement of actions.
1-75. Procedure on death of party.

SUBCHAPTER IV. VENUE.

Art. 7. Venue.

1-76. Where subject of action situated.
1-77. Where cause of action arose.
1-78. Official bonds, executors and administrators.
1-79. Domestic corporations.
1-80. Foreign corporations.
1-81. Actions against railroads.
1-82. Venue in all other cases.
1-83. Change of venue.
1-84. Removal for fair trial.
1-85. Affidavits on hearing for removal; when removal ordered.
1-86. Additional jurors from other counties instead of removal.
1-87. Transcript of removal; subsequent proceedings.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

Art. 8. Summons.

1-88. Civil actions commenced by.
1-89. Contents, return, seal.
1-90. Issued to several counties.
CHAPTER 1. CIVIL PROCEDURE

Sec.
1-91. When directed to officer of adjoining county.
1-92. Uniform pleading and practice in inferior courts where summons issued to run outside of county.
1-93. Amount requisite for summons to run outside of county.
1-94. When officer must execute and return.
1-95. Alias and pluries.
1-96. Discontinuance.
1-97. Service by copy.
1-98. Service by publication.
1-99. Manner of publication.
1-100. When service by publication complete.
1-101. Jurisdiction acquired from service.
1-102. Proof of service.
1-103. Voluntary appearance by defendant.
1-104. Personal service on nonresident.
1-105. Service upon non-resident drivers of motor vehicles.
1-106. Record of such processes; delivery of return.
1-107. Alternative method of service upon non-resident defendants.
1-108. Defense after judgment on substituted service.

Art. 9. Prosecution Bonds.
1-109. Plaintiff's, for costs.
1-110. Suit as a pauper; counsel.
1-111. Defendant's, for costs and damages in actions for land.

Art. 10. Joint and Several Debtors.
1-113. Defendants jointly or severally liable.
1-114. Summoned after judgment; defense.
1-115. Pleadings and proceedings same as in action.

Art. 11. Lis Pendens.
1-117. Cross-index of lis pendens.
1-118. Effect on subsequent purchasers.
1-119. Notice void unless action prosecuted.
1-120. Cancellation of notice.

SUBCHAPTER VI. PLEADINGS.

1-121. First pleading and its filing.
1-122. Contents.
1-123. What causes of action may be joined.

1-124. Demurrer and answer.
1-125. When defendant appears and pleads; extension of time; clerk to mail answer to plaintiff.
1-126. Sham and irrelevant defenses.

1-127. Grounds for.
1-128. Must specify grounds.
1-129. Amendment; hearing.
1-130. Appeals.
1-132. Division of actions when misjoinder.
1-133. Grounds not appearing in complaint.
1-134. Objection waived.

Art. 15. Answer.
1-135. Contents.
1-137. Counterclaim.
1-138. Several defenses.
1-139. Contributory negligence pleaded and proved.

Art. 16. Reply.
1-140. Demurrer or reply to answer; where answer contains a counterclaim.
1-141. Content; demurrer to answer.
1-142. Demurrer to reply.

Art. 17. Pleadings, General Provisions.
1-143. Forms of pleading.
1-144. Subscription and verification of pleading.
1-145. Form of verification.
1-146. Verification by agent or attorney.
1-147. Verification by corporation or the state.
1-148. Verification before what officer.
1-149. When verification omitted; use in criminal prosecutions.
1-150. Items of account; bill of particulars.
1-151. Pleadings construed liberally.
1-152. Time for pleading enlarged.
1-153. Irrelevant, redundant, indefinite pleadings.
1-154. Pleading judgments.
1-155. How conditions precedent pleaded.
1-156. How instrument for payment of money pleaded.
1-158. Pleadings in libel and slander.
1-159. Allegations not denied, deemed true.
1-160. Pleading lost, copy used.

Art. 18. Amendments.
1-161. Amendment as of course.
1-162. Pleading over after demurrer.
1-163. Amendments in discretion of court.
1-164. Amendment changing nature of action or relief; effect.
1-165. Unsubstantial defects disregarded.
1-166. Defendant sued in fictitious name; amendment.
1-167. Supplemental pleadings.
1-168. Variance, material and immaterial.
1-169. Total failure of proof.

SUBCHAPTER VII. TRIAL AND ITS INCIDENTS.

Art. 19. Trial.
1-170. Defined.
1-171. Joinder of issue and trial.
1-172. How issue tried.
1-173. Issues of fact.
1-174. Issues of fact before the clerk.
1-175. Continuance before term; affidavit.
1-176. Continuance during term.
1-177. Counter affidavits as to continuance.
1-178. Order of business.
1-179. Separate trials.
1-180. Judge to explain law, but give no opinion on facts.
1-181. Request for instructions.
1-182. Instructions in writing; when to be taken to jury room.
1-183. Motion for nonsuit.
1-184. Waiver of jury trial.
1-185. Findings of fact and conclusions of law by judge.
CHAPTER 1. CIVIL PROCEDURE

Art. 20. Reference.


Art. 22. Verdict.


SUBCHAPTER VIII. JUDGMENT.


Art. 25. Submission of Controversy without Action.


Art. 27. Appeal.
CHAPTER 1. CIVIL PROCEDURE

Sec.
1-274. Duty of clerk on appeal.
1-276. Judge determines entire controversy; may recommit.
1-277. Appeal from superior court judge.
1-278. Interlocutory orders reviewed on appeal from judgment.
1-279. When appeal taken.
1-280. Entry and notice of appeal.
1-281. Appeals from judgments not in term time.
1-282. Case on appeal; statement, service, and return.
1-283. Settlement of case on appeal.
1-284. Clerk to prepare transcript.
1-285. Undertaking on appeal; filing; waiver.
1-286. Justification of sureties.
1-287. Notice of motion to dismiss; new bond or deposit.
1-288. Appeals in forma pauperis; clerk's fees.
1-289. Undertaking to stay execution on money judgment.
1-290. How judgment for personal property stayed.
1-291. How judgment directing conveyance stayed.
1-292. How judgment for real property stayed.
1-293. Docket entry of stay.
1-294. Scope of stay; security limited for fiduciaries.
1-295. Undertaking in one or more instruments; served on appellee.
1-296. Judgment not vacated by stay.
1-297. Judgment on appeal and on undertakings; restitution.
1-298. Procedure after determination of appeal.
1-299. Appeal from justice heard de novo; judgment by default; appeal dismissed.
1-300. Appeal from justice docketed for trial de novo.
1-301. Plaintiff's cost bond on appeal from justice.

SUBCHAPTER X. EXECUTION.

Art. 28. Execution.
1-303. Kinds of; signed by clerk; when sealed.
1-304. Against married woman.
1-305. Clerk to issue, in six weeks; penalty.
1-306. Enforcement as of course.
1-307. Issued from and returned to court of rendition.
1-308. To what counties issued.
1-309. Sale of land under execution.
1-310. When dated and returnable.
1-311. Against the person.
1-312. Rights against property of defendant dying in execution.
1-313. Form of execution.
1-314. Variance between judgment and execution.
1-315. Property liable to sale under execution.
1-316. Sale of trust estates; purchaser's title.
1-317. Sheriff's deed on sale of equity of redemption.
1-318. Forthcoming bond for personal property.
1-319. Procedure on giving bond; subsequent levies.
1-321. Entry of returns on judgment docket; penalty.

Sec.
1-322. Cost of keeping livestock; officer's account.
1-323. Purchaser of defective title; remedy against defendant.
1-324. Costs on execution paid to clerk; penalty.

Art. 29. Execution and Judicial Sales.
1-325. How advertised.
1-326. Advertisement on resale.
1-327. Judicial foreclosure; notice of sale and resale.
1-328. Notice defined.
1-329. Validation of certain sales.
1-330. Notice served on defendant; when on governor and attorney general.
1-331. Sale days; place of sale; ratification of prior sales.
1-332. Sales on other days validated.
1-333. Sale hours.
1-334. Postponement.
1-335. Certain sales validated.
1-336. Advertisement as to personal property.
1-337. Penalty for selling contrary to law.
1-338. Officer's return of no sale for want of bidders; penalty.
1-339. Officer to prepare deed for property sold.

Art. 30. Betterments.
1-340. Petition by claimant; execution suspended; issues found.
1-342. Value of improvements estimated.
1-343. Improvements to balance rents.
1-344. Verdict, judgment, and lien.
1-345. Life tenant recovers from remainderman.
1-346. Value of premises without improvements.
1-347. Plaintiff's election that defendant take premises.
1-348. Payment made to court; land sold on default.
1-349. Procedure where plaintiff is under disability.
1-350. Defendant evicted, may recover from plaintiff.
1-351. Not applicable to suit by mortgagee.

Art. 31. Supplemental Proceedings.
1-352. Execution unsatisfied, debtor ordered to answer.
1-353. Property withheld from execution; proceedings.
1-354. Proceedings against joint debtors.
1-355. Debtor leaving state, or concealing himself, arrested; bond.
1-356. Examination of parties and witnesses.
1-357. Incriminating answers not privileged; not used in criminal proceedings.
1-358. Disposition of property forbidden.
1-359. Debtors of judgment debtor may satisfy execution.
1-360. Debtors of judgment debtor, summoned.
1-361. Where proceedings instituted and defendant examined.
1-362. Debtor's property ordered sold.
1-363. Receiver appointed.
1-364. Filing and record of appointment; property vests in receiver.
1-365. Where order of appointment recorded.
1-366. Receiver to sue debtors of judgment debtor.
CHAPTER 1. CIVIL PROCEDURE

Sec. 1-367. Reference.
1-368. Disobedience of orders punished as for contempt.

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

Art. 32. Property Exempt from Execution.
1-369. Property exempted.
1-370. Conveyed homestead not exempt.
1-371. Sheriff to summon and swear appraisers.
1-372. Duty of appraisers; proceedings on return.
1-373. Reallotment for increase of value.
1-374. Appeal as to reallocation.
1-375. Levy on excess; return of officer.
1-376. When appraisers select homestead.
1-377. Homestead in tracts not contiguous.
1-378. Personal property appraised on demand.
1-379. Appraiser’s oath and fees.
1-380. Returns registered.
1-381. Exceptions to valuation and allotment; procedure.
1-382. Revaluation demanded; jury verdict; commissioners; report.
1-383. Undertaking of objector.
1-384. Set aside for fraud, or irregularity.
1-385. Return registered; original or copy evidence.
1-386. Allotted on petition of owner.
1-387. Advertisement of petition; time of hearing.
1-388. Exceptions, when allotted on petition.
1-389. Allotted to widow or minor children on death of homesteader.
1-390. Liability of officer as to allotment, return and levy.
1-391. Liability of officer, appraiser, or assessor, for conspiracy or fraud.
1-392. Forms.

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

Art. 33. Special Proceedings.
1-393. Chapter applicable to special proceedings.
1-394. Contested special proceedings; commencement; summons.
1-395. Return of summons.
1-396. When complaint filed.
1-397. [Repealed.]
1-398. Filing time enlarged.
1-399. Defenses pleaded; transferred to civil issue; amendments.
1-400. Ex parte; commenced by petition.
1-401. Clerk acts summarily; authority from non-resident.
1-402. Judge approves when petitioner is infant.
1-403. Orders signed by judge.
1-404. Reports of commissioners and jurors.
1-405. No report set aside for trivial defect.
1-406. Commissioner of sale to account in sixty days.
1-407. Commissioners selling land for reinvestment, etc., to give bond.
1-408. Action in which clerk may allow fees of commissioners; fees taxed as costs.

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

Art. 34. Arrest and Bail.
1-409. Arrest only as herein prescribed.
1-410. In what cases arrest allowed.
1-411. Order and affidavit.
1-412. Undertaking before order.
1-413. Issuance and form of order.
1-414. Copies of affidavit and order to defendant.
1-415. Execution of order.
1-416. Vacation of order for failure to serve.
1-417. Motion to vacate order; jury trial.
1-418. Counter affidavits by plaintiff.
1-419. How defendant discharged.
1-420. Defendant’s undertaking.
1-421. Defendant’s undertaking delivered to clerk; exception.
1-422. Notice of justification; new bail.
1-423. Qualifications of bail.
1-424. Justification of bail.
1-425. Allowance of bail.
1-426. Deposit in lieu of bail.
1-427. Deposit paid into court; liability on sheriff’s bond.
1-428. Bail substituted for deposit.
1-429. Deposit applied to plaintiff’s judgment.
1-430. Defendant in jail, sheriff may take bail.
1-431. When sheriff liable as bail.
1-432. Action on sheriff’s bond.
1-433. Bail exonerated.
1-434. Surrender of defendant.
1-435. Bail may arrest defendant.
1-436. Proceedings against bail by motion.
1-437. Liability of bail to sheriff.
1-438. When bail to pay costs.
1-439. Bail not discharged by amendment.

Art. 35. Attachment.
1-440. In what actions attachment granted.
1-441. Affidavit must show what.
1-442. Affidavit to be filed.
1-443. By whom granted.
1-444. Time of issuance; service of summons.
1-446. Validity of undertaking.
1-447. To whom warrant directed; duty of officer.
1-448. Notice; service and content.
1-449. Execution, levy, and lien.
1-450. Return of warrant by sheriff.
1-451. When granted by justice of peace.
1-452. Publication in justice’s court.
1-453. Justice’s attachment against land.
1-454. Sale of attached property pending litigation.
1-455. Replevy by defendant; undertaking.
1-456. Defendant may apply for discharge and delivery of property.
1-457. Defendant’s undertaking.
1-458. All property liable to attachment.
1-459. Levy on intangible property.
1-460. Certificate of defendant’s interest to be furnished to sheriff.
1-461. Proceedings against garnishee.
1-463. Garnishee denying debt; issue tried.
1-464. Property with garnishee valued; garnishee exonerated.
1-465. Conditional judgment against garnishee.
1-466. Satisfaction of judgment.
1-467. Plaintiff may sue on defendant’s bond.
1-468. On defendant’s recovery, bonds and property delivered to him.
1-469. Motion to vacate or increase security.
CHAPTER 1. CIVIL PROCEDURE

Sec.
1-470. Exceptions to and justification of sureties.
1-471. Intervention.

Art. 36. Claim and Delivery.
1-472. Claim for delivery of personal property.
1-473. Affidavit and requisites.
1-474. Order of seizure and delivery to plaintiff.
1-475. Plaintiff's undertaking.
1-476. Sheriff's duties.
1-477. Exceptions to undertaking; liability of sheriff.
1-478. Defendant's undertaking for replevy.
1-479. Qualification and justification of defendant's sureties.
1-480. Property concealed in buildings.
1-481. Care and delivery of seized property.
1-482. Property claimed by third person; proceedings.
1-483. Delivery of property to intervener.
1-484. Sheriff to return papers in ten days.

Art. 37. Injunction.
1-485. When temporary injunction issued.
1-486. When solvent defendant restrained.
1-487. Timber lands, trial of title to.
1-488. When timber may be cut.
1-489. Time of issuing.
1-490. Not issued for longer than twenty days without notice.
1-491. Issued after answer, only on notice.
1-492. Order to show cause.
1-493. What judges have jurisdiction.
1-495. Stipulation as to judge to hear.
1-496. Undertaking.
1-497. Damages on dissolution.
1-498. Issued without notice; application to vacate.
1-499. When opposing affidavits admitted.
1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.

Art. 38. Receivers.
1-501. What judge appoints.
1-502. In what cases appointed.
1-503. Appointment refused on bond being given.
1-504. Receiver's bond.
1-505. Sale of property in hands of receiver.
1-506. Confirmation of sales outside county of action; notice to creditors.
1-507. Validation of sales made outside county of action.

Art. 39. Deposit or Delivery of Money or Other Property.
1-508. Ordered paid into court.
1-509. Ordered seized by sheriff.
1-510. Defendant ordered to satisfy admitted sum.

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

Art. 40. Mandamus.
1-511. Begun by summons and verified complaint.
1-512. For money demand.
1-513. For other relief returnable in vacation; issues of fact.

Art. 41. Quo Warranto.
1-514. Writs of sci. fa. and quo warranto abolished.
1-515. Action by attorney-general.

Sec.
1-516. Action by private person with leave.
1-517. Solvent sureties required.
1-518. Leave withdrawn and action dismissed for insufficient bond.
1-519. Arrest and bail of defendant usurping office.
1-520. Several claims tried in one action.
1-521. Trials expedited.
1-522. Time for bringing action.
1-523. Defendant's undertaking before answer.
1-524. Possession of office not disturbed pending trial.
1-525. Judgment by default and inquiry on failure of defendant to give bond.
1-526. Service of summons and complaint.
1-527. Judgment in such actions.
1-528. Mandamus to aid relator.
1-529. Appeal; bonds of parties.
1-530. Relator inducted into office; duty.
1-531. Refusal to surrender official papers misdemeanors.
1-532. Action to recover property forfeited to state.

Art. 42. Waste.
1-533. Remedy and judgment.
1-534. For and against whom action lies.
1-535. Tenant in possession liable.
1-536. Action by tenant against cotenant.
1-537. Action by heirs.
1-538. Judgment for treble damages and possession.

Art. 43. Nuisance.
1-539. Remedy for nuisance.

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

Art. 44. Compromise.
1-540. By agreement receipt of less sum is discharge.
1-541. Tender of judgment.
1-542. Conditional tender of judgment for damages.
1-543. Disclaimer of title in trespass; tender of judgment.

Art. 45. Arbitration and Award.
1-544. Agreement for arbitration.
1-545. Statement of questions in controversy.
1-546. "Court" defined.
1-547. Cases where court may appoint arbitrator; number of arbitrators.
1-548. Application in writing; hearing.
1-549. Notice of time and place of hearing.
1-551. Award within sixty days.
1-552. Representation before arbitrators.
1-553. Requirement of attendance of witnesses.
1-554. Depositions.
1-555. Orders for preservation of property.
1-556. Questions of law submitted to court; form of award.
1-557. Award in writing and signed by arbitrators.
1-558. Time for application for confirmation.
1-559. Order vacating award.
1-560. Order modifying or correcting award.
1-561. Notice of motion to vacate, modify or correct award within three months.
1-562. Judgment or decree entered.
of this section and sec. 1-3 the terms of section 1-64, as to
proceeding, notwithstanding this section. In re Cook, 218
for collection of legacies and distributive shares, see § 28-
mon v. Hollomon, 125 N. C. 29, 33, 34 S. E. 99.

SUBCHAPTER I. DEFINITIONS AND GEN-
ERAL PROVISIONS.

Art. 1. Definitions.
§ 1-1. Remedies.—Remedies in the courts of justice are divided into—
1. Actions.
2. Special proceedings.

Application of Sec. 1-64 to All Civil Remedies.—By virtue of this section and sec. 1-3 the terms of section 1-64, as to actions by guardians, embrace all civil remedies. Hollo-
mon v. Harrington, 125 N. C. 29, 33, 34 S. E. 99.

Admission of Patient to Hospital for Insane.—A proceed-
ing in accordance with the provisions of § 122-35 et seq., in
strictness, seems to be neither a civil action nor a special proceed-
ing, notwithstanding this section. In re Cook, 218
N. C. 384, 11 S. E. (2d) 142.

§ 1-2. Actions.—An action is an ordinary pro-
cceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense. (Rev., s. 346; Code, s. 125; C. C. P., s. 1; C. S. 391.)

Art. 47. Motions and Orders.
§ 1-577. Definition of order.
§ 1-578. Motions; when and where made.
§ 1-579. Affidavit for or against, compelled.
§ 1-580. Motions determined in ten days.
§ 1-581. Notice of motion.
§ 1-582. Orders without notice, vacated.

Art. 1. Definitions.
§ 1-583. Orders by clerk on motion to remove; right
of appeal; notice.
§ 1-584. Motions to remove to federal court; notice.

Art. 48. Notices.
§ 1-585. Form and service.
§ 1-586. Service upon attorney.
§ 1-587. Service upon a party.
§ 1-588. Service by publication.
§ 1-589. Service by telephone or registered mail on
witnesses and jurors.
§ 1-590. Subpoena, service and signature.
§ 1-591. Application of this article.
§ 1-592. Officer’s return evidence of service.

Art. 49. Time.
§ 1-593. How computed.
§ 1-594. Computation in publication.

Art. 50. General Provisions as to Legal
Advertising.
§ 1-595. Advertisement of public sales.
§ 1-596. Charges for legal advertising.
§ 1-597. Regulations for newspaper publication of
legal notices, advertisements, etc.
§ 1-598. Annual statements filed with clerk; viola-
tion a misdemeanor.
§ 1-599. Application of two preceding sections.

Under this test, proceedings in bastardy (State v. Mc-
Intosh, 64 N. C. 690), or a petition by an administrator to
sell lands for the payments of debts (Hyman v. Jarnigan,
65 N. C. 96; Badger v. Jones, 66 N. C. 305), classify as
special proceedings.

In Woodley v. Gilliam, 64 N. C. 649, Mr. Justice Rodman
expressed the opinion that a better test of a special pro-
cceeding is whether or not existing statutes direct a pro-
cedure different from the ordinary. He stated, however,
that in practice the results of applying the two tests
would almost always coincide, although he thought the
one suggested by him the most convenient. And the
court held in Sumner v. Millir, 64 N. C. 688, 689, Mr.
Justice Dick delivering the opinion, that proceedings to
obtain damages for injuries to land caused by the erection
of a mill are special proceedings because made so by the
statute creating a statutory remedy.

Under either rule an action to recover the possession of
land, as, for example, ejectment, is not a special proceed-
ing. Woodley v. Gilliam, 64 N. C. 649. Nor is mandamus
to try title to an office, notwithstanding that it is not an
ordinary civil action. State v. Tate, 66 N. C. 231.

Section quoted in Jacoby Hdw. Co. v. Jones Cotton Co.,
188 N. C. 465, 124 S. E. 725.

§ 1-4. Kinds of actions.—Actions are of two
kinds—
1. Civil.
2. Criminal.

(Rev., s. 349; Code, s. 128; C. C. P., s. 4; C. S. 394.)

§ 1-5. Criminal action.—A criminal action is—
1. An action prosecuted by the state as a party,
against a person charged with a public offense,
for the punishment thereof.
2. An action prosecuted by the state, at the
instance of an individual, to prevent an appre-
hended crime against his person or property.
(Rev., s. 350; Code, s. 129; C. C. P., s. 5; Const.,
Art. IV, s. 1; C. S. 355.)

Editor’s Note.—This section worked a significant
change in the law of the state with its enactment in the
Code of Civil Procedure. Prior to that time “all suits
prosecuted in the name of the state were not necessarily
criminal suits as distinguished from civil suits—the true test

[ 87 ]
being that when the proceeding was by indictment the suit was criminal, and when by action or other mode, though in the name of the state, it was a civil suit.” State v. Pate, 44 N. C. 244. Hence a warrant to keep the peace was a civil action though brought in the name of the state, at law and equity remain separate and distinct, and it is no longer suited for different forms of action as they used to be, and pleadings are not suited for different forms of action as they used to be, but are all suited to one form, whether the subject of the action be a tort or a contract. Bittig v. Thaxton, 72 N. C. 541, 549.

§ 1-9. One form of action. — The distinction between actions at law and suits in equity and the forms of such actions and suits are abolished, and there is but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which is denominated a civil action. (Rev., s. 354; Code, s. 131; C. C. P., s. 12; Const., Art. IV, s. 1; C. S. 399.)

Effect upon Substantive Law—Torts. — Although there is but one form of action there are torts and contracts just as there were prior to the C. C. P., but there are not several forms of action as there used to be, and pleadings are not suited for different forms of action as they used to be, but are all suited to one form, whether the subject of the action be a tort or a contract. Bittig v. Thaxton, 72 N. C. 541, 549.

§ 1-8. Remedies not merged. — Where the violation of a right admits both of a civil and a criminal remedy the right to prosecute the one is not merged in the other. (Rev., s. 353; Code, s. 131; C. C. P., s. 7; C. S. 398.) Summons Served upon Person in Jail. — In view of this section it was proper to serve a summons and order of arrest upon the defendant while confined in jail upon failure to give appearance bond to answer for a secret criminal bill. White v. Underwood, 125 N. C. 25, 26, 34 S. E. 104.


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§ 1-9. Legal and Equitable Principles. — Although one tribunal deals out both law and equity, the principles of law and equity remain separate and distinct, and it is just as important now as ever before to keep them separate. Jordan v. Lanier, 73 N. C. 90, 92.

But it is true that having but one tribunal causes the principles of law and equity to run into each other to some extent at least. For an illustration, see Jordan v. Lanier, 73 N. C. 90, 92.

The defendant's right of action by his counterclaim upon his unendorsed bond is still an equitable claim notwithstanding this section. Kiff v. Weaver, 94 N. C. 274, 279. Any defense either legal or equitable may be set up by the defendant in an action by the endorsee upon a non-negotiable note. Thompson v. Osborne, 152 N. C. 467, 67 S. E. 1029.

Common Law Forms Immaterial. — Since the old technical distinctions in the forms of actions were abolished by this section, it is immaterial whether the plaintiff's
remedy under the old practice was trespass or case. 
Snedden v. Harris, 109 N. C. 349, 357, 13 S. E. 920.
An exception to a complaint that it is for money had and received and as such cannot be maintained unless the money has been actually received by the defendant is not reasonable under this section regarding the common-law practice. Staton v. Webb, 137 N. C. 35, 38, 49 S. E. 881.
Where parties are brought into court by summons, the plaintiff is the party alleging his claim, provable by any cause of action, or an equitable cause of action, or can combine them as he may elect. Wilson v. Waldo, 221 Fed. 655, 507.
Cited in Riddick v. Davis, 220 N. C. 120, 16 S. E. (2d) 625.

§ 1-10. Plaintiff and defendant.—In civil actions the party complaining is the plaintiff, and the adverse party the defendant. (Rev., s. 355; Code, s. 134; C. C. P. s. 13; C. S. 400.)

§ 1-11. How party may appear.—A party may appear either in person or by attorney in actions or proceedings in which he is interested. (Rev., s. 359; Code, s. 109; C. C. P., s. 423; C. S. 401.)

This right is alternative. A party has no right to appear both by himself and by counsel. Nor should he be permitted to ex parte gratia to do so. Abernethy v. Burns, 206 N. C. 370, 173 S. E. 899. See McClamroch v. Colonial Ice Co., 217 N. C. 106, 6 S. E. (2d) 850.

§ 1-12. Feigned issues abolished and substituted.—Feigned issues are abolished, and instead thereof, in the cases where the power formerly existed to order a feigned issue, or when a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made by the judge, stating distinctly and plainly the question of fact to be tried; and this order is the only authority necessary for a trial. (Rev., s. 357; Code, s. 135; C. C. P., s. 15; C. S. 403.)

Benefit of Feigned Issue Preserved. — See Harkey v. Houston, 65 N. C. 137.

Effect upon Proper Parties. — Since feigned issues in seduced cases have been abolished, the woman and not her father is the real party in interest if she be of age. Hood v. Sudderith, 111 N. C. 215, 16 S. E. 397.

Effect of Carrying Feigned Issue to Supreme Court. — When an action upon a feigned issue is carried to the Supreme Court it will be dismissed. Blake v. Askew, 76 N. C. 313.

§ 1-13. Jurisdiction of clerk.—The clerk of the superior court has jurisdiction to hear and decide all questions of fact and law arising in the course of the proceedings and in such cases the clerk continued to exercise the power hereby conferred, upon, except as such authority may have been modified or affected by subsequent statutes. Jones v. Desern, 94 N. C. 32, 33; Warden v. McKinnon, 94 N. C. 378, 387; Brittain v. Mull, 91 N. C. 498, 562.

With the passage of the Crisp Act this section is in full force and effect and should be construed in connection with section 1-89 where the terms of the recent act will be found. See embellishment of the Crisp Act in Battle's revisal, 172 N. C. 391, 173 S. E. 123.

Constitutionality of Suspension Act.—The constitutionality of the suspension act was attacked in McAdoo v. Benbow, 63 N. C. 461, upon the ground that the act required the clerk to hear and decide questions of practice and procedure, but it was held that the constitutional provision did not create such power as was necessary to carry out the purposes of the act. Brittain v. Mull, 91 N. C. 498; Wharton v. Warden v. McKinnon, 94 N. C. 378, 387; Brittain v. Mull, 91 N. C. 498, 562.

As was indicated in McAdoo v. Benbow, 63 N. C. 461, 464, the jurisdiction is conferred upon the court and not upon the clerk. He is merely an instrument in performing his functions. Thus there is no divided jurisdiction between the clerk and judge, but they both function as officials of the same court exercising but one jurisdiction. Jones v. Desern, 94 N. C. 32, 33.

Upon appeal from the rulings of the clerk, in vacation, upon procedural motions in pending civil actions, the jurisdiction of the superior court is not exclusive. Under such circumstances, the clerk should proceed with due regard and make decisions of questions of law, with which a party should be dissatisfied, such party might appeal, and in this manner the holding of the Judge would become that of the Court. It was the duty of the Clerk to make all proper orders of reference, as well as other orders and judgments in the course of the proceeding, except in some exceptional cases, otherwise expressly provided for. Brittain v. Mull, 91 N. C. 498; Wharton v. Wilkerson, 92 N. C. 407; Lottin v. Rouse, 94 N. C. 508, 509.

The Court in term, should not do more than to direct the Clerk to perfect the pleadings and to allow or disallow amendments in pleadings when proper; and make decisions of questions of law, with which a party should be dissatisfied, such party might appeal, and in this manner the holding of the Judge would become that of the Court. It was the duty of the Judge to make all proper orders of reference, as well as other orders and judgments in the course of the proceeding. If he should err in such a proceeding, an appeal might be taken as indicated above. Lottin v. Rouse, 94 N. C. 508, 510.

It was not the duty of the Judge in term, after the issues were tried—there being no question of law to be decided, an amendment according to law. If the Clerk should proceed in the course of the proceeding. If he should err in such a proceeding, an appeal might be taken as indicated above. Lottin v. Rouse, 94 N. C. 508, 510.

Same.—To Grant Equitable Relief.—The C. C. P. does not give the clerk power to make an order granting affirmative equitable relief. Equitable relief must be set up in the an-
We are not authorized to decide the questions of law prematurely, the Judge has power to allow amendments, or he may order the Clerk, acting for the Court, to decide whatever questions may arise, and to make all proper orders. Brittain v. Mull, 94 N. C. 595, 599.

Amendments after Joiner of Issues.—Where, in special proceedings, the pleadings are made up before the Clerk, and after joiner of issues and the introduction of evidence, the Court, in term, the Judge has power to allow amendments, or he may stay the trial and remand the papers to the Clerk, in order that he may consider a motion to amend. Lottin v. Rouse, 94 N. C. 508.

Same—Remanding Order Interlocutory.—An order remanding the papers to the Clerk, in order that he may consider a motion to amend the pleadings, to the end that an account may be taken, is interlocutory and does not impair a substantial right, and cannot be appealed from. Lottin v. Rouse, 94 N. C. 508.

Application to Special Proceedings.—See the editor's note to this section. Proceedings to obtain partition, dower and the like are special preceedings, Jones v. Desern, 94 N. C. 32, 35. So is a proceeding by creditors to compel an administrator to an account and payment of the debts of the estate. Brittain v. Mull, 94 N. C. 496; Warden v. McKinnon, 94 N. C. 378, 387.

And the granting of a warrant of attachment was a special proceeding. Cushing v. Styron, 104 N. C. 338, 339, 10 S. E. 258.

Stated in Ex parte Wilson, 222 N. C. 99, 22 S. E. (2d) 262 (con. op.).

SUBCHAPTER II. LIMITATIONS.

Art. 3. Limitations, General Provisions.

§ 1-14. When action commenced.—An action is commenced as to each defendant when the summons is issued against him. (Rev., s. 359; Code, s. 161; C. C. P., s. 40; C. S. 404.)

When Statute Adopted.—The statutes of limitation appearing in the following sections did not become effective until the adoption of the C. C. P.; prior to that time the statute of presumptions was in force. Crawford v. McLellan, 262 (con. op.).

The statutes prescribing limitations in the code displace those contained in the Revised Code. Lynn v. Lowe, 88 N. C. 266.

Subchapter Exclusive. — All civil actions must be commenced within the periods prescribed in this subchapter, “except where in special cases a different limitation is prescribed by statute.” Woody v. Brooks, 102 N. C. 334, 340, 9 S. E. 294.

Modes of Commencing Action.—There are only two ways by which a civil action may be commenced: 1. By issuing a summons; 2. By submitting a controversy without action. When the former method is resorted to the action is commenced when the summons is issued, and not until that is done. But if the defendant sees proper to do so he may appear without a summons and thereby waive its issuance. McClure v. Fellows, 131 N. C. 509, 42 S. E. 951.

Any form of action or special proceeding in this State must always be commenced by summons or attachment. McClure v. Fellows, 131 N. C. 509, 42 S. E. 951.

What Constitutes Issuing of Summons.—The word “issue,” means going out of the hands of the clerk, expressed or implied, to be delivered to the Sheriff for service. If the clerk delivers it to the Sheriff to be served, it is then issued. If the Clerk delivers it to the Sheriff, it is issued as a pleading. A pleading is issued when the plaintiff or some one else, to be delivered by him to the Sheriff, this is an issue of the summons; or, as is often the case, if the summons is filled out by the attorney of plaintiff, and put in the hands of the Sheriff, the Sheriff is in effect impliedly consigning the same to the Sheriff as a pleading. But unless the Sheriff actually takes it, and puts it in the hands of the Sheriff, and the Sheriff actually takes it, and puts it in the hands of the Sheriff, it is not an issue of the summons. Nor would it be the fact that a summons was filled up and held by the clerk for a prosecution bond constitute the issuing of a summons, until it is presented to, given or at least until it goes out by the consent of the clerk for the purpose of being served on the defendant. Webster v. Sharpe, 116 N. C. 466, 471, 21 S. E. 912; Pettigrew v. McColin, 105 N. C. 472, 8 S. E. 701.

Notwithstanding the omission of the signature of the clerk, or the omission of the seal, it has been held sufficient where the clerk actually issued it, but where the clerk gave a blank summons to counsel who filled it out without either the seal or the signature of the clerk, it was held without giving the clerk an opportunity to pass upon the sufficiency of the undertaking, the summons was too defective to constitute a commencement. Redmond v. Mullenaux, 113 N. C. 505, 511, 18 S. E. 708.

Effect of Defective Summons.—If a paper bear internal evidence of its official origin, and of the purpose for which it was issued, it is issued to the Sheriff, or the Clerk, or the Sheriff, and it is sufficient. It may be amended to conform to the requirements of a perfect summons, and be considered as issued in the first instance. But, unless there is something upon the face of the paper which shows it to be other than an official paper, it is not a summons, but no summons at all, and cannot be considered the commencement of an action. Redmond v. Mullenaux, 113 N. C. 505, 510, 18 S. E. 708.

Issuance Does Not Confer Jurisdiction.—While an action is commenced as to each defendant when the summons is issued against him, jurisdiction of the court and of parties litigant can be acquired only by a legal service of process, unless there is an acceptance of service or a general appearance, actual or constructive. Hatch v. Alamance Co., 103 N. C. 617, 112 S. E. 529. Bernhardt v. Brown, 118 N. C. 324, 13 S. E. 258; Flournoy, 118 N. C. 299; 60 S. E. 978; Warwick v. Reynolds, & Co., 114 N. C. 606, 66 S. E. 657, 21 R. C. L. 1135.

Cited in Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 436, 139 A. L. R. 1438 (dis. op.).

§ 1-15. Statute runs from accrual of action; pleading.—Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited can be taken advantage of by answer. (Rev, s. 360; Code, s. 378; C. C. P., s. 17; C. S. 404.)

Section not Statute of Presumptions.—Now we have no statute of presumptions. This section prescribes a statute of limitations only. Helm Co. v. Griffin, 112 N. C. 356, 355, 16 S. E. 1023.

This section applies to actions wherein formal pleadings are required to be filed and not to proceedings in the nature of a controversy without action upon an agreed statement of facts for the distribution of funds arising from a foreclosure sale in re an insolvent, or a proceeding or a case in liquidation of the estate of a deceased person. stabilization of assets, administration, bankruptcy, or the like. Facts will suffice. Pipes v. Lum. Co., 112 N. C. 612, 44 S. E. 114.

It is for the judge to the jury where the statute of limitations is not pleaded, that the plaintiff can not recover. Pogram v. Stolz, 67 N. C. 144, 146.

Manner of Pleading.—It was unquestionably true under the former system, where an action was commenced by the statement of a claim or cause of action the statute now requires it to be pleaded, and to be taken advantage of by answer, by the statute. Albertson v. Terry, 109 N. C. 8, 10, 13 S. E. 713; King v. Powell, 127 N. C. 10, 11, 37 S. E. 62. But facts will suffice. Guthrie v. Bank, 107 N. C. 337, 12 S. E. 204; Randolph v. Randolph, 107 N. C. 506, 12 S. E. 374; and this is required by the statute. Albertson v. Terry, 109 N. C. 8, 10, 13 S. E. 713; King v. Powell, 127 N. C. 10, 11, 37 S. E. 62. But facts will suffice. Pipes v. Lum. Co., 112 N. C. 612, 44 S. E. 114.

It is for the judge to instruct the jury where the statute of limitations is not pleaded that the plaintiff can not recover. Pogram v. Stolz, 67 N. C. 144, 146.
§ 1-16. Defenses pleaded by insane party.—On the trial of any action or special proceeding to which an insane person is a party, such insane person is deemed to have pleaded specially any defense, and shall on trial have the benefit of any defense, whether pleaded or not, that might have been made for him by his guardian or attorney under the provisions of this chapter. The court, at any time before the action or proceeding is finally disposed of, may order the bringing in, by proper notice, of one or more of the near relatives or friends of the insane person, and may make such other order as it deems necessary for his proper defense. (Rev., s. 361; 1889, c. 89, s. 2; C. S. 406.)

Applicable against State Institutions.—The superintendent of the State Hospital cannot recover compensation against a guardian of insane person for the maintenance of his ward for more than one year, if the ward has not been committed to the State Hospital. (Rev., s. 367; C. S. 406.)

Hearing of Family.—If there was ever a time when the facts concerning the person ought to be heard, it would seem that a petition for the appointment of a receiver for an insane person confined in the state asylum is one. In re Hybart, 119 N. C. 395, 25 S. E. 963; In re Farmers, etc., Bank v. Cramer, 127 N. C. 386, 392, 122 S. E. 1.

§ 1-17. Disabilities.—A person entitled to commence an action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, who is at the time the cause of action accrued either:
  1. Within the age of twenty-one years; or
  2. Insane; or
  3. Imprisoned on a criminal charge, or in execution under sentence for a criminal offense; may bring his action within the times 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; or in no other case. (Rev., s. 362; Code, ss. 148, 183; C. C. P., ss. 27, 142; 1899, c. 78; C. S. 407.)

Editor's Note.—In 1899 the legislature struck the provisions which made coverture a disability on pari with the others enumerated in this section. See Weathers v. Borders, 124 N. C. 610, 617, 32 S. E. 881; Berry v. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278.

But the statute provided that the time elapsing before its passage can not be counted against a married woman in actions of ejectment, and in other actions it should not apply to actions pending at its passage. LaFerri v. Young, 125 N. C. 296, 297, 300, 34 S. E. 444; Swift v. Dixon, 131 N. C. 42, 42 S. E. 458.

Applicable to Defects of Other Sections. — The statute of limitations does not run against an idiot by reason of the disability in that case. Outland v. Outland, 118 N. C. 138, 23 S. E. 975.

Detention in Asylum by Defendant's Wrongful Act.—Where plaintiff's cause of action was based upon the alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum, defendant will not be allowed to take advantage of the section. LaFerri v. Young, 125 N. C. 296, 297, 300, 34 S. E. 444; Outland v. Outland, 118 N. C. 138, 23 S. E. 975.

Former Law Unchanged. — There is nothing in this section which changes the law as it formerly existed. Frederick v. Williams, 103 N. C. 189, 9 S. E. 298.

Section Relates to True Title. — Adverse possession relates only to the true title, and the exemptions in the statutes as to those under disability can apply only to one having by virtue of his title the right to sue. Berry v. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278.

Effect of Defects of Other Sections. — The criticism to which section 1-35 may be subjected in misrepresenting other applicable sections cannot affect the application of this section. Clayton v. Rose, 87 N. C. 106, 68 S. E. 452.

Three Year Period Enforced. — In case of infancy, even after the expiration of the time of the limitation, an action may be brought within three years after full age. Campbell v. Cramer, 95 N. C. 156, 157; and if not brought within that time the action is barred. Clendenlin v. Clendenlin, 181 N. C. 465, 472, 107 S. E. 438. Dissenting Opinion. Seven years' adverse possession under color, is no bar to an action of ejectment, where the person entitled to commence the same is an infant at the time the title to the land descended to him, and suits within three years next after full age. Clayton v. Rose, 87 N. C. 106.

If land is an in issue, or for such length of time as would 'ar his recovery if sane, such insane person, or those claiming under him, must come in an answer and within the disabilities of insanity removed, else their rights to recovery will be barred. Warlick v. Plonk, 103 N. C. 81, 9 S. E. 190.

Effect of Disability Continuing Through Life. — If the disability continued an entire life, or for an indefinite time, and afterwards sufficient to complete the prescribed time of seven years, the title would be perfected in the occupant, subordinate only to a right in the heir to sue for the recovery of the land. While the period of three years next after death. The running of the statute against the action and to consummate the title would be concurrent after the death of the grantor. Ellington v. Ellington, 103 N. C. 54, 57, 9 S. E. 208.

Effect of Guardian Having Right to Sue. — Culp v. Lee, 109 N. C. 675, 678, 14 S. E. 74, has no application to actions [91]
for the recovery of reality when the legal title is in the person under disability. The court held that the distributee was prima facie entitled to the title as guardian, because he had been exposed to an action by him for the full period prescribed by the statute, was protected by the lapse of time. Cross v. Craven, 120 N. C. 331, 332, 26 S. E. 940. The execution, being a judgment that the distributee has the authority and duty to bring on behalf of his ward is the failure of the ward, entailing the same legal consequences with respect to the bar of the statute of limitations as if the grantor to make them, and under which the issuance of Article X, section 6, of our State Constitution, and under color, the coverture of the plaintiff will not avail him to bar a suit to cancel deeds because of the mental incapacity of the grantor to make them, which is the failure of the ward, entailing the same legal consequences with respect to the bar of the statute of limitations as if the grantor had a legal existence. Other sections are §§ 52-1 et seq. See 2 N. C. L. S. 566, 4180. E. 9.

§ 1-18. Disappearance of Title.—Where the final account has been instituted, the time of the running of the statute begins to run from the arrival of the ward at age. Self v. Shugart, 135 N. C. 185, 187, 47 S. E. 484.

§ 1-19. Cumulative Disabilities.—When two or more disabilities coexist at the time the right of action accrues or when one disability supervenes upon an existing one, the limitation does not attach until they all are removed. (Rev., s. 364; Code, ss. 119, 170; C. C. P., ss. 28, 49; C. S. 409.)

Editor's Note.—By the phraseology of this section, it is evident that cumulative disabilities will only prevent the running of a statute before it has started. Any number of disabilities may coexist at the time of the accrual of a cause of action, and defendant denies the allegation of nonresidence, in the absence of evidence by plaintiff in support of the allegation of nonresidence. This section, as a general rule statutes of this character apply to actions pending at the time they take effect provided the actions have not been barred by a prior statute of limitations. For the principle applied see Carter v. Reaves, 167 N. C. 131, 83 S. E. 248. It applies also in the case of insanity, see note under section 1-16; and applies formerly in the case of coverture, see note under sec. 1-18.

§ 1-20. Disability must exist when right of action accrues.—No person may avail himself of a disability except as authorized in § 1-19, unless it existed when his right of action accrued. (Rev., s. 365; Code, s. 169; C. C. P., s. 48; C. S. 410.)

Running of Statute Cannot Be Stopped.—If the statute of limitations commences to run nothing stops it. When it begins to run against the ancestor, it continues to run against the heir, although the heir is under disability when the descent is cast. Frederick v. Williams, 103 N. C. 189, 9 S. E. 298. See Clendenin v. Clendenin, 181 N. C. 465, 472; 107 S. E. 498; Asbury v. Fair, 111 N. C. 251, 16 S. E. 467.

§ 1-21. Defendant out of state; when action begun or judgment enforced.—If, when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the state, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this state, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and re- sides out of this state, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action, or the enforcement of the judgment. (Rev., s. 366; Code, s. 162; C. C. P., s. 41; 1881, c. 258, ss. 1, 2; C. S. 411.)

Retroactive Effect.—As a general rule statutes of this character apply to actions pending at the time they take effect provided the actions have not been barred by a prior statute of limitations. See Cross v. Brown, 51 N. C. 130.

The general purpose of this section, taken in connection with the statute of limitation, is to give the person having an accrued cause of action, or judgment, as prescribed, the opportunity substantially during the whole of the lapse of the time against him to bring his action or enforce his judgment. Armfield v. Moore, 97 N. C. 34, 37, 2 S. E. 467.

Nonsuit in Absence of Supporting Evidence.—Where plaintiff resists under this section defendant's plea of the statute of limitations solely on the ground that defendant was out of the state; plaintiff may not rely on the time he has been out of the state, but must rely on the time against him to bring his action or enforce his judgment. Armfield v. Moore, 97 N. C. 34, 37, 2 S. E. 467.

The words "any person," are employed to designate the person to be affected and embraced by the section, and are very comprehensive, and there is nothing in its scope or purpose that excludes nonresidents. Armfield v. Moore, 97 N. C. 34, 37, 2 S. E. 467.

"The times herein limited" means, and must mean, the time prescribed elsewhere in the Code, or in statutes amended or passed as substitutes therefor. The plain intent of the statute is to put nonresidents on the same footing as residents, and to protect them from action unless they have been for two years exposed to service of summons. Armfield v. Moore, 97 N. C. 34, 2 S. E. 347; Williams v. Iron Belt Bldg., etc., Ass'n, 131 N. C. 267, 270, 42 S. E. 607; Hill v. Lindsay, 210 N. C. 694, 188 S. E. 496.
Sufficiency of Return to Start Statute. — Where the debtor was a nonresident of this State, but was here on visits of six months each year, and his visits would not have effect of putting the statute in motion. Armfield v. Moore, 97 N. C. 34, 2 S. E. 347.

"The return to the State," specified by this section, as necessary to make the debt further subject to suit, means a return with the view to residence—not a casual appearance in the state, passing through it, or even making a visit here. Lee v. Moore, 97 N. C. 24, 2 S. E. 347.

Same.—Applicable Where Absence Started Before Accrual. — Where a debtor is out of the State at the time the cause of action accrues, the statute of limitation will not operate as a bar because of the continuous lapse of the time prescribed next after the cause of action accrued, or judgment was rendered or docketed: (1) Where the debtor was out of the state at the time the cause of action accrued or the judgment was rendered or docketed. This case may apply alike to a resident or nonresident debtor. In it time does not begin to lapse in his favor until he returns to this State for the purpose of making it his residence. Armfield v. Moore, 97 N. C. 34, 2 S. E. 347.

When Running Suspended by Action. — It will be observed from the preceding provisions and exceptions that embraces three distinct cases in which the statute of limitation will not operate as a bar because of the continuous lapse of the time prescribed next after the cause of action accrued, or judgment was rendered or docketed: (1) Where the debtor was out of the state at the time the cause of action accrued or the judgment was rendered or docketed. This case may apply alike to a resident or nonresident debtor. In it time does not begin to lapse in his favor until he returns to the State—not simply on a hasty visit of a day or two, at long intervals, but for the purpose of residence out of it, or to sojourn out of it for a year or more, the time of his absence not will be allowed in his favor; it will be substituted for that of residence of the State—partly or entirely, as the case might be, as if he had remained in the State. (2) When, after the cause of action accrued or the judgment was rendered or docketed, the debtor-resident or nonresident of the State—remains absent from the State for the purpose of residence out of it, or to sojourn out of it for a year or more, the time of his absence will not be allowed in his favor; it will be substituted for that of residence in the State. (3) When the person against whom the cause of action has accrued or judgment has been rendered or docketed, the debtor shall depart from the State, "and remain continuously absent for the space of a year or more," the period allowed for the commencement of such action or the enforcement of such judgment will be suspended, as if he had remained in the State. Armfield v. Moore, 97 N. C. 34, 36, 2 S. E. 347; Arthur v. Henry, 157 N. C. 393, 395, 73 S. E. 206.

The statute of limitations is suspended in the following circumstances: (1) When the person against whom the cause of action exists becomes a nonresident, whether he remain continuously absent for a year or occasionally visits the state: (2) When such person as a resident or nonresident remains continuously absent from the state for one year or more. Lee v. McKoy, 118 N. C. 518, 24 S. E. 210.

When a person becomes a nonresident of the state it is not necessary that he should remain continuously out of it the state one year to stop the running of the statute, nor would occasional visits to the state put the statute in motion. Lee v. McKoy, 118 N. C. 518, 521, 24 S. E. 210.

When a cause of action of such a character as this one instance, where an action in rem will lie against property situated here. No presumption of payment of the debt will be raised within the period allowed for the commencement of the action. Three years after judgment will be allowed in his favor. Mitchell, 187 N. C. 374, 121 S. E. 661.

Section Not Applicable after Statute Has Run. — This section is not applicable after the statute of limitation has run. Southern R. Co. v. Mayes, 113 Fed. 84.

Applicability to Actions in Rem. — This section is applicable to actions in rem as well as actions in personam, no exception being made. Love v. West, 169 N. C. 13, 24 S. E. 1048.

Applicability to Suits against Bail. — Proceedings against bail, in civil actions, are barred by statute commenced three years after judgment against the principal, notwithstanding the principal may have left the state in the meanwhile. Albermarle Steam Nav. Co. v. Williams, 111 N. C. 35, 49 S. E. 967.

Applicable to Enforce Resulting Trust. — Where a cause of action to enforce a resulting trust has existed for more than ten years, but subtracting the length of time the trustee thereof had been out of the state, the elapsed time is less than the statutory period prescribed, the action is not barred by the ten-year statute. Miller v. Miller, 200 N. C. 458, 157 S. E. 600.

Effect of Nonresident's Ownership of Property in State. — The fact that a non-resident debtor has property within the State will not affect this Section, which suspends the operation of the Statute of Limitations for the period during which the defendant was out of the State. Grist v. Williams, 111 N. C. 53, 15 S. E. 889.


Effect of Corporation Service Statutes. — Sections 58-153, 58-154 of the General Statutes authorize service of summons against non-resident corporations. This section is applicable to actions against foreign nonresident insurance companies upon the Commissioner of Insurance, in no way abrogate or affect the suspension of the running of the statutes of limitation in such cases. The suspension of the running of such a statute may be a reason why the General Assembly should amend this section, so as to set the statute running in such cases, but it has not done so. Green v. Hartford Life Ins. Co., 139 N. C. 309, 310, 51 S. E. 887.

Applicable to Operation of Sec. 1-53. — The existence of the conditions enumerated in this section will suspend the operation of sec. 1-53. Williams v. Iron Belt Bldg., etc., Ass'n, 131 N. C. 267, 269, 42 S. E. 607.


§ 1-22. Death before limitation expires; action by or against executor. — If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from the death of a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representative after the expiration of that time, and within one year from the date on which the cause of action is based. See also § 1-53. As to final settlement of personal representative, see § 28-121 et seq. as to actions which do not survive, see § 28-175. See also § 28-121 and § 28-162 et seq.

I. General Consideration.
II. Death of Creditor.
III. Death of the Debtor.
IV. Filing Claim.

I. GENERAL CONSIDERATION.

Cross References.—As to actions which survive to and against a personal representative, see § 28-122 et seq. As to actions which do not survive, see § 28-175. See also § 28-121 and § 28-162 et seq.

Editor's Note.—This section was new with the C. C. P. It has remained unchanged since its insertion except that the last sentence was added by the act of 1881, and the proviso at the end of the second sentence by the act of 1919. The provision has been held to be an enabling and not a
CH. 1.

CIVIL PROCEDURE—LIMITATIONS

§ 1-22

II. DEATH OF CREDITOR.

Brought within Year of Creditor's Death.—Actions upon claims in favor of an estate of a decedent must be brought within one year of the death of the creditor, without regard to the time when administrator was appointed. Coppersmith v. Wilson, 107 N. C. 31, 12 S. E. 77.

Construction upon Section.—Although it was held that a decedent's estate does not become an entity until there is a personal representative in those cases where, in regular course, but for the interposition of this section, the claim would become barred in less time than one year from the death of the debtor, it is running. Irvin v. Harris, 184 N. C. 547, 114 S. E. 818. It means that if at the time of the death of the debtor the claim is not barred, action may be brought within the period of the statute, which continues to run. Irvin v. Harris, 184 N. C. 547, 114 S. E. 818. It means that if at the time of the death of the debtor the claim is not barred, action may be brought within one year after the grant of letters to the personal representative in those cases where, in regular course, but for the interposition of this section, the claim would become barred in less time than one year from the death of the debtor.

Personal representative in those cases where, in regular course, but for this section, it would not be barred till a later date. The object in view is that when the creditor dies, there shall be at least one year after the death of the creditor, or one year after the grant of letters of administration, to enable the representative of the debtor, before action is barred. This is conclusively shown by the words of the section, that if the party die before the claim is barred action may be brought "After the expiration of the time limited, and within one year." Benson v. Bennett, 112 N. C. 505, 507, 17 S. E. 432; Coppersmith v. Wilson, 107 N. C. 31, 12 S. E. 77.

The death of the judgment creditor did not suspend the statute. The effect was only to give one year's time from death of judgment creditor to the representative to bring action, if otherwise it would have been barred by the lapse of ten years before such year had expired. Benson v. Bennett, 112 N. C. 505, 17 S. E. 432; Winslow v. Benton, 130 N. C. 58, 59, 40 S. E. 840; V. v. Hines, 87 N. C. 445, 450; Daniel v. Langhille, 113 N. C. 344, 347; Humphreys v. Stephens, 191 N. C. 101, 131 S. E. 383.

And for that reason will not constitute an exception to the rule that no such extension of time to prevent the bar of the statutes from becoming complete as is provided in this section. Hawkins v. Savage, 75 N. C. 133; Bruner v. Threadgill, 88 N. C. 361. Patterson v. Wadsworth, 89 N. C. 459.

Exception to General Rule.—This section is an exception to the general rule that when the statutes of limitation once begin to run nothing can stop them. Matthews v. Peters, 150 N. C. 134, 135, 60 S. E. 721. Winslow v. Benton, 130 N. C. 58, 59, 40 S. E. 840.

However, it should be observed that it has no application where the bar attached before death. Grady v. Wilson, 113 N. C. 347, 20 S. E. 518; Parker v. Hardin, 121 N. C. 57, 58, 28 S. E. 30; Copeland v. Collins, 122 N. C. 619, 30 S. E. 315; Winslow v. Benton, 130 N. C. 58, 59, 40 S. E. 840; V. v. Hines, 87 N. C. 445, 450; Daniel v. Langhille, 113 N. C. 344, 347; Humphreys v. Stephens, 191 N. C. 101, 131 S. E. 383.

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To What Limitations Applicable.—The section only applies to the limitations prescribed in the Code of Civil Procedure. Hall v. Gibbs, 87 N. C. 4, 5, 6.

Nothing will defeat the operation of this section except the disabilities mentioned in the statutes, fraud or certain other defenses of an equitable nature. Syme v. Badger, 96 N. C. 344, 347, 20 S. E. 518. It is running. Irvin v. Harris, 184 N. C. 547, 114 S. E. 818. But there was no such extension of time to prevent the bar of the statutes from becoming complete as is provided in this section. Hawkins v. Savage, 75 N. C. 133; Bruner v. Threadgill, 88 N. C. 361. Patterson v. Wadsworth, 89 N. C. 459.

Applicability in Action to Subject Lands.—The heirs at law can successfully plead the statute of limitations against the administrator seeking to subject their lands to the payment of deceased's debt as fully as he can against a creditor. Matthews v. Peterson, 150 N. C. 134, 135, 60 S. E. 721. Winslow v. Benton, 130 N. C. 58, 59, 40 S. E. 840.

When Time Extended.—This section does not extend the life of a judgment beyond the ten years where the judgment creditor dies more than a year before the expiration of the ten-year limitation. Hughes v. Boone, 114 N. C. 54, 19 S. E. 63.

The death of the judgment creditor did not suspend the statute. The effect was only to give one year's time from death of judgment creditor to the representative to bring action, if otherwise it would have been barred by the lapse of ten years before such year had expired. Benson v. Bennett, 112 N. C. 505, 17 S. E. 432; Winslow v. Benton, 130 N. C. 58, 59, 40 S. E. 840; V. v. Hines, 87 N. C. 445, 450; Daniel v. Langhille, 113 N. C. 344, 347; Humphreys v. Stephens, 191 N. C. 101, 131 S. E. 383.

Principle Illustrated.—Where the statute had not run at the deceased's death, and the action was brought within one year after the issuing of the letters of administration, the action was not barred under this section notwithstanding that the ordinary statutory period had elapsed between the death of the creditor and the bringing of the action. Thigpen v. East Carolina Railway, 384 N. C. 33, 113 S. E. 562.

Contract as to Limit Permissible.—A reasonable stipulation in a contract of carriage with a railroad company for an interstate shipment of goods, as to the time wherein suit may be brought for loss or damage, is a part of the consideration where the party is not under a disability or against such a person, it may be noted here that the parties are to be declared to be in loco parentis of the claimant. This would not suspend the running of the statute to the complete bar of the statute. See Gurnett v. Jones, 176 N. C. 542, 97 S. E. 494.

Cited in 13 N. C. Law Rev. 66.
tion was not at the moment of penning the sentence directed, and certainly with no intent to disregard or ignore the express statutory mandate. Mauney v. Holmes, 87 N. C. 493.

Applicable to Partners.—Notwithstanding that a deceased partner's debt to his firm would have otherwise been barred by the ten years from the date of his death, yet where no administrator has been appointed, the debt will not be barred until after one year from the appointment of an administrator unless more than ten years has elapsed since his death. Irvin v. Harris, 182 N. C. 656, 109 S. E. 571.

Principle Illustrated.—It was held that a claim reduced to judgment and not barred by the ten years proviso of section 1-22 was not barred as between the estate and its personal representative until two years and ten months after the latter representative's admission, and the action was barred by statute since his death, yet where no administration was brought upon it, in one year after the expiration of the ten years on the appointment of administrator as prescribed by statute. Brittain v. Dickson, 104 N. C. 457, 10 S. E. 899.

Where judgment is obtained against an administrator who dies five years later and there was no further administration until thirteen years later when steps were taken to collect the judgment, it was held that the ten year proviso applied to bar an enforcement. Fisher v. Ballard, 164 N. C. 336, 60 S. E. 239.

Where the period of limitation for judgment was ten years, and some two months before it ran the judgment creditor died and no representative qualified until two and a half years later but in the meantime the debt had died and his representative was not qualified until two years later after the death of the creditor, and the action was brought four months after the latter representative's qualification, by virtue of this section it was not barred. Dunlap v. Hendley, 92 N. C. 115.

Proviso—Issuing within Ten Years.—The proviso is a wise restriction to prevent the inconvenience and often the inconvenience or rejection of the personal or administrator so that they might make collection immediately upon appointment, with memorandum of the judgment creditors so that they might make collection immediately upon appointment, with memorandum of the judgment in hand, investigates and ascertains that the judgment in hand, and in case of doubt, he may suspend collection for a time, while he is enabled to ascertain the correctness of the claim filed with him in proper time, he has presented it to the administrator with sufficient notice, the personal representative— the very reverse of presenting the claim for instant payment. Stonestreet v. Frost, 123 N. C. 640, 645, 31 S. E. 836. From dissenting opinion.

The word "filed" has reference, certainly, to the old custom of stringing on a line or wire papers of value for past or future usefulness, or maybe both. The same end is served by the admission of the personal representative—the very reverse of presenting the claim for instant payment. Stonestreet v. Frost, 123 N. C. 640, 645, 31 S. E. 836. From dissenting opinion.

The filing of claim is intended to be of advantage to creditors who do not receive or who do not expect to receive payment of their debts on presentation, in enabling them to leave with the personal representative—the very reverse of presenting the claim for instant payment. Stonestreet v. Frost, 123 N. C. 640, 645, 31 S. E. 836. From dissenting opinion.

The word "filed" signifies that the claim is to be exhibited, to the personal representative, for his admission or rejection. It is not required of the creditor to part with the possession of the evidence of his claim. Hinton v. Pritchard, 126 N. C. 8, 35 S. E. 127.

Sufficiency of Filing.—Where an administrator, knowing that his appointment is at the instance and solicitation of judgment creditors so that they might make collection immediately upon appointment, with memorandum of the judgment in hand, invests and ascertains that the judgment has not been paid, and thereafter institutes proceedings to sell the lands of intestate to make assets to pay the judgment, the claim on the judgment has been filed and admitted by the administrator in his discretion. Howland v. Stillman, 220 N. C. 361, 17 S. E. (2d) 336.

Mere notice to an executor of a claim against the deceased, merely signed or acknowledged by the executor, is not a filing of the claim within the meaning of section 1-22 of the Code of Civil Procedure, but where, after such notice, the executor carries the item as a debt on the books of the estate and also brings suit, and the executor's approval will be inferred, and the statute will not operate as a bar. Horne Corp. v. Creech, 205 N. C. 55, 169 S. E. 794.

Section Illustrated.—The exhibition by the Sheriff within one year of the date of administration to the administrator, of an execution issued in favor of the county against the intestate, which the administrator admits is correct and does not pay for want of assets—is a sufficient "filing" required by this section, so as to render unnecessary an action to prevent the bar of the Statute of Limitations. Stonestreet v. Frost, 123 N. C. 640, 645, 31 S. E. 836. See dissenting opinion.

In Stonestreet v. Frost, 123 N. C. 640, at pages 646 and 647, 31 S. E. 836, it is said that it is a sufficient "filing," when the claim is presented within the proper time to the personal representative and he acknowledges the validity of the debt. The creditor may then compel the administration to pay the claim. "The claimant, as to the correctness of the claim, only has to make his admission, and the personal representative is bound to certify as to the nature and amount of the debt." Justice v. Galler, 131 N. C. 393, 394, 42 S. E. 830.

Sufficiency of Admission.—A partial payment by the personal representative, without objection, is an unequivocal act from which an admission of the justice of the claim may be inferred. Hinton v. Pritchard, 126 N. C. 8, 35 S. E. 127.

When the personal representative does not deny the correctness of the claim filed with him in proper time, but filed his petition to make assets to pay it, this is strong proof that he admitted it. Woodlief v. Bragg, 108 N. C. 571, 13 S. E. 211.

Application to Heirs.—There is nothing in this section which would seem to indicate a suspension of the statute as to the personal representative only, leaving the heir at law to be protected by the lapse of time. Woodlief v. Bragg, 108 N. C. 571, 572, 13 S. E. 211.

The personal representative represents the deceased, and his omission to acknowledge a claim, or his refusal to allow payment for fraud, will estop the heirs. Woodlief v. Bragg, 108 N. C. 571, 13 S. E. 211.

While the admission of a claim by the personal representative is as much barred by the filing of the claim within the prescribed time and its admission by the personal representative, as he would be by the latter submitting to a judgment. It will be noted that the judgment in hand, which is a cause of action accrued prior to the Code of Civil Procedure and this section did not apply to it at
§ 1-23
CH. 1. CIVIL PROCEDURE—LIMITATIONS
§ 1-25


Not Applicable to Judgments.— Where a judgment had been obtained on a claim, the amendatory act of 1881 has no application. Woodlief v. Bragg, 108 N. C. 571, 573, 13 S. E. 211.

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

When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action. (Rev., s. 368; Code, s. 107; C. C. P., s. 46; C. S. 413.)

Nature of Operation upon Statute. — This section as its terms clearly impart, affects, and is intended to affect only a litigant's right to prosecute an action in court as fixed by the statute, and does not as a rule operate to extend or prolong a time limit or a property right as determined by the contract of the parties. Gatewood v. Fry, 138 N. C. 415, 418, 111 S. E. 77.

Effect of Irregularity in Granting. — Mere irregularity in the granting of an injunction will not render it a nullity, so as to prevent the suspension of the statute of limitations during the pendency of the injunction. Walton v. Pearson, 85 N. C. 34, 35.

§ 1-24. Time during controversy on probate of will or granting letters. — In reckoning time when pleaded as a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there is an administrator appointed during the pendency of the action. Stelges v. Simmons, 170 N. C. 24, 46, 86 S. E. 801.

It does not apply to the heirs at law or devisees to nullify the protection given every one in adverse possession of realty for seven years under color of title, nor to invalidate a judgment rendered against the heir or devisee that the title to the property is in another. Stelges v. Simmons, 170 N. C. 42, 46, 86 S. E. 801.

Persons Protected. — This section applies only to protect creditors, there being no one for them to sue. Stelges v. Simmons, 170 N. C. 42, 46, 86 S. E. 801.

This section applies only where there is no administrator or collector during the contest. Hughes v. Boone, 114 N. C. 51, 19 S. E. 63.

Cited.— Frederick v. Williams, 103 N. C. 199, 191 S. E. 298; Ex parte Smith, 134 N. C. 495, 47 S. E. 16.

§ 1-25. New action within one year after nonsuit, etc.—If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed, or a judgment or granting letters of administration, unless there is an administrator appointed during the pendency of the action, the plaintiff may be brought against him. (Rev., s. 369; Code, s. 108; C. C. P., s. 47; C. S. 414.)

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Effect Where No Representative during Contest. — This section applies only where there is no administrator or collector during the contest. Hughes v. Boone, 114 N. C. 51, 19 S. E. 63.

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Cross References. — As to actions which do and which do not survive, see § 28-172 et seq. As to actions in forma pauperis, see § 1-109 et seq. and § 6-24.

§ 1-25. New action within one year after nonsuit, etc.—If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed, or a judgment or granting letters of administration, unless there is an administrator appointed during the pendency of the action, the plaintiff may be brought against him. (Rev., s. 369; Code, s. 108; C. C. P., s. 47; C. S. 414.)

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Editor's Notes. — This section was amended in 1915 by adding the condition relating to the payment of costs prior to the commencement of the record action. Rankin v. Oates, 183 N. C. 517, 12 S. E. 32.

The addition is mandatory as to the payment of costs prior to the commencement of the record action. Rankin v. Oates, 183 N. C. 517, 12 S. E. 32.

§ 1-25. New action within one year after nonsuit, etc.—If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed, or a judgment or granting letters of administration, unless there is an administrator appointed during the pendency of the action, the plaintiff may be brought against him. (Rev., s. 369; Code, s. 142, 166; C. C. P., ss. 21, 45; 1915, c. 211, s. 1; C. S. 415.)

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The addition is mandatory as to the payment of costs prior to the commencement of the record action. Rankin v. Oates, 183 N. C. 517, 12 S. E. 32.
in the original action, there can be no question as to the protection of this statute being available. Federal Reserve Bank v. Daugherty, 268 N. C. 793, 150 S. E. 2d 803.

Where plaintiff took a voluntary nonsuit in the federal court on his cause of action to recover the penalty for usury, based on numerous separate transactions between the plaintiff and defendant, the circuit court found that the plaintiff's cause of action had been barred by separate actions in the state court embracing the identical issues declared on in the original action, and if the original action is barred under the provisions of this section it is not necessary to decide whether the same parties are the same and whether the cause is the same as in the original action. The federal court entered a judgment dismissing the plaintiff's cause of action, and the judgment was affirmed by the circuit court. Little v. Bost, 208 N. C. 762, 182 S. E. 448.

Section 1-25. — Effect of New Cause of Action. — Where a new cause of action is alleged the original action is no protection as against the statute of limitations. Woodcock v. Bostic, 128 N. C. 243, 38 S. E. 881.

Where the cause of action of the first and second suit are identical this section applies notwithstanding that the first suit was dismissed because of a failure to state a cause. Webb v. Hicks, 125 N. C. 201, 202, 34 S. E. 395.

Effect of New Cause of Action. — Where a new cause of action is alleged the original action is no protection as against the statute of limitations. Woodcock v. Bostic, 128 N. C. 243, 248, 38 S. E. 881.

The statutory remedy against defunct corporations must be instituted within one year. Where a new action is brought, but not in the proper manner, against the proper parties, this section will not apply to save the right of action from the statutory bar. VonGlahn v. DeRusha, 208 N. C. 467, 150 S. E. 759.

Effect of Agreement Not to Plead Statute. — An agreement in the original action not to plead the statute of limitations does not apply to the new action. Citizens' Sav., etc., Co. v. West, 204 N. C. 230, 167 S. E. 954.

Nonsuit Operates as Res Judicata Only Where Sec- ond Action Is Substantially Identical with First. — In order for a judgment to operate as res judicata in a subsequent action brought under the provisions of this section, it is required that the trial court find as a fact that the second suit is based upon substantially identical allegations and facts as the first. When the court, having no evidence and finding no facts which the judgment dismissing the action upon the plea of estoppel by the former judgment is predicated upon, independently is in error, an action in equity may be maintained. In re College County School Dist., 206 N. C. 371, 174 S. E. 90; Ingel v. Cassidy, 211 N. C. 287, 189 S. E. 776.

Burden of Proving Identity of Causes. — In action to recover laborer's wages, a plaintiff depends upon a nonsuit in a former action to repel the bar of the statute of limitation, it is necessary for him to bring himself within the meaning of the statute and show identity of parties, cause of action, and title, or that he is the "heir at law or representative" of the former plaintiff, the second action being regarded as a continuance of the writ in the first one; and it is insufficient if the nonsuit in the second action was a general nonsuit for plaintiff as the plaintiff in the first one before the latter commenced his action. Quecch v. Futch, 174 N. C. 395, 93 S. E. 895.

Real Evidence to Prove Nature of Action. — In an action to recover land parcel testimony that a prior action brought without filing a complaint is identical with the present action is inadmissible. Young v. Atlantic Coast Line Co., 205 N. C. 417, 177 S. E. 600; Parmiter v. Western Union Tel. Co., 204 N. C. 224, 168 S. E. 410; Little v. Bost, 203 N. C. 762, 182 S. E. 446.

The question as to whether an action is a continuation of a former suit within so as to be governed by this section is one of law to be decided from the original complaint, and when no complaint is filed in the prior action the court must look to the acts of the plaintiff to show by parol evidence. Motsinger v. Hauser, 195 N. C. 463, 142 S. E. 589.

Dismissal or nonsuit as to one defendant for misjoinder of parties determines a nonsuit within the provisions of this section, permitting plaintiff to institute another action within one year of nonsuit when the original action is in

Limited Protection Where Second Action Brought in Equity. — The fact that more than one year had elapsed before the beginning of the present action, from the termination by judgment on appeal, though the first complaint was inadmissible, is not in strictness a statute of limitation, but a condition affecting the cause of action. The cause of action was barred by the statute of limitation within the time specified it comes within the provisions of this section. Trull v. Seaboard Air Line R. Co., 131 N. C. 245, 66 S. E. 586. The maximum time allowed under the two sections was two years, and within two years Vessels v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 512.

A new action for wrongful death commenced within one year from the date of nonsuit falls within the provisions of this section notwithstanding the condition of § 22-171, and the fact that the plaintiff has been assessed with additional costs upon motion for reassessment made in the second action and has not paid the cost so reassessed is immaterial. See Williams v. Great Atlantic, etc., Tea Co., 204 N. C. 715, 169 S. E. 618. See notes to § 22-173.

While the requirement that an action for wrongful death must be instituted within one year is a condition connected to the cause of action rather than a statute of limitations, this section applies to actions for wrongful death. Sligh v. Southern Ry. Co., 218 N. C. 762, 12 S. E. (2d) 253.


Section Illustrative. — Where an action is begun within the prescribed period, but terminated in a non-suit after the period has run, this section applies to permit another action within one year from the date of non-suit. Hines v. Rowland Lumber Co., 174 N. C. 244, 93 S. E. 833.

Where it does not appear otherwise than that the first suit was commenced in time, and the second was instituted within a year of the nonsuit, this section operates to prevent a bar of the statute. Bank v. Longhian, 122 N. C. 668, 671, 30 S. E. 17.

Effect of Costs Provisions. — This section does not forbid the commencement of a second action without paying the costs of the first, but such an action is void if bringing the new action free from the bar of the statute, if pleaded; and a motion to dismiss it before answer filed, upon the ground that the plaintiff is entitled to costs, may not be granted, which will be denied. Bradshaw v. Citizens' Nat. Bank, 172 N. C. 632, 90 S. E. 789.

But where the appropriate statute has been pleaded and its time expired both before the bringing of the new action and the payment of the cost in the original one, the second action is barred though commenced within the one-year period, when the original case has not been brought in time. Rankin v. Oates, 183 N. C. 517, 112 E. 32.

Same — When Applicable. — The amendment of 1915 re- quiring the payment of costs has no application when the second action is brought after the expiration of the condition of the general law. Summers v. Southern R. Co., 173 N. C. 398, 92 S. E. 160.

Same — Excuse. — It may be shown by plaintiff that
his failure to pay costs before commencing his second action upon the same contract was caused by the failure or the deliberate omission of the plaintiff to ascertain and to know the amount thereof though the plaintiff had urgently and continuously requested it, and that he would have promptly paid them according to the provisions of the statute, if the court had advised him Hunsucker v. Corbitt, 187 N. C. 496, 122 S. E. 378.

A nonsuit designates the action of the court in ending the case or sending the case out of court where plaintiff is not entitled to proceed to the trial of the case on account of defect in parties, pleadings or jurisdiction, or where the plaintiff is unable to prove his case and the cause is dismissed as upon a demurrer to the evidence, and in such instances, where the defendant has been charged with the payment of any part of the costs, the plaintiff must be entitled to bring a new action within one year. Blades v. Southern Ry. Co., 218 N. C. 753, 11 S. E. (2d) 823.

Judgment of Nonsuit on Merits of Case as Bar to Subsequent Action on Same Cause on Substantially Same Evidence.—A plaintiff may bring an action and have it heard upon its merits, and, if a judgment of nonsuit is then entered, he may bring a new suit within one year, or he may have the cause reviewed by the Supreme Court. If the Supreme Court affirms the judgment of the trial court, he may, under this section, bring a new action within the period therein specified. But, if upon the trial of the new action, upon its merits, in either event, it appears to the trial court, and is found by such court, that the action is substantially identical in fact and substantially identical in law, with the former action, that the judgment in the first action was a bar or res judicata, and thus end that particular litigation. Hampton v. Rex Spinning Co., 196 N. C. 235, 240, 151 S. E. 589.

Cross Action.—Plaintiff administratrix was a party defendant in an action for negligence. The administratrix set up as a defense therein against her codrittendants for the wrongful death prior to the date of intestate's death. On appeal, the cross action was dismissed because it did not arise out of plaintiff's cause of action as a matter of law. Where is the statute of limitations is within one year, the court held that the judgment in the first action was a bar or res judicata, and thus end that particular litigation. Blakes v. Southern Ry. Co., 218 N. C. 702, 12 S. E. (2d) 553.

Effect of Costs Provisions.—In order to be entitled to institute an action within one year after nonsuit in an action on contract, the bar of the statute of limitations for plaintiffs must show that the costs in the prior action have been paid or that it was brought in forma paupcris. Osborne v. Alford, 192 N. C. 227, 135 S. E. 235.

Propriety of Directed Verdict for Plaintiff Where Record Contains No Evidence of Payment of Costs of Prior Action.—Where, after judgment as of nonsuit, another action has been brought on the same cause of action within one year under the provisions of this section, and defendant moves for judgment of nonsuit and excepts to the trial court's refusal of the motion, and on appeal the only question presented is whether the plaintiff had paid the costs of the prior action as required by the statute, held, the burden is upon the plaintiff to show compliance therewith. Where is the statute of limitations contains no evidence that the costs of the prior action had been paid, a directed verdict in the plaintiff's favor will be held erroneous, and it cannot be sustained. So where the record contains no evidence that the trial court stated at the close of testimony that as he understood the evidence he would have to give a directed verdict and he did, and the counsel did not object until after a verdict in the plaintiff's favor. Southerland v. Crump, 199 N. C. 111, 153 S. E. 645.


§ 1-26. New promise must be in writing.—No acknowledgment or promise is evidence of a new or continuing contract, from which the statute of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest. (Rev., s. 371; Code, s. 172; C. C. P., s. 51; C. C. S., s. 416.)

I. General Consideration.

II. Acknowledgment or New Promise.

III. Part Payment.

IV. Request Not to Sue.

I. GENERAL CONSIDERATION.

Cross Reference.—As to contracts requiring writing, see § 22-1 et seq.

1. 13 N. C. Law Rev. 57 for comment on this section.

Effect upon Prior Law.—This section does not change the character or quality of the acknowledgment or new promise therefore required to make a new promise statutory, for, if the new promise should be "in some writing signed by the party to be charged therefor, as the court shall direct," Phillips v. Giles, 175 N. C. 493, 95 S. E. 772; Peoples Barnstead Co. v. Tar River Lbr. Co., 221 N. C. 89, 19 S. E. (2d) 143.

The substituted statute after a fixed time bars the cause of action itself, and does not, as before, obstruct the remedy merely. McDonald v.Dickson, 87 N. C. 404, 406.

The Section is Mandatory. — Fleming v. Staton, 74 N. C. 262.

Retroactive Effect.—This section has an application where the cause of action had accrued upon the new as well as the old cause. Farson v. Bowden, 74 N. C. 41, 45.

Section as Rule of Evidence. — This section is merely a rule of evidence to prevent fraud and perjury. Royster v. Farrell, 115 N. C. 366, 310, 20 S. E. 475.

Applicability to Judgments. — A judgment is not a contract within the meaning of this section. This is true even though there be a contract of sale of merchandise which loses its identity when merged in a judgment; and that a new cause of action arises out of the judgment. McDonald v. Dickson, 87 N. C. 404. See the dissenting opinion.

Action of One of Class Affected by All Class Actions. — Where the condition stated upon a negotiable note, the endorser signs as sureties, a payment thereon of the maker's obligation constitutes a payment of the whole amount of the note and extinguishes the right of action; and extinguishes the cause of action arising out of the judgment. Dillard v. Farmers Mercantile Co., 190 N. C. 225, 129 S. E. 598.

II. ACKNOWLEDGMENT OR NEW PROMISE.

The English Statute.—The original statute of limitation (21 Jas. I, ch. 16) had no provision as to new promises and acknowledgments. The court made the law on this subject and made it apply to all causes of action that rested on a promise. This because a cause of action was extinguished in 21 years after the cause of action had accrued upon the new as well as the old cause. Farson v. Bowden, 74 N. C. 41, 45.

Elements Necessary to Valid Promise.—In Greenleaf v. Norfolk, etc., Co., 91 N. C. 333, the Supreme Court declared that the promise must be (1) in writing, (2) extend to the whole debt, (3) extend to the whole debt, (but see Pope v. Andrews, 90 N. C. 401) and must (3) be to pay money and not in something else of value. The promise to pay the debt, too, must be (4) unconditional. Greenleaf v. Norfolk, etc., Co., 91 N. C. 333; Bates & Co. v. Herren & Co., 95 N. C. 388; Taylor v. Miller, 113 N. C. 240, 18 S. E. 504; Wells v. Hill, 118 N. C. 222, 16 S. E. 771; Bryant v. Kellum, 209 N. C. 112, 182 S. E. 708.

The promise must be (5) indenital and (6) between the original parties—by the same man; and, further, when the original contract is made with another one, and the promise relied on to repel the statute is made with one who is the plaintiff in the action, the cause of action is the new promise, and it must be declared on; this new promise must be in writing. Fleming v. Staton, 74 N. C. 203; Pool v. Bledesc, 85 N. C. 1, 1.

It has been held, that the promise must be made to the creditor himself (Farker v. Shuford, 76 N. C. 219, and Farson v. Bowden, 74 N. C. 41), or to an attorney or agent for the creditor (Kirby v. Mills, 78 N. C. 63; Kirkman, 95 N. C. 63, 67), and must be express (Cooper v. Jones, 128 N. C. 40, 38 S. E. 28), clear and positive (Hussey v. Blakes, 83 N. C. 636, 57 S. E. 461).

The new promise must be distinct and specific, and a mere acknowledgement of the debt, though implying a promise to pay, is not sufficient. Rigs v. Roberts, 85 N.
§ 1-26 CH. 1.

1023. C. 152; Faison v. Bowden, 76 N. C. 425. This section provides that the statute is only waived by acknowledgment or new promise, which amounts to "a new or continuing contract." Helm Co. v. Griffin, 112 N. C. 356, 358, 16 S. E. 504.

In Riggs v. Roberts, 85 N. C. 152, the words "distinct and specific," "unequivocal," are really applied to a promise to pay which would revive a debt from which the debtor had been discharged in bankruptcy. Where a qualifying word alone would be applicable to the promise or acknowledgment, to take case out of the statute of limitations, there is no special weight superadded by the use of the word "all at once." Taylor v. Miller, 113 N. C. 340, 341, 18 S. E. 504.

In other words there must be such facts and circumstances as to show that the debtor recognized a present subsisting obligation and proposed to renew the obligation. This means that the acknowledgment of a debt, which would be sufficient to repel the statute, must manifest an intention to renew the debt as strong and convincing as if there had been a direct promise to pay it. This principle runs through all the decisions of the Supreme Court on this subject. Wells v. Hill, 118 N. C. 900, 903, 24 S. E. 771; Simonton v. Clark, 65 N. C. 525. See dissenting opinion.

A written acknowledgment, or new promise, certain in its terms, or which can be made certain, is sufficient to repel the operation of this section. It follows that a mere vague declaration of an intention to pay an undefined amount, and without reference to anything that can make it certain, would not be sufficient, but an admission that "the parties are yet without sufficient of writing, see note to sec. 1-180.

When Promise Implied. — Where the debtor has, by a signed written instrument, unqualifiedly and definitely acknowledged the debt as a subsisting obligation, and a letter acknowledging the debt at the time defendant left plaintiff's city but claiming that it had been canceled by the creditor's action in selling the debtor's goods of a value greatly in excess of the debt, is not such an acknowledgment as will imply a promise to pay. Phillips v. Giles, 175 N. C. 409, 95 S. E. 722. McRae v. Leroy, 46 N. C. 91, 12 S. E. 465; Cecil v. Henderson, 121 N. C. 244, 246, 28 S. E. 481.

The Writing. — As to expression of opinion in charging on sufficiency of writing, see note to sec. 1-180.

A new promise-proposal, if not in writing, can not defeat the operation of the statute of limitation. Raby v. Stuman, 127 N. C. 463, 37 S. E. 476.

In order to revive a debt which is barred by the statute of limitation, there must be an express unconditional promise to pay, or acknowledgment of the debt as a subsisting obligation, and a letter acknowledging the debt at the time defendant left plaintiff's city but claiming that it had been canceled by the creditor's action in selling the debtor's goods of a value greatly in excess of the debt, is not such an acknowledgment as will imply a promise to pay. Phillips v. Giles, 175 N. C. 409, 95 S. E. 722. And it is proper to except parol evidence that a new promise was made (Christman v. Haywood, 119 N. C. 133, 134, 25 S. E. 851), although provision is made in the next section the law was otherwise. Faison v. Bowden, 72 N. C. 405; Riggs v. Roberts, 85 N. C. 152.

It was said in Fleming v. Fleming, 85 N. C. 127, that the oral assertion of a claim to an administrator who refuses or to some other means by which the nature and amount of it can be ascertained; or there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which the law will imply a promise to pay. McBride v. Gray, 44 N. C. 420; Faison v. Bowden, 72 N. C. 405; Riggs v. Roberts, 85 N. C. 152. Since the statute, the words used are as applicable to this section as the words used to express the operation of this section. Irvin v. Harris, 112 N. C. 547, 9 S. E. 867. The words "I propose to settle," written in answer to a letter demanding payment of a note barred by the lapse of time, amount to an acknowledgment or new promise sufficiently certain in its terms. Long v. Oxford, 104 N. C. 408, 409, 10 S. E. 504.

A paper-writing signed by a parent certifying that she owes her daughter a sum of money, in a stated amount, for moneys she has advanced, is a binding promise and stating the daughter was to have a certain sum of money from her estate, giving her reasons, is sufficiently definite to imply a promise to pay the amount of the debt, and a new promise, to repel the bar of the statute of limitations. Phillips v. Giles, 175 N. C. 409, 410, 95 S. E. 722.

Where a suit had already been commenced to recover an amount alleged to be due as a promissory note barred by the statute of limitations, there must be an express unconditional promise to pay in writing or a written, definite and unconditional acknowledgment of the debt as a subsisting obligation as will repel the statutory bar. Smith v. Gordon, 204 N. C. 695, 169 S. E. 634.

Must Be within Statutory Limit. — The three-year statute of limitations bars the personal action prior to the section. Where a letter relied on as arresting the running of the statute is written more than three years before the commencement of the action it is ineffective. Smith v. Gordon, 204 N. C. 695, 169 S. E. 634.

When Promise Implied. — Where the debtor has, by a signed written instrument, unqualifiedly and definitely acknowledged the debt as a subsisting obligation, the law will imply a promise to pay the amount alleged to be due upon account, and the defendant set up the statutory bar as a defense, but wrote a letter to the plaintiff's attorney stating that, if he would take five hundred dollars in satisfaction, judgment might go against him at court, the letter is an admission and assumption of the debt to the specified amount ($500), and operation to remove the bar to the recovery of the time. Pope v. Andrews, 90 N. C. 401. But see Wells v. Hill, 118 N. C. 900, 24 S. E. 771, this citation.

When a debtor wrote to his creditors declining proffered credit because he was unable to pay what he already owed them (which was barred by the statute), but expressing his willingness to re-retain the ability to re-credit in the future it was held, that, as the letter contained no promise to pay the barred debt, the bar of the statute was not removed. Helm Co. v. Griffin, 112 N. C. 547, 9 S. E. 867.

Acknowledgment as Rebutting Presumption of Satisfaction. — Before the adoption of The Code, proof of a promise or acknowledgment would rebut the presumption of satisfaction of a mortgage, as is shown by numerous decisions. Brown v. Becknall, 58 N. C. 423; Ray v. Pearce, 54 N. C. 485; Hughes v. Edwards, 8 Wheat., 489; Simmons v. Ballard, 102 N. C. 105, 9 S. E. 495. And now the bar of our statute of limitations may be overcome by proof of a promise or acknowledgment, but the proof must be in writing, unless the new promise be one that the law implies from a part payment. Hill v. Hilliard & Co., 103 N. C. 34, 61 S. E. 699; Royster v. Farrell, 115 N. C. 306, 210, 20 S. E. 475.

III. PART PAYMENT.

Editor's Note. — It should be observed that the effect of partial payment stopping the statute is not of statutory origin. It was not in the English statute of James I. and 9 Geo. IV, did nothing more than recognize the common law right. Thus it originated with the courts and its application to the courts as has always been the case. See Battle v. Moore, 116 N. C. 491, 11 S. E. 214.

Thus the effect of this section is to leave the law as it was prior to the adoption of the C. & O. of Civil Procedure as rephrased the effect of partial payment stopping the statute as a bar of the statute of limitations, See State Nat. Bank v. Harris, 96 N. C. 118, 1 S. E. 459.

The effect of any payment of principal or interest, being expressly excepted from this section, thereby leaving as to

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[99]
such payments the principals obtaining at common law before the enactment of the statute. Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 S. E. 372.

Payment of Tangible To Account.—This section dispenses with the writing where a partial payment is made, because the payment is in effect a written promise. McDonald v. Dickson, 87 N. C. 404. See the dissenting opinion.

Payment to the Defendant.—As to the statute having having run, will not be stopped by reason of such payment, (Cashmar-King Supply Co. v. Dowd, 146 N. C. 191, 59 S. E. 685) for partial payment starts the statute running except where made by one of several obligors of the same class, it becomes the duty of the other obligors to pay the balance thereof. McDonald v. Dickson, 87 N. C. 404. See the dissenting opinion.

IV. REQUEST NOT TO SUE.

Statement of Rule.—Where delay in bringing suit is caused by a request of the defendant, or his attorney and his promise to pay the debt and not to avail himself of the plea of the statute, he will not be allowed to plead the statute as to the debt, as it would be against equity and good conscience. Joyner v. Massey, 97 N. C. 148, 5 S. E. 702. This principle is derived from equity as is a new promise or partial payment, and does not depend upon statute. However it is recognized as an exception to such statute as is the acceptance of such a plea of this section. See Barcraft & Co. v. Roberts & Co., 91 N. C. 363, 369.

So it has been held that notwithstanding this section, when a creditor has delayed action at the request of the defendant, and under his promise, express or implied, to pay the debt and not to plead the statute of limitations, the courts, in the exercise of their equitable jurisdiction, will suspend the operation of the statute to arrest the running or remove the bar of the statute of limitations, where there is no proof that the creditor refrained from suing at the request of the executor, or that there was a verbal promise or request not to sue and promises not to plead the statute, the courts proceed upon the idea of an equitable estoppel, holding that it would be against good conscience and to do equity, to permit the creditor to sue against the sureties, arrests the operation of the statute of limitations need not be in writing. State v. United States Fidelity etc., Co., 176 N. C. 598, 97 S. E. 490.

Persons Who May Make.—Trustee for Creditors.—Where an assignment for the benefit of creditors confers no power on the trustee, as agent of the creditor, to do any act to waive the operation of an agreed compromise of a debt, such payment as will rebut the statute of limitations, but an agreement to apply one existing liability to another is such an agreement made by the trustee on a note of the debtor will not stay the statute of limitation, but an agreement not to do so, will not be permitted to defeat plaintiff's action by interposing the plea.
act, admission or acknowledgment by any partner after the dissolution of the copartnership, or by any of the makers of a promissory note or bond after the statute of limitations has barred the same, is evidence to repel the statute, except against the partner or maker of the promissory note or bond doing the act or making the admission or acknowledgment. (Rev., s. 372; Code, s. 171; C. C. L. s. 590; C. S. 417.)

Section Changed Law. — In McIntyre & Co. v. Oliver, 9 N. C., 239, it was held that the acknowledgment of a subsequent person to whom a partner after the dissolution of the firm, was binding on all the constituent members and prevented the operation of the statute of limitations. It was also held by the court in Hill v. Givens, 19 N. C., 231, and Walton v. Robinson, 27 N. C., 341. In the latter case, the samereviving effect is ascribed to a payment as involving a resumption of the residue of the debt. In consequence of these rulings was passed the act of 1852, now embodied in this section. Wood v. Barber, 90 N. C., 76, 79.

Part payment of a note by the payee who had endorsed it without knowledge that the maker was to be one against the maker, this section, confining the act, admission or acknowledgment as evidence to repel the bar to the associated partners, obligors and makers of a note. Lotton v. Badham, 127 N. C., 9, 37 S. E., 143. In this latter case it is recognized and distinguished in Jasper v. Edwards, 115 N. C., 246, 248, 20 S. E., 392; Garrett v. Reeves, 125 N. C., 529, 540, 34 S. E., 636. From the dissenting opinion see the excellent discussion in Green v. Greensboro College, 82 N. C., 451.

A payment made by the maker, after the bar of the statute, operates as a renewal as to himself, but a payment by the cashier of a bank who was also a member of the firm, and as made a partial payment upon the same, it was held that, to remove the statutory bar set up by the defendant firm, the burden is on the plaintiff to show in what capacity the payment was made, and whether the payment was made by any partner or maker of the promissory note or bond, as maker, as principal of the firm, or as a member of the firm. The section is not applicable to these facts until a dissolution. Wood v. Barber, 90 N. C., 70, 79.

As to co-obligors on a note, it was held that a payment by one before the debt was barred would extend the time as to the other, but a promise to pay would not have that effect. The rule as to payment has been applied to all co-obligors who come within the same class as original makers of a note, and as made a partial payment upon the same, it was held that, to remove the statutory bar set up by the defendant firm, the burden is on the plaintiff to show in what capacity the payment was made, and whether the payment was made by any partner or maker of the promissory note or bond, as maker, as principal of the firm, or as a member of the firm. The section is not applicable to these facts until a dissolution. Wood v. Barber, 90 N. C., 76, 70.

A Default Judgment on Debt Barred. — A judgment by one before the debt was barred would extend the time as to the others. Lane v. Richardson, 79 N. C., 159. See also Rogers v. Clements, 98 N. C., 180, 3 S. E., 512.

§ 1-28. Undisclosed partner.—The statutes of limitations apply to a civil action brought against an undisclosed partner only from the time the partnership became known to the plaintiff. (Rev., s. 373; 1893, c. 154; C. S. 448.)

§ 1-29. Cotenants.—If in actions by tenants in common or joint tenants of personal property, to recover the same, or damages for its detention or injury, any of them are barred of their recovery by limitation of time, the rights of the others are not affected thereby, but they may recover according to their right and interest, notwithstanding such bar. (Rev., s. 374; Code, s. 173; C. C. F., s. 52; 1921, c. 105; C. S. 419.)

§ 1-30. When Statute Does Not Apply. — No statute of limitations runs against the sovereign unless it is expressly so provided therein; hence, where an act authorizing the collection of taxes for public improvements, since the three-year statute does not affect the law as to real property. Expressio unius est exclusio alterius. Cameron v. Hicks, 141 N. C., 21, 36, 33 S. E., 728.

Elements of Tenancy in Common.—Under the law of North Carolina, as in New York, tenancy in common arises whenever an estate in real or personal property is owned by two or more persons, and it is recognized and distinguished in Jasper v. Edwards, 115 N. C., 246, 248, 20 S. E., 392; Garrett v. Reeves, 125 N. C., 529, 34 S. E., 636. From the dissenting opinion see the excellent discussion in Green v. Greensboro College, 82 N. C., 451.

The maxim no longer obtains even in the case of collectible taxes, unless the statute applicable to or controlling the subject provides otherwise. Wilmington v. Cronly, 122 N. C., 388, 30 S. E., 9; Furman v. Timberlake, 93 N. C., 66; Threadgill v. Wadesboro, 170 N. C., 641, 87 S. E., 521.

When Statute Does Not Apply. — No statute of limitations applies to a civil action brought in the name of the state, or for its benefit, in the same manner as to actions by or for the benefit of private parties. (Rev., s. 375; Code, s. 175; C. C. P., s. 419.)

This section abrogated the common law maxim "nullum tempest curricur regii" protecting public property from the negligence of public officers. Furman v. Timberlake, 93 N. C., 66, 67.

The maxim no longer obtains even in the case of collectible taxes, unless the statute applicable to or controlling the subject provides otherwise. Wilmington v. Cronly, 122 N. C., 388, 30 S. E., 9.

The three-year statute of limitations does not apply to an action by a municipality to enforce assessment liens for public improvements, since the three-year statute does not apply to actions brought by the state or its political subdivisions in the capacity of its sovereignty. Charlotte v. Kavanaugh, 221 N. C., 259, 26 S. E., 2d (1949).
§ 1-32. Not applicable to bank bills.—The limitations prescribed by law do not affect actions against directors or stockholders of any banking association incorporated under the laws of this state, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery of the aggrieved party to the fact upon which the penalty or forfeiture attaches, or the liability was created. (Rev. s. 377; Code, s. 174; C. C. P., s. 53; 1874-5, c. 170; C. S. 422.)

Cited in Ownbey v. Parkway Properties, 222 N. C. 54, 21 S. E. (2d) 900.

§ 1-33. Actions against bank directors or stockholders.—The limitations prescribed by law do not affect actions against directors or stockholders of any banking association incorporated under the laws of this state, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery of the aggrieved party to the fact upon which the penalty or forfeiture attaches, or the liability was created. (Rev. s. 377; Code, s. 175; C. C. P., s. 54; C. S. 423.)

When Statute Begins to Run.—It is a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of the bank, and did not begin to run upon the actual discovery. Later on. Houston v. Thornton, 122 N. C. 765, 372 S. E. 297.

§ 1-34. Aliens in time of war.—When a person is an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action. (Rev. s. 379; Code, s. 165; C. C. P., s. 44; C. S. 424.)

Editor's Note.—As to right of alien enemy to sue in the courts of this state, see Krachanake v. Acme Mfg. Co., 175 N. C. 435, 95 S. E. 851.

Art. 4. Limitations, Real Property

§ 1-35. Title against state.—The state will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the state to the same.

1. When the person in possession thereof, or those under whom he claims, has been in the adverse possession thereof for thirty years, this possession having been ascertained and identified under known and visible lines or boundaries; which shall give a title in fee to the possessor.

2. When the person in possession thereof, or those under whom he claims, has been in possession under color of title for twenty-one years, this possession having been ascertained and identified under known and visible lines or boundaries. (Rev. s. 380; Code, s. 139; C. C. P., s. 18; R. C., c. 65, s. 2; C. S. 301.)

Cross References.—See to validity of such possession against claimants under the state, see § 1-37. As to statutes of limitation with reference to titles of the state board of education, see § 146-91.

Law Prior to Section.—Before the Code of Civil Procedure, to prevent the uncertainty of titles, the courts of this state had adopted the arbitrary rule, that from the adverse possession of land for thirty years a grant from the state should be presumed—a rule so arbitrary that a jury

[ 102 ]
was not permitted to find the fact against the presumption; nor was it necessary that the party in adverse possession should have been held up to known and visible boundaries, but only to the extent of the title claimed by the persons in possession. The necessity of such proof is due to the fact that the law permits in the absence of metes and bounds set forth in deeds, or known and visible boundaries, as for instance, by the declarations of old men now dead, the presumption of adverse possession is not sufficient. Malloy v. Braden, 86 N. C. 251.

A party may show, as against the State, possession under known and visible boundaries for thirty years. Mobley v. Griffin, 104 N. C. 551, 7 S. E. 14.

Sufficiency of Possession.—The possession spoken of must be constituted by such acts as would expose the party to be subject to the State, or to some person claiming under the State; for it is the forbearance to sue that raises such a presumption of right as induced the Legislature to ratify the apparent title. Hedrick v. Gobble, 61 N. C. 348, 349.

Possession is insufficient to constitute the basis of adverse possession against the state or a private individual where the plaintiff merely shows that the agent of plaintiff's grantor raked and hauled straw one or two years and plaintiff's father cultivated an acre or two of the land one year. Prevatt v. Harrelson, 132 N. C. 251, 43 S. E. 800.

The evidence was held sufficient to submit to the jury the issue of plaintiffs' actual, open, continuous, notoriety, and adverse possession. If plaintiffs have an adverse possession of thirty years a jury is not at liberty to find that in fact no grant ever issued. Melvin v. Waddell, 75 N. C. 361.

Effect of Section upon Prior Law. — But the law is now changed, and the thirty years' adverse possession which was formerly held to be a presumption of a grant, is now by statute made, under certain circumstances, an absolute bar against the state. Price v. Jackson, 91 N. C. 11, 14.

The State is deemed to have surrendered its right where it permits an adverse occupation of land for thirty years without interruption for twenty-one years, and a title vests in the occupant which can only be divested by a subsequent adverse possession by another till his right in turn ripens in the same way. Walker v. Moses, 113 N. C. 527, 18 S. E. 339.

Section Not Retroactive. — The right of action which accrued prior to the adoption of C. C. P., is not governed by its provisions. Johnson v. Parker, 79 N. C. 475, 477.

Extent and Limitation of Application. — This section may be confined to cases where, by reason of adverse possession of land for the time mentioned in the section, the State is willing to forego her title thereto and agree to be barred for so long a time for any of the issues or profits thereof. It was not intended by this section that the State should not be barred from recovering except by the lapse of thirty years or twenty-one years, on personal actions after the state has parted with the title to the lands, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title, and the State agrees that when the adverse possession has continued for so long a time—thirty years without color and twenty-one years with color—she will not sue the person who has thus held the possession, but surrender her title and profits. But this does not mean that the time limited for bringing any suit for the rents, issues or profits of land should be lengthened so that instead of being thirty years, and twenty-one years, it should be thirty or twenty-one years. Tillery v. Whitewater Lumber Co., 172 N. C. 296, 298, 90 S. E. 196.

Adverse Possession against Municipality. — Under the law as this State, it formerly stood, title by adverse occupation could be acquired against a municipality. This was established and recognized as a rule of property not only under our decisions applicable to the case of Moore v. State, 130 N. C. 163, Adverse Possession 1883; State v. Long, 94 N. C. 866; Crump v. Mims, 64 N. C. 767; but the principle was embodied in our statute law in 1888, now sections 1-30 and 1-37. Threadgill v. Wadesboro, 170 N. C. 641, 67 S. E. 13.

Application to Rents, Profits etc. — It was not intended by this section that the state should not be barred from recovering except by the lapse of thirty years or twenty-one years, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title; nor will she surrender her title and profits. But this does not mean that the time limited for bringing any suit for the rents, issues, or profits of land should be lengthened so that instead of being thirty years, or twenty-one years, it should be thirty or twenty-one years. Those periods are not applicable to personal actions, but only to actions for recovery of land or some interest therein. Tillery v. Whitewater Lumber Co., 172 N. C. 296, 298, 90 S. E. 196.

Application to Personal Actions. — The limitations as to color for twenty-one years, and without for thirty years, do not apply to personal actions after the State has parted with title. Price v. Jackson, 91 N. C. 11, 14.

Same—Nature of Presumption. — The question of the presumption of a grant from adverse possession has never been regarded as one to be decided upon the authority of the Legislature or arbitrary rule established by the Legislature, or by the Courts, to prevent the uncertainty of titles which would arise if the questions in each case were to be determined by a jury, on their belief of the fact, derived from a consideration of all the circumstances in evidence. Melvin v. Waddell, 75 N. C. 361.

Extensive Scope of Section. — Thirty years adverse possession is necessary only to bar the State, and this need not be a continuous occupancy, nor need there be any connection between the tenants. FitzRandolph v. Norman, 4 N. C. 564; Candler v. Lunsford, 20 N. C. 542; Reed v. Earnhart, 32 N. C. 516; Davis v. McArthur, 78 N. C. 357; Cowles v. Hall, 90 N. C. 339; Mallett v. Simpson, 94 N. C. 37; Bryan v. Speivey, 109 N. C. 57, 13 S. E. 766; Hamilton v. Tarde, 114 N. C. 532, 19 S. E. 607; Walden v. Ray, 121 N. C. 237, 238, 28 S. E. 293; May v. Mfg. Co., 164 N. C. 262, 80 S. E. 380.

Possibility of Revivifying Alternatives. — The State is deemed to have surrendered its right in adverse possession of the title, when adverse possession has continued for so long a time—thirty years without color and twenty-one years with color—she will not sue the person who has thus held the possession, but surrender her title and profits. But this does not mean that the time limited for bringing any suit for the rents, issues or profits of land should be lengthened so that instead of being thirty years, and twenty-one years, it should be thirty or twenty-one years. Tillery v. Whitewater Lumber Co., 172 N. C. 296, 298, 90 S. E. 196.


Same—Lappage. — The rule, that in controversies between titles of different dates which lap, actual possession of the later is required to prevent the action of the earlier claimant, applies to controversies between the State and citizens who claim under mesne conveyances which extend the boundaries of the original grant. Hedrick v. Gobble, 61 N. C. 348.

Necessity of Privity of Possession.—A plaintiff, in proving adverse possession of thirty years, a title vested in plaintiffs under the provisions of this section. But on an issue against the State as to whether the adverse possession is a ripen title in plaintiffs under the provisions of this section, and defendants' motion to nonsuit was erroneously granted. Moore v. State, 109 N. C. 569.

Evidence held sufficient to support directed verdict for the holder of paper title on theory that defendants did not establish title by adverse possession as contemplated by this section. Price v. Jackson, 91 N. C. 11, 14.

Same—Identification of State. — In case of a reliance upon thirty years adverse possession the plaintiff must show a privity between himself and those who preceded him in the possession, and also, that the possession was held up to known and visible boundaries. Price v. Jackson, 91 N. C. 11. This decision is in keeping with the express terms of the section. —Ed. Note.

In case of a reliance upon thirty years adverse possession the plaintiff must show a privity between himself and those who preceded him in the possession, and also, that the possession was held up to known and visible boundaries. Price v. Jackson, 91 N. C. 11. This decision is in keeping with the express terms of the section. —Ed. Note.

Connection of Occupation with Boundaries. — Where there is a physical occupation of land with color, and by one of certain marked boundaries, there must be some evidence tending to connect such occupation with the boundaries claimed or some exclusive right of control over the unoccupied portions of the land. May v. Manufacturing & Trading Co., 164 N. C. 262, 80 S. E. 380.

Possession Short of Period as Evidence of Grant. — If there has been an adverse possession of thirty years or more years, it is not a circumstance to be submitted to a jury, either alone or with others of like tendency, as evidence upon which they may find the fact of a grant. But on an issue as to possession of the premises for thirty years, it is sufficient to find that in fact no grant ever issued. Melvin v. Waddell, 75 N. C. 361.

Possession Short of Period as Evidence of Claim. — Conceding the evidence establishes 30 years' possession, there was still left for the jury's determination the questions as to whether such possession was adverse, and as to whether such possession was colorable for thirty years, as required by this section. McKay v. Bullard, 207 N. C. 628, 630, 178 S. E. 95.
§ 1-36. Title presumed out of state.—In all actions involving the title to real property title is conclusively deemed to be out of the state unless it is a party to the action, but this section does not apply to the trials of protested entries laid for the purpose of obtaining grants, nor to actions instituted prior to May 1, 1917. (1917, c. 195; C. S. 426.)

Section Not Retroactive.—This section, having no retroactive effect, is applicable only to actions commenced since May 1, 1917. Riddle v. Riddle, 176 N. C. 445, 97 S. E. 357; Stevens v. Turchen, 177 N. C. 524, 198 S. E. 617.

Purpose of Section.—To remove the burdensome and untoward condition growing out of the difficulty of proving title to land by adverse possession, this section provides that, in actions between individual litigants, title is conclusively presumed to be out of the State. But that is the extent and limit of it. There is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. Moore v. Miller, 179 N. C. 396, 399, 102 S. E. 623.

"Where either party exhibits a patent to the land in dispute, since the State can no longer assert any claim, it is familiar learning that either the grantee or the party claiming adversely to it after its introduction may, as a general rule, use it to show that the State is no longer a claimant and make good his own claim by proof of possession under colorable title for seven years only. Gilchrist v. Middleton, 151 N. C. 484, 59 S. E. 335; Hamilton v. Icard, 114 N. C. 532, 542, 19 S. E. 607.

This rule also applies where the question of title to land depends upon the true divisional lines between the parties to the action, adjoining owners, and each has introduced a grant from the State to their lands respectively, which taken together, cover the locus in quo, and either one may then establish title to any part thereof by adverse possession in seven years. Stewart v. Stephenson, 172 N. C. 81, 89 S. E. 1060.

Within Legislative Power.—This section affects the remedy—mode of procedure—and is within the power of the legislature to enact. Johnson v. Fry, 195 N. C. 832, 837, 143 S. E. 857.

May Show Title out of State.—Under this section may be shown title out of State, though either may so do. Dill-Cramer-Truitt Corp. v. Downs, 193 N. C. 189, 190, 141 S. E. 570, citing Pennell v. Brookshire, 193 N. C. 73, 136 S. E. 257.

Sources of Title Available.—And where the plaintiff has sufficiently alleged general ownership of the locus in quo, he is not confined to the location of the adjoining boundary line under his grant, but may avail himself of any source of title that he may be able to establish by his testimony. Stewart v. Stephenson, 172 N. C. 81, 89 S. E. 1060.

In an action to recover lands by twenty years adverse possession under § 1-35, it is not required that the plaintiff should show title out of the State, except in cases of protested entries, etc., when the State is not a party to the action. Johnson v. Fry, 195 N. C. 832, 143 S. E. 857.

In an action to show title out of State by adverse possession, etc., when the State is a party to the action, if it is shown that the burden of proof is on the plaintiff, or if the State is not a party to the action, the burden is on the plaintiff. Dill Corporation v. Downs, 195 N. C. 189, 191 S. E. 570.


Cited in Ware v. Knight, 199 N. C. 251, 254, 154 S. E. 35.

§ 1-37. Such possession valid against claimants under State.—All such possession as is described in § 1-35, under such title as is therein described, is hereby ratified and confirmed, and declared to be a good and legal bar against the entry or suit of any person, under the right or claim of the State. (Rev., s. 381; Code, s. 140; C. C. P., s. 19; C. S. 427.)

Sufficiency of Possession as Affecting Application.—This section does not apply where the proof of possession is insufficient under § 1-35, Prevatt v. Harrelson, 132 N. C. 250, 251, 43 S. E. 800.

Application against Municipality.—Prior to the enactment of § 1-45, title to lands by adverse possession could be acquired against a State or a municipality, the latter being a political agent of the State; and where before the enactment of this statute sufficient possession of the character required had ripened the title to a part of a street of a city under our statutes, this section and section 1-30, as construed by the decisions, the municipality may not reassert the lost ownership except under the power of eminent domain vested in it by the law and for the public benefit. Threadgill v. Wadesboro, 170 N. C. 541, 87 S. E. 251.

§ 1-38. Seven years possession under color of title.—When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possession by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability. (Rev., s. 382; Code, s. 141; C. C. P., s. 20; C. S. 428.)

I. General Note on Adverse Possession.

A. General Consideration.

B. Character of Possession.

II. Note to Section 1-38.

I. GENERAL NOTE ON ADVERSE POSSESSION.

A. General Consideration.

Cross References.—As to title presumed out of state, see § 1-36. As to adverse possession of twenty years, see § 1-40.

For article on Adverse Possession—Color of Title, see 16 N. C. Law Rev. 149.

Editor’s Notes.—The scope of this note is limited to a treatment of the general principles of titles by adverse possession of property which are alike applicable and essential to all the sections of the opus, or subject matter, which it would have been impracticable to cite all of the great mass of cases upon this subject in this note and no attempt has been made to do so but references have been made to the digest where collectivity or order of the cases may be found.

While statutes of limitations are generally held to bar the remedy and not affect the right, adverse possession affects the right by vesting the actual title in the disseisor. In this respect it is an exception to the general rule of limitations.
Definition.—Adverse possession consists of the actual possession of property held to the exclusion of others including the owner or true owner, by acts of dominion over the land, in making the ordinary use and taking the usual profits of which the property is susceptible in its present state, to the exclusion of all others, including the true owner. Caravel v. Cregall, 218 N. C. 40, 7 S. E. 2d.

Such adverse possession as will ripen into title must be for the prescribed period of time and be clear, definite, positive and notorious. It must be continuous, adverse, hostile, and exclusive during the whole statutory period, and under a claim of title to the land occupied. Bland v. Beasley, 145 N. C. 168, 58 S. E. 993.

In other words, the claim must be adverse and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. It is the occupation with the intent to claim against the true owner which renders the entry adverse possession. Snowdon v. Bill, 159 N. C. 497, 75 S. E. 2d.

There must be known and visible boundaries such as to apprise the true owner and the world of the existence of the property. See Hayfield v. Hill, 163 N. C. 263, 79 S. E. 667 and cases cited.

A better and more concise definition than was given in Lawrence v. Chief v. Bumpass, 191 N. C. 521, 132 S. E. 275, is as follows: "Adverse possession within the meaning of the law consists in actual possession, with an intent to hold solely for title, exclusive of all others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, to act so as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be as decided and notorious as the nature of the land will permit, and exclusive during the whole statutory period, and under a claim of title to the land occupied." Carr v. Ennis, 195 N. C. 320, 142 S. E. 8.

The particular elements will now be presented in somewhat greater detail. Color of title is defined in Smith v. Proctor, 139 N. C. 314, 324, 51 S. E. 889, as "a paper-writing (usually a deed) which professes and appears to pass the title, but fail in some respect or other in which the title of the married woman is not taken is color of title. Norwood v. Totten, 166 N. C. 648, 82 S. E. 951, see Barbee v. Bumpass, 191 N. C. 121, 132 S. E. 275; Booth v. Hines, 175 N. C. 151, 96 S. E. 142; Gant v. Bumpass, 191 N. C. 540, 132 S. E. 290, it is held: Failure to comply with $ 32-12, renders a deed void, although it is good as color of title. Best v. Utey, 189 N. C. 356, 361, 127 S. E. 337; Whitten v. Peace, 188 N. C. 298, 124 S. E. 571; Ennis v. Ennis, 195 N. C. 320, 321, 142 S. E. 8.

Whether a deed is chancertous which conveys to the grantor's son certain described lands, reserving to the grantor, in the event of the death of the son, all that he may hold therein, the title of the married woman is not taken is color of title. Norwood v. Totten, 166 N. C. 648, 82 S. E. 951, see Barbee v. Bumpass, 191 N. C. 121, 132 S. E. 275; Booth v. Hines, 175 N. C. 151, 96 S. E. 142; Gant v. Bumpass, 191 N. C. 540, 132 S. E. 290, it is held: Failure to comply with § 32-12, renders a deed void, although it is good as color of title. Best v. Utey, 189 N. C. 356, 361, 127 S. E. 337; Whitten v. Peace, 188 N. C. 298, 124 S. E. 571; Ennis v. Ennis, 195 N. C. 320, 321, 142 S. E. 8.

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An unregistered deed ordinarily is not color of title, even though it purports to pass the title. Johnson v. Fry, 195 N. C. 833, 838, 143 S. E. 857.

And where the probate of a deed to lands is fatally defective, the claimant is not permitted to go into the possession of the land after a period of five years, even if the deed is color of title. Johnson v. Winborne, 3 N. C. 56; Andrews v. Mulford, 2 N. C. 311. It has been held that cutting timber and making shingles in a swamp unfit for cultivation continues for seven years (see sec. 1-38) Is a good possession.

B. Character of Possession. Must Be Actual. — There can be no adverse possession without an actual possession of the locus in quo, Cotter v. Blockman, 4 N. C. 368, and no constructive possession will ripen into a good title. Williams v. Wallace, 78 N. C. 354. The statute of limitations in favor of the adverse possessor is limited to a period of 21 years, if it is for the purpose of establishing an adverse title. Sec. 1-38 and 1-39, after the falling in of the life estate, the possessor must file suit against the true owner to acquire title by adverse possession. Sec. 1-44. And where the probate of a deed to lands is fatally defective, the claimant is not permitted to go into the possession of the land after a period of five years, even if the deed is color of title. Johnson v. Fry, 195 N. C. 833, 838, 143 S. E. 857.

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Test Sufficiency. — As stated above in this note, using the land continuously and openly a sufficient length of time for the only purpose for which it is fit, is all that is required to effect an actual ouster, and the statute begins to run at the end of 1 yr. after the entry. If they should, such facts do not prove an adverse claim, as all of these are but acts of trespass: Whereas, when a settlement is made upon land, houses erected, lands cleared, and cultivated, and the party openly continues in possession, such acts admit of no other construction than that, the possessor means to claim the land as his own. Grant v. Winborne, 3 N. C. 56; Andrews v. Mulford, 2 N. C. 311. It has been held that cutting timber and making shingles in a swamp unfit for cultivation continues for seven years (see sec. 1-38) Is a good possession.

Applying the "use of which the land is capable" test to the right holder has indicated that such acts are sufficient: Overflowing land under certain circumstances, see LaRoque v. Kennedy, 156 N. C. 360, 72 S. E. 454; erecting dams and fish traps, Gudger v. Kensey, 83 N. C. 482, 483;


Title to Remaindermen During Life Estate. — Title by adverse possession cannot be had against the remaindermen during the life of the life tenant. In the case of a life estate, possession of the remainder may be had, but title to the life estate may be gained at such time. Brown v. Brown, 168 N. C. 4, 84 S. E. 25. The statutes cannot begin to run against the remaindermen until the life tenant has died. The possession begun and continued under a claim of right, Malloy v. Bruden, 86 N. C. 251. However it does constitute a relevant fact in establishing a claim of title and may be considered with evidence of possession in proving adverse possession. Austin v. King, 97 N. C. 339, 2 S. E. 678; Christman v. Hillard, 167 N. C. 4, 7, 82 S. E. 949.

Adjoining Boundaries. — I. two persons own adjoining lands, and one of them except for the purpose of inducing the jury to believe that any slight encroachments might be regarded as permissive, and could not be treated as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary. The line being admitted, it would not make a title by adverse possession to the fence, for the reason that because there was no intention to go beyond his deed, but an intention to keep within it, which by a mere mistake he had happened not to do. Currie v. Gilchrist, 168 N. C. 548, 61 S. E. 381; Blue Ridge Land Co. v. Floyd, 171 N. C. 547, 567, 578, S. E. 852; Roe v. Jourdain, 181 N. C. 180, 106 S. E. 690.

Necessity of Being Visible and Notorious. — It was suggested under the definition that the possession must be as open and notorious as the possession would be if the owner were present and could treat it as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary. The line being admitted, it would not make a title by adverse possession to the fence, for the reason that because there was no intention to go beyond his deed, but an intention to keep within it, which by a mere mistake he had happened not to do. Currie v. Gilchrist, 168 N. C. 548, 61 S. E. 381.

The illustrations given under the preceding catch line and the rule therein developed are but illustrations of this rule. The possession must always be such as to continually expose the party to suit by the true owner. The possession spoken of must be constituted by such acts as would expose the party to a suit by the State, or the actual and continuous occupation is such that from the very nature of things there are periods of time when the adverse possessor is not actually upon the land but is in fact occupying it under his claim the possession is not sufficiently interrupted to defeat title when so held for a sufficient period of time.

The discussion under this catch line is limited to actions against private individuals. The rule regarding the continuance of the possession against the state is converse to the preceding contrary rule as to possession against private individuals. See note to sec. 1-35.

Tacking Possessions — Privity. — It is not necessary that the adverse claimant hold the possession for the statutory period. A gap occurring during the period of an adverse possession, when taken together with the gap from the date of the adverse possession up to his death, does not render the possession insufficient to defeat title by adverse possession under a deed to his ancestor, as color, to show a continuity of such possession for seven years. Blue Ridge Land Co. v. Floyd, 117 N. C. 466, 53 S. E. 687.

It has been held that the possession by a tenant of a defendant's ancestor for one year, under his deed, and the actual and continuous occupation by the land by his heirs at law after his death, for the purpose of cutting a few logs, is insufficient evidence of adverse possession in character and continuity to be submitted to the jury. Blue Ridge Land Co. v. Floyd, 167 N. C. 663, 61 S. E. 687.

An intervening period of five months, Holdfast v. Shepherd, 28 N. C. 361, and one year, Ward v. Herrin, 49 N. C. 23, 24; Malloy v. Bruden, 86 N. C. 251, 259, have been held to be sufficient intervals to defeat title by adverse possession. A gap occurring during the period of a suspension of the statute is sufficient to destroy the continuity. Malloy v. Bruden, 86 N. C. 251.

Reasons for Rule as to Continuity. — The reason for the rule of continuity is that at all times there is a presumption in favor of the true owner, and he is deemed by law to have possession coextensive with his title except during the periods he is actually ousted by the personal occupation of another, so that whenever the adverse possession is interrupted, it again draws to it the possession, and the seizin of the owner is not to be understood that the possession is interfered with by the casual entry of a trespasser sufficiently to defeat title by adverse possession. Hayes v. Lumber Co., 180 N. C. 252, 104 S. E. 527.

From the above authorities it would seem that the true rule is that whenever an occupation ceases for a period ever so brief the statute stops running but if the nature of the only use to which the land can be subjected is such or the actual and continuous occupation is such that from the very nature of things there are periods of time when the adverse possessor is not actually upon the land but is in fact occupying it under his claim the possession is not sufficiently interrupted to defeat title when so held for a sufficient period of time.

The discussion under this catch line is limited to actions against private individuals. The rule regarding the continuance of the possession against the state is converse to the preceding contrary rule as to possession against private individuals. See note to sec. 1-35.

It has been held that to constitute privity, the later occupation must be a proprietary one, by adverse possession or by descent from the heir, or for seven years under color, the burden is upon him who relies upon such claim to show continuous possession. There is no presumption that the possession of real estate is adverse to its owner. Monk v. Tann, 117 N. C. 439, 49 S. E. 345; Bland v. Beasley, 145 N. C. 168, 170, 58 S. E. 991. See sec. 1-42.

II. NOTE TO SECTION 1-38.

1. Generally.—When title to land is out of the state, seven years adverse possession under color of title is necessary to ripen title in ordinary cases. Virginia-Carolina Tie, etc., Co. v. Dunbar, 106 F. (2d) 831.

2. Presumption of Proof.—Presumptions.—When the title is claimed by adverse possession, the burden is on the claimant to show such possession. There is no presumption that the possession of real estate is adverse to its owner. Monk v. Tann, 117 N. C. 439, 49 S. E. 345; Bland v. Beasley, 145 N. C. 168, 170, 58 S. E. 991. See sec. 1-42.

Connection with Grant as Requisite to Pleading Section.—The plaintiff may show title out of the state by offering a grant to a stranger, without connecting himself with it, and then prove its non-issuance by adverse possession. Duke Power Co. v. Toms, 118 F. (2d) 443, 445.

Sufficiency of Paper to Constitute Color.—There can be no color of title without some paper writing attempting to convey title, which does not do it either because of want of title in the person making it or because of the defective mode of conveyance used; and, at least, that under the act of 1891 it must not be so plainly and obviously defective as to preclude the possibility of its being effective at all. When the time of the adverse possession relied on, and it was clearly competent for a witness to testify that he knew the land described in the deed and to the acts of possession occurring on that land. Duke Power Co. v. Toms, 118 F. (2d) 443, 445.

SAME.—Bond for Title as Color.—Where a bond for title is sufficient to constitute color of title because of defects discoverable from the record, the purport of this section being to afford protection to apparent titles, void in law, and supply a defense where none existed without its aid. Perry v. Bassenger, 219 N. C. 838, 15 S. E. (2d) 305.

SAME.—Bond for Title as Color.—Where a bond for title is unconditional and calls for no future payment, the presumption, in the absence of any evidence to the contrary, is that the price was paid before or at the time of the signing, so that it is "color of title" to support adverse possession within this section. Bland v. Beasley, 145 N. C. 168, 170, 58 S. E. 991.

"After payment of the purchase money, a bond for title is 'color of title' to support adverse possession even against the vendor. Avent v. Arrington, 105 N. C. 377, 10 S. E. 388; Betts v. Gahagan, 212 N. C. 335, 191 S. E. 142.

SAME.—Deed for Partition as Color.—A deed by the heirs of a deceased owner of land for partition thereof is not color of title within this section. Betts v. Gahagan, 212 Fed. 120.

A deed by a grantee in a deed of partition by heirs of the deceased owner to a third person of the land conveyed to the grantee in the partition is color of title within this section, where the third person had no interest in the land outside of the deed. Betts v. Gahagan, 212 F. 120.

Where the possession of a widow, when tacked to the possession of her husband, is sufficient to confer title to the land on the heirs of the husband. Barrett v. Brewer, 153 N. C. 796, 157 S. E. 748; Truston v. Blount, 4 N. C. 455. "In a like manner the widow may tack her possession to that of her husband where she immediately possesses the property as a part of her homestead, (Atwell v. Shook, 133 N. C. 547, 69 S. E. 614; Alexander v. Gibbon, 118 N. C. 375, 54 S. E. 777) or dower. Jacobs v. Williams, 235 N. C. 796, 24 S. E. 748. It has been held that to constitute privity, the later occupation must be a proprietary one, by adverse possession or by descent from the heir, or for seven years under color, the burden is upon him who relies upon such claim to show continuous possession. There is no presumption that the possession of real estate is adverse to its owner. Monk v. Tann, 117 N. C. 439, 49 S. E. 345; Bland v. Beasley, 145 N. C. 168, 170, 58 S. E. 991. See sec. 1-42.

II. NOTE TO SECTION 1-38.
this section is immaterial. Atwell v. Shook, 133 N. C. 387, 45 S. E. 777.

Where land devised to testator's children with remainder to his grandchildren was sold under order of court by a commissioner to one of the life tenants, and defendants were the purchasers by mesne conveyances from the life tenant, the undivided interest conveyed was similar to a deed from a stranger, constituted color of title. Perry v. Bassenger, 219 N. C. 838, 15 S. E. (2d) 365.

Same—Unregistered Deed.—An unregistered deed is not color of title as against judgment creditors of the grantor. Eaton v. Doub, 190 N. C. 144, 123 S. E. 494.

While an unregistered deed is not color of title as against subsequent grantees under registered deeds and creditors of the grantor, a registered deed conveys by registered deed, and mesne conveyances from him are duly registered, such recorded deeds are color of title, under this section, and where the land is held by actual possession prior to the filing of a judgment against the grantor in the unregistered deed, the judgment does not constitute a lien against the land. Glass v. Lynchburg Shoe Co., 212 N. C. 70, 192 S. E. 899.

Same—Voidable Deed.—A voidable deed is sufficient color of title as against creditors of the grantor where it is immaterial that although it is a distinct and separate source of title from one under which entry was first made. Butler v. Beil, 181 N. C. 155, 156 S. E. 216.


A wife's deed to her husband is color of title even if it be void, and his sufficient adverse possession for seven years, under this section, may be obnoxious in misreciting other intended sections. Green v. Potts v. Payne, 200 N. C. 246, 156 S. E. 499.

Same—Deed by Mortgagee in Possession.—A deed by the mortgagor in possession to a third party, with notice of the mortgage, conveys only the equity of redemption, and does not pass such a colorable title as may ripen by possession into an absolute legal estate. Parker v. Banks, 79 N. C. 480.

Same—Sheriff's Deed after Judgment against Nonresident.—A sheriff's deed at an execution sale under a judgment obtained against the nonresident owner by his wife to recover for maintenance and necessaries furnished by her to their minor children, in which action attachment was levied on the land, is at least color of title under this section, the judgment not being void. Campbell v. Campbell, 221 N. C. 257, 20 S. E. (2d) 53.

Same—Deed after Husband Abandons Wife.—After abandonment, the wife's possession as purchaser at execution sale of a judgment obtained against him, is adverse to the husband, and is sufficient color of title for purposes of this section, will bar him. Campbell v. Campbell, 221 N. C. 257, 20 S. E. (2d) 53.

The evidence tended to show that plaintiff, the owner of the locus in quo, left the state and abandoned his wife and children, that thereafter: a tax lien on the locus in quo was foreclosed and deed was made by the commissioner to plaintiff's wife, directed to plaintiff, executed by a quitclaim deed to plaintiff's youngest child. That some 13 years prior to the institution of the action, relying upon the belief that the husband was dead, the wife executed quantum meruit title to the other children, directed to plaintiff's youngest child, and that the following day the youngest child and her husband executed deed of trust upon the property in which she represented that her father was dead and that she had title. Defendants' claim of title as grantees from the purchaser at the foreclosure sale of the deed of trust. It was held that the tax deed and the deeds of the wife and the other children to the youngest child constituted color of title, and since the youngest child went into possession under such color of title and remained in possession for a period in excess of 7 years is sufficient to take the case to the jury upon defendants' contentions that they had acquired title to the locus in quo by adverse possession under this section, and the verdict of the jury under correct instructions from the court is determinative of the question. Nichols v. York, 219 N. C. 250, 220 S. E. 952.

Same—Deed of Non Compos Mentis.—The deed of a person non compositus is color of title, and possession under it for seven years is sufficient color of title. Ellington v. Ellington, 103 N. C. 54, 9 S. E. 268.

Character of Possession Under Section.—Chief Justice Ruf- fin in Green v. Harman, 15 N. C. 158 at p. 165, said: "The operation of the statute is dependent upon two conditions: (1) The one is possession continued for seven years; and the other the character of that possession—that it should be adverse. It has never been held that the owner should actually know of the fact of possession, nor have actual knowledge of the nature or extent of the possessor's claim. It need not be, therefore, that the possessor be aware that he is in possession, nor that he is intended that he should." Blue Ridge Land Co. v. Floyd, 171 N. C. 543, 546, 88 S. E. 862.

Adverse possession must be possession under known and evident title, and it must be adverse to the grantor, and the title under which entry was made. Berry v. Coppersmith, 212 N. C. 50, 54, 191 S. E. 3.

The possession of one under color is sufficient notice of his claim of title to the lands. Butler v. Bell, 181 N. C. 85, 156 S. E. 217.

The adverse possession for seven years under color, which bars the entry of the true owner, must be open, continuous, and uninterrupted, by distinct and unequivocal acts of ownership, the burden being upon him who asserts that he has thus acquired the title, to show such actual adverse possession. Monk v. Wilmington, 137 N. C. 325, 49 S. E. 745; Betts v. Beverly, 152 N. C. 56, 67 S. E. 55. But in the case of Stewart v. McCormick, 161 N. C. 625, 626, 77 S. E. 761. For full treatment see part one of this note, supra.

If the character of the possession is insufficient to ripen a perfect title, the question of color of title does not arise. Clendenin v. Clendenin, 181 N. C. 465, 107 S. E. 458.

Charging This and Section 1-40.—Where, in an action for the recovery of land, defendant relied on this section and section 1-40, and the evidence justified a finding in his favor under this section, but there was no evidence to support a verdict under section 1-40, the error in refusing to charge on that basis was not error. Bond v. Beverly, 152 N. C. 56, 67 S. E. 55.

Conflict Making Jury Question.—Where the defendant in ejectment claims the locus in quo by sufficient evidence of adverse possession with and without "color," as against the plaintiff's chain of paper title, and the defendant denies the genuineness of a lease to his predecessor which the plaintiff has introduced, an issue of fact is raised for the determination of the jury. Virginia-Carolina Power Co. v. Taylor, 191 N. C. 329, 131 S. E. 666.

Effect on Lien of Judgment Creditor.—Adverse possession against a judgment debtor for a period of seven years under color of title is sufficient to defeat a judgment creditor, the judgment creditor having no right of entry or cause of action for possession, but only a lien enforceable according to the prescribed procedure, and as to him the possession is not adverse. Moses v. Major, 201 N. C. 613, 160 S. E. 890.

Effect of Miscitation.—The criticism to which this section may be objectionable in misreciting other intended sections cannot affect the application of section 1-17 to the present case. In the present case there was no error in the instructions expressly made subject. Clayton v. Rose, 87 N. C. 106, 111.

Formerly this section cited the statutes naming and defining adverse possession, and is to these citations that this annotation refers. Ed. Note.


§ 1-59. Seizin within twenty years necessary.—No action for the recovery of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of the action, unless he was under the disabilities prescribed by law. (Rev., s. 383; Code, s. 143; C. C. P. s. 22; C. S. 429.)

Section Not Retroactive.—This statutory provision does not extend to actions already commenced or rights of actions already accrued at the ratification of the Code. Covington v. Stewart, 77 N. C. 148, 151.

Legal Title Prima Facie Evidence of Possession.—If a plaintiff establishes, on the trial of the issue of possession, that he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to plaintiff prior to the required time, it is prima facie evidence of the commencement of such action. Johnston v. Pate, 83 N. C. 110; Conkey v. Roper Lumber Co., 126 N. C. 499, 501, 36 S. E. 425.

Same—Section Construed with Section 1-42.—In cases where there is no tenancy in common this section must be construed with section 1-42, for this section is explained in sec. 1-42 by the further declaration that the person who

[108]
Prior to the passage of sec. 1-36, in 1917, before one could establish title to property under this section, title must be acquired by adverse possession for twenty years. Conkey v. Roper Lumber Co., 126 N. C. 499, 48 S. E. 141. Where the owner of land has platted and sold it by deeds to their boundaries and each introduced a grant from the state to their lands respectively, which taken together, indicate that it has become adverse, and that the occupation and use of the claimant for twenty years, continuously, presumed to be out of the state and such proof is not notoriously adverse or some act must be done to clearly indicate that it has become adverse. Thus, where adjoining owners were litigating with respect to streets, parks, etc., according to a registered plat, the court is required to give a title in fee to the possessor, as seizin follows the act of the court to the jury as to the issue of possession. Bland v. Beasley, 145 N. C. 168, 58 S. E. 930. Where title by adverse possession can be established under State statutes of limitation, the statute of limitations will not be waived or abated by a conveyance purported to be adverse to the title. Moore v. Curtis, 169 N. C. 74, 8 S. E. 132. Where plaintiffs acquired the title by adverse possession for twenty years, was the possession of the plaintiff. Conkey v. Roper Lumber Co., 126 N. C. 499, 48 S. E. 141. Where the possession of all adjoining owners was adverse, the court is required to give a title in fee to the possessor. Bland v. Beasley, 145 N. C. 168, 58 S. E. 930. Where title by adverse possession can be established under Section 1-38, it is not sufficient under this section to sustain a charge that where title is out of the state and the defendant has been in adverse possession for thirty years, it is not sufficient to sustain a charge. Moore v. Curtis, 169 N. C. 74, 8 S. E. 132. Where title by adverse possession can be established under Section 1-38, it is not sufficient under this section to sustain a charge that where title is out of the state and the defendant has been in adverse possession for thirty years, it is not sufficient to sustain a charge. Moore v. Curtis, 169 N. C. 74, 8 S. E. 132.
§ 1-41. CIVIL PROCEDURE—LIMITATIONS

§ 1-42. Action after entry.—No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action is commenced thereupon within one year after the making of the entry, and within the time prescribed in this chapter. (Rev., s. 365; Code, s. 145; C. C. P., s. 24; C. C. P. 431.)

Editor's Note. — At common law any person who had a right to recover by adverse possession, without the formality of a legal action, and being in possession of the premises, could retain it, and plead that it was his soil and freehold. This was allowed in all cases where the original entry was void, or could not be sustained, or when the statute began running, as this case might be) provided the various sections of the code. The effect seems to be that the common law entry without maintaining a suit within one year thereof is insufficient so that one cannot repossess himself by an entry without also maintaining an action. The latter part of this section, "unless the party is barred by the statute prescribing the statute of limitations," is but recognition of the statutes prescribing the various periods necessary for an adverse possession ripening into title.

Cited in Clayton v. Cagle, 97 N. C. 300, 303, 1 S. E. 523.

§ 1-42. Possession follows legal title.—In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the possession has been adverse to the legal title for the time prescribed by law before the commencement of the action. (Rev., s. 386; Code, s. 146; C. C. P., s. 25; C. C. P. 432.)

Cross References.—As to title against the state, see § 1-35. As to adverse possession of seven years under color of title, see § 1-38. As to adverse possession of twenty years, see § 1-39.

Necessity of Showing Legal Title. — The statutory presumption as to possession and occupation of land in favor of the true owner, from the express language of the provision, will arise only when evidence is produced of a claimant who has shown "a legal title", and until this is made to appear the presumption is primarily in favor of the occupant, that he is in possession asserting ownership. Moore v. Miller, 177 N. C. 369, 198 S. E. 451.

Presumption of Subordination. — When the defendant relies on a deed made to his ancestor as color, and adverse possession of others thereunder to ripen his title, it is necessary to show that their occupation was under and in subordination to the deed under which he claims, or the presumption will obtain that they were under the true title. Waccamaw, 200 N. C. 593, 158 S. E. 104.

Title acquired by adverse possession is legal title, and occupation of the premises for a period of twenty years under a color of title adverse to the true owner and the owner and his grantee under the provisions of this section shall be deemed sufficient or valid, as a subsequent title, unless it appears that the party having the legal title was not in possession for the time prescribed by law. (Rev., s. 369, 371, 160 S. E. 453.)

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§ 1-43 CIVIL PROCEDURE—LIMITATIONS

§ 1-43 Tenant's possession is landlord's.—When the relation of landlord and tenant has existed, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; nor where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that the tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited. (Rev., s. 387; Code, s. 117; C. C. P. S. 396; C. S. 1463.)

Cross Reference.—As to provisions concerning landlord and tenant generally, see § 42-1 et seq.

§ 1-44 Procedure.—If the plaintiff can prove title by estoppel, as by showing that the defendant was his tenant (or derived his title through his tenant) when the action was brought. Cornell v. Mann, 100 N. C. 234, 5 S. E. 782; Merritt v. Waddell, 104 N. C. 112, 115, 10 S. E. 142; Moore v. Miller, 179 N. C. 396, 398, 102 S. E. 625.

§ 1-45 Section Fixed—Maximum Period.—The presumption which attaches to the possession of a tenant following the termination of tenancy, is only a presumption for the periods limited, and after the expiration of such periods, the presumption no longer exists. Monk v. Wilmington, 137 N. C. 322, 328, 49 S. E. 345. From distress for rent.

Disability Limited to Persons Having Right of Entry, etc.—Adverse possession relates only to the true title, and the exceptions in this statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. Berry v. Lumber Co., 141 N. C. 386, 396, 54 S. E. 278.

Application to Claims from Common Source. — Where the tenant's title is derived from a common source, the landlord's title is deemed to be in subordination thereto under this section, the plain--

§ 1-46 Tenancy and possession of the tenant in common is shown, the possession of one is the possession of the whole land. Roscoe v. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389.

Burden and Sufficiency of Proof.—The burden in an action to recover lands, depending upon adverse possession, extends to the party claiming under color, the burden of proving his title is upon the adverse possessor. Lawrence v. Eller, 169 N. C. 211, 85 S. E. 291; Ab-
years and a few months after the death of her husband, and for seven years and a few months after the taking effect of any adverse action. Day v. Howard, 73 N. C. 1.

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§ 1-44 CH. 1.

§ 1-44. No title by possession of right of way.

—No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right of way, depot, stationhouse or place of landing, by any statute of limitation or by occupation of the same by any person whatever. (Rev., s. 388; Code, s. 150; C. C. P., s. 29; R. C., c. 65, s. 23; C. S. 434.)

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Reason for Section. — The provisions of this section are justified upon the ground that the right of way is donated to the public, and further, that this statute is not for the purpose of loss by adverse possession. One using the right of way is at most a permissive licensee. Muse v. R. R. Co., 149 N. C. 445, 63 S. E. 102; Carolina, etc., R. Co. v. McCaskill, 94 N. C. 746; R. R. v. Olive, 142 N. C. 257, 25 S. E. 363.

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When Section Applies. — This section applies, it would seem, only to cases of adverse possession or otherwise taken in possession of a right of way and has no application where there is merely an executory contract. The decisions seem to hold that the section does not apply unless the company has operating the road. See May v. Atlantic, etc., R. Co., 151 N. C. 388, 66 S. E. 310.

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Before this section can apply the company must have secured or acquired the right of way either by condemnation or otherwise and an executory contract to convey is not sufficient to meet the requirement. Even if an instrument is drawn for the purpose of making the conveyance, the same is not an executory instrument or it will be deemed insufficient for the purpose of bringing it within the purview of this section. Beattie v. Carolina R. Co., 108 N. C. 425, 12 S. E. 913.

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Effect of Section. — Under this section the possession by the owners of the land of the right of way might be used by the owner it has a right of entry whenever it needs the property for its use. Railroad v. Sturgeon, 120 N. C. 225, 56 S. E. 779; Railroad v. Olive, 142 N. C. 257, 55 S. E. 363; Carolina Central R. Co. v. McCaskill, 94 N. C. 746, 753; Earnhardt v. Sou. R. Co., 157 N. C. 358, 72 S. E. 1023.

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Effect upon Power of State, etc., to Change Grade.—This section does not prevent the State from changing the grade of a railroad company to change the grade of its roadbed where it is crossed by streets, so that public travel and drainage may not be impeded. Atlantic, etc., R. Co. v. Williams, 138 N. C. 353, 48 S. E. 514, aff’d 232 U. S. 546, 34 S. Ct. 364, 58 L. Ed. 721.

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Section Not Applicable.—An incorporated city or town which obtains the necessary right of a railroad company by long and continuous, open, and adverse use thereof for such purpose, and where the city has used the land for a long period of time there is a presumption of an original condemnation by the city, and this section has no application as to the rights of municipalities to acquire the land. In the Matter of Assessment Against Property of Southern Ry. Co., 196 N. C. 756, 177 S. E. 221.

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§ 1-45. No title by possession of public ways.—No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations. (Rev., s. 389; 1891, c. 224; C. S. 433.)

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Prior Law.—Prior to the enactment of this section title to lands by adverse possession could be acquired against the corporation or company, by reason of any occupancy of such lands by the railroad company, or other agent of the State; and where before the enactment of this statute sufficient possession of the character required had ripened the title to a part of a street of a city under what are now sections 1-30, 1-35, as construed by the decisions of our Supreme Court, the municipality may not reassert the loss ownership except under the power of eminent domain vested in it by the law and for the public use. Threadgill v. Wadesboro, 170 N. C. 641, 67 S. E. 521.

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For cases decided prior to section, see Turner v. Com., 127 N. C. 153, 37 S. E. 191; Moore v. Carson, 104 N. C. 422, 10 S. E. 689; State v. Long, 94 N. C. 896; Crump v. Mims, 64 N. C. 767.

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Same—Effect of Section upon Title Acquired.—Where an owner has acquired title by adverse possession to a part of a street under the Code of 1868 and the construction placed thereon by the decisions of the Supreme Court, the reversal of the principle thereunder by this Court cannot disturb the title theretofore acquired. Threadgill v. Wadesboro, 170 N. C. 641, 87 S. E. 521.

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Application of Section.—Possession of the street by any one claiming it adversely cannot divest or destroy the right of any public use thereon. The same would also hold where a town entered into the possession of a square by adverse possession under a deed purporting to convey a part thereof. Gates County v. Hill, 158 N. C. 584, 73 S. E. 847.

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A right to maintain a building on a navigable stream which obstructs the operation of a draw in a county bridge cannot be acquired by adverse use by virtue of this section. Law v. County of Crabbe, 119 N. C. 537, 74 S. E. 104.

Same—Curing Erroneous Charge. — An erroneous charge that the title to an open square, dedicated to and accepted by a town, would be acquired by seven years adverse possession, contrary to the provisions of this section, may be cured alone by a full and complete charge on the principles of an offer to dedicate and an acceptance of the square by the town. Atlantic, etc., R. Co. v. Dunn, 183 N. C. 427, 111 S. E. 754.

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Applies Only to Streets Acquired by Municipality.—The principle of law of this section applies only to such streets or roads belonging to a municipality or corporation, which may be dedicated by a private citizen for use as streets when such offer of dedication has not been accepted by the municipality before the offer has been unequivocally withdrawn. Gray v. Laboy, 193 N. C. 237, 137 S. E. 106.

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Sections Construed with This Section. — Construing sec—

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[112]
was passed, provided it shall never exceed the time allowed of this section the right of the town to the use of the amending act, then two years more would be reasonable. been barred in six years, and four years had elapsed before other periods of limitation on actions, Culbreth v. Down

tion 146-91 providing that no statute of limitation shall effect the title or bar the action of one claiming it under an assignment from the State Board of Education, etc., with some exceptions. It is held, that the limitations as to color for twenty-one years, and without for thirty years, do not apply to personal actions after the State has parted with her title to the lands; and the thirty years statute to recover damages for trespass in cutting and removing trees from the land applies under the facts in this case. Tillery v. Whiteville Lumber Co., 172 N. C. 296, 90 S. E. 389.

Possession Prior to Enactment—When sufficient adverse possession of a street of an unincorporated town by the present owners and those claiming under them has been in existence for five years prior to the passage of this section the right of the town to the use of the street is barred by the statute of limitations. Tadlock v. Mizell; (195) N. C. 472, 132 S. E. 739.

Property Conveyed to Trustees for Municipal Purposes—Where property was conveyed to trustees for the benefit of members of the community for use as a community house or playground, this section does not apply. Carswell v. Creswell, 217 N. C. 40, 7 S. E. (2d) 58.

Art. 5. Limitations, Other than Real Property.

§ 1-46. Periods prescribed.—The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article. (Rev., s. 390; Code, s. 151; C. C. P., s. 20; C. S. 436.)

Statute Affects Remedy Only.—The statute of limitations relates only to remedy, and the defendant is never absolved from the liability which is created until the plaintiff resorts to his remedy, either by action on the judgment, or motion in the nature of scire facias to revive it. Berry v. Conpensing.

Defenses Against Former Statute.—Since the prior law was not an absolute bar to actions, but merely raised a presumption of payment which might be rebutted, the question of the real presence of debt or other such questions were material in rebutting the presumption raised, but under the present law are immaterial for such purposes since the present statutes totally bar the action. See Campbell v. Brown, 86 N. C. 376, 382.

Actions for Which No Statutes.—There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. Jones v. Commissioners, 107 N. C. 248, 12 S. E. 69. Nor is there any statute applicable to the probate of wills. In re Dupree’s Will, 163 N. C. 539, 182 S. E. 411.

Application of Statutes to Trust Relations.—Where a partner receives firm money in winding up the affairs of the partnership, he holds such money in trust for the other partners and the statutes do not run. McNair v. Ragland, 7 N. C. 139, 145.

Suspension of Statutes.—The statute of limitation does not run when there is no one in esse capable of suing. Grant v. Hughes, 94 N. C. 231.

Effect of Change of Period by Amendment.—A reasonable time for the commencement of an action before the statute changing the period works a bar, Nichols v. R. R., 120 N. C. 495, 26 S. E. 643, shall be the balance of the time unexpired according to the law as it stood when the amending act was provided it shall never exceed the time allowed by the new statute. For example, if the action would have been barred in six years, and four years had elapsed before the amending Act was passed, the plaintiff’s right of action would be for twenty years from his title to the land, count from the time of the passing of the act, and to all other periods of limitation on actions. Culbreth v. Downing, 121 N. C. 205, 206, 28 S. E. 294.


§ 1-47. Ten years.—Within ten years an action—

1. Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.

2. Upon a sealed instrument against the principal thereto.

3. For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagee or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

4. For the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him has been in possession, within ten years after the right of action accrued.

5. For the allotment of dower upon lands not in the actual possession of the widow following the death of her husband. (Rev., s. 391; Code, s. 152; C. C. P., ss. 14, 31; 1937, c. 368; C. S. 437.)

I. In General.

II. Subs. (1). Judgments and Decrees.

III. Subs. (2). Sealed Instruments.

IV. Subs. (3). Mortgage Foreclosure.


I. IN GENERAL.

Editor’s Note.—The 1937 amendment added subsection 5 to this section.

For a discussion of the effect of the amendment, see 15 N. C. Law Rev. 330, 331.

See 11 N. C. Law Rev. 220.

Law Prior to Section.—It was said of the statute of prescription immediately preceding this section that, “It’s obvious policy, as said in Inglish v. Smith, 41 N. C. 90, to insist peremptorily on diligence in all cases to which it has any application, and it is one which the courts must fairly carry out. So emphatic is it a statute of repose, that no saving is made in it of the rights of infants, females in marriage, or persons non compos.” Hamlin v. Mebane, 54 N. C. 18; Hodges v. Council, 88 N. C. 181; Headen v. Womack, 88 N. C. 468, 470.

The presumption was not conclusive; it might have been rebutted by any pertinent proof, and such proof was presumed by the appellate court where there was no complaint of the finding of fact by the Court. In re Walker, 107 N. C. 340, 343, 12 S. E. 136.

Though not strictly a statute of limitations, the section was re-denominated in a general sense, and hence it was made part of the chapter denominated in the Revival Code “Limitations.” And although it did not create an absolute bar, it did, in a sense, create a conditional bar. Rogers v. Connolly, 72 N. C. 359.

Same.—Effect of Present Section.—This section has taken the place of the former statute of limitations, R. C., ch. 65, sec. 18 in respect to judgments. Brown v. Harding, 171 N. C. 686, 689, 89 S. E. 222.

Application Limited to Actions or Suits—Power of Sale.—The statute was intended to apply only to actions or suits, and this is apparent from the very language of the law. In a case where it became necessary to decide whether a sale under a power of sale was a suit or an action within the meaning of a statute it was held that a proceeding to foreclose a mortgage by advertisement is not a suit. Such a proceeding is merely an action of the mortgagee exercising the power given him by the mortgagor. In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court. Core v. Hyatt, 132 N. C. 620, 44 S. E. 678; Miller v. Core, 133 N. C. 578, 582, 45 S. E. 240.

The legislature has prescribed ten years as the limitation to an action upon a judgment, but it has made no provision for a party to an action or suit to bring under the limitation any action or proceeding in the nature of an action taken against him. Berry v. Conpensing, 90 N. C. 395, 398.

Same.—Leave to Issue Execution.—A proceeding for leave to issue execution in a judgment charging lands with ownership in partition is an "action" within the meaning of the statute of limitations. Ex parte Smith, 134 N. C. 495, 47 S. E. 15.
§ 1-47

Sufficiency of Plea of Section.—An answer alleging "that the plaintiff has not brought his action within the time prescribed by law, and that the cause is barred by the statute of limitations," is sufficient to meet the statute of limitations. Pemberton v. Simmons, 100 N. C. 316, 6 S. E. 122.

Duty to Consider Unsatisfactory Plea.—Although the plea of this section was indefinite and unsatisfactory, it was the duty of the court below to have considered and determined whether the limitations, as alleged by the defendant, was a sufficient plea of the statute of limitations. McDonald v. Dickson, 87 N. C. 401. See dissenting opinion.

Effect of Making or Adding Parties.—Where this section applies, its provisions are not affected by the fact that the original action was brought in the Supreme Court, had not been made before a succeeding term of the superior court, and the judge had thereupon ordered a discontinuance of the action, from which there was no appeal. Geitner v. Proctor, 105 N. C. 222, 10 S. E. 1035.

Duty of the court below to have considered and determined whether the plea of the statute of limitations made does not remove the statutory bar. McDonald v. Dickson, 87 N. C. 401. See dissenting opinion.

Pemberton v. Simmons, 100 N. C. 316, 6 S. E. 122. See dissenting opinion.

Code Sec. 417; Ritter v. Chandler, 214 N. C. 703, 200 S. E. 398; Own-

dierogation of common right as is the statute of limitations, Section 326, was subject to the statute of presumptions, which corresponded to this section, because this section is not retroactive. Herman v. Watts, 107 N. C. 344, 646, 12 S. E. 437. If there are valid subsisting judgments for the unpaid mortgage debt and the vendor does not deny the liability, the assignee of a joint vendor cannot insist upon the statute of presumption of payment of lapsed time as that which terminates the lien of the judgment, and operates as a bar to a new action upon it. McDonald v. Dickson, 87 N. C. 401. See dissenting opinion.

Prior to this statute there was no limitation absolutely barring the cause of action upon a judgment, but the statutes merely raised a presumption of payment which might be rebutted by competent evidence.

The period of time necessary to lapse before the presumption arose varied with the various statutes. At common law the period required was a great lapse of time, next the period was fixed by statute at 20 years, and then by the act of 1855 was changed to ten years. This remained the law until the C. C. P. of 1868 which changed the presumption to an absolute statute period fixed at ten years. See McDonald v. Dickson, 87 N. C. 404, 412.

Statute Strictly Construed.—A statute so entirely in derogation of common right as is the statute of limitations, should not be considered. There is no analogy which makes the decisions in Sikes v. Parker, 95 N. C. 232; Usry v. Suit, 91 N. C. 406, 416; Wilcoxon v. Logan, 91 N. C. 449; Soles (ad) sac

The transcript of a justice's judgment docketed in the superior court becomes, for the purpose of lien and execution, a judgment of the superior court. Broyles v. Brittain v. Dickson, 104 N. C. 542, 97 S. E. 494.

There is therefore no analogy which makes the decisions in Sikes v. Parker, 95 N. C. 232; Usry v. Suit, 91 N. C. 406, 416; Wilcoxon v. Logan, 91 N. C. 449; Soles (ad) sac

The mere transfer of the debtor's title. But it has been held that "the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing," and "the penalty of the statute of limitations is lost if the judgment is rendered in a justice's court, and is not completed before the expiration of ten years." Osborne v. Board of Education, 207 N. C. 503, 504, 177 S. E. 642, citing Hyman v. Jones, 205 N. C. 266, 171 S. E. 103.

Application to Foreign Judgments. — This section applies to foreign judgments. Arrington v. Arrington, 127 N. C. 190, 41 S. E. 121, 177 S. E. 245.

When Statute Begins to Run — Judgment for Costs. — A judgment for costs is considered part of the first judgment where the costs were first levied against the plaintiff but were later adjudged against the defendant, and there is no bar except from the lapse of ten years under this section. Owen v. Paxton, 122 N. C. 770, 772, 30 S. E. 343.

Same.—At Time of Judgment or Confirmation of Sale. — Where an action is instituted to recover the amount due on a mortgage from the proceeds of a sale of real estate, in which judgment is rendered on the debt, an order being made for the sale of the land, which sale was later reported and confirmed, the statute of limitations began to run at the date of the money judgment and not from the date of the confirmation of the sale. McCaskill v. McKinnon, 121 N. C. 192, 29 S. E. 265.

Same.—Judgment for a Devastavit against Executor. — When an action is brought against an executor or administrator for a devastavit, and a judgment is obtained against him, the cause of action accrues as against his real and personal representative, when such representative qualifies and gives bond. Syms v. Brittain, 248 N. C. 61.

Same.—Alimony Payable Annually. — In an action on a judgment for alimony, payable annually, the annual sums are barred within ten years from the time they became due under this section. Arrington v. Arrington, 127 N. C. 190, 37 S. E. 212. See dissenting opinion.

Stopping the Statute. — Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, motion denied and appeal taken to the judge, and the clerk ordered that execution should not issue until the adjournment of the August, 1931, term of court, and the appeal to the judge was never heard, the judgment was not barred under this section. The judge did not have the effect of stopping the statute and the judgment was barred in 1939 by the ten years statute of limitations. Exum v. Carolina R. Co., 222 N. C. 222, 22 S. E. (2d) 424.

Comp. Code Section 326—Effect of Judgment upon Continuing Tort. — A cause of action on contract or tort loses its identity when merged in a judgment; and thereafter a new cause of action arises out of the judgment. McDonald v. Dickson, 87 N. C. 404.

A judgment for a devastavit is barred by the ten years statute of limitation unless the claim was admitted by the administrator, or action was brought upon it, in re Morgan, 161 N. C. 257, 64 S. E. 613.

Same—Specialties Reduced to Judgments. — Specialties, when reduced to judgments, are merged, and the statute bar-
Effect of Issuing Executions During i’eriod.—The statute of limitations may be set up as a defense by an administra-
tor or assignee for leave to issue execution, from the date of docketing a judgment against his intestate, and although executions have regularly been issued within the prescribed period of three years after the judg-
ment was docketed, Berton v. Commercial Bank, 81 N. C. 976.

The words "any state" must be taken to mean the judg-
ment of a court of any state including our own. But it
would make a difference if it was not construed to include this state, since, by section 1-56, every action for
relief not specially provided for must be commenced within
the same period of ten years after the cause of action shall
have accrued. McDonald v. Dickson, 85 N. C. 248.

Effect of Payment on Judgment.—A payment on a
judgment does not arrest the running of the statute of limitations. McCaskill v. McKinnon, 121 N. C. 192, 28 S. E. 389.

A partial payment on a judgment does not arrest the run-

Comparison of Effect of Application of Section 1-56 with
This Section.—It can make no difference whether subsec-
tion 1 of this section or section 1-56 applies. The result
will be the same in either case. Ex parte Smith, 134 N. C. 495, 502, 47 S. E. 16.

Application to Issuance of Execution. — The issuing of
an execution on a decree charging ownership in partition is barred within ten years. Ex parte Smith, 134 N. C. 495, 47 S. E. 16.

The statute of limitations is a proper plea and a com-
plainant has no right to issue an execution for relief to arrest a judgment, when such motion is made more than ten years after the rendition of such judgment. McDonald v. Dick-
son, 85 N. C. 248.

III. SUBS. (2) SEALLED INSTRUMENTS.

Section Operated upon Remedy.—This section limits the time within which an action might be brought and thus op-
erates upon the remedy and not the right. The bar of the statute on a sealed promissory note is of that character, and while it takes away the forum for the enforcement of the debt, it does not destroy the debt. Denzal v. Tart, 227 N. C. 106, 109, 19 S. E. (2d) 130.

When Statute Begins to Run.—Breach of Warranty. —In an action for breach of a covenant of warranty the statute of limitations begins to run when there is an ouster of the grantee. Shankle v. Ingram, 133 N. C. 254, 45 S. E. 573.

Same—Breach of Covenant of Seizin. — In an action for damages for breach of covenant of seizin the statute of limitation begins to run upon delivery of the deed. Shankle v. Ingram, 133 N. C. 254, 45 S. E. 573.

Same—Coupons of Bonds. — The statute of limitations begins to run upon the discharge of the bonds, not of the coupons. Threadgill v. Com-
missioners, 116 N. C. 616, 617, 21 S. E. 425.

Same—Guaranty under Seal. — An action upon a guar-
anty, such as a surety, is barred within ten years of the cause of action accrues. Coleman v. Fuller, 105 N. C. 325, 11 S. E. 175.

Application to Suresties. — This subsection is not applic-
able to actions against sureties. The use of the word "principal" and the omission of the word "sureties" clearly indicates this to be the intention of the legislature. Section
1-52, subs. (1) is applicable to sureties and the action against them is limited to three years. Welfare v. Thomp-
son, 83 N. C. 279; Redmond v. Pippen, 113 N. C. 92, 18 S. E. 50; Barnes v. Crawford, 201 N. C. 434, 437, 180 S. E. 464; North Carolina Bank v. Co., 207 N. C. 244, 180 S. E. 81; North Carolina Bank, etc., Co. v. Will-
liams, 209 N. C. 806, 185 S. E. 13.

Guaranty as Principal under Section. — Neither the spec-
ific or the letter of this section makes a guarantor prin-
cipal to the original obligation. Coleman v. Fuller, 105 N. C. 328, 332, 11 S. E. 173. From dissenting opinion.

Character of Possession Necessary.—It is impossible to sup-
pose that the legislature intended a constructive possession, for the "mortgagor or grantor" could never have such posses-

Where the note contained the word "seal" opposite the
signature it was held to be conclusive as to the nature of the instrument. Therefore this section controls as to the time within which an action might be brought. Federal Reserve Bank v. Kolm, 61 F. (2d) 1002.

Application to Bonds.—Former Law. — The correponding
section of the former law was construed to embrace single bonds, though they were not named in terms. Rogers v. Clements, 95 N. C. 180, 184, 3 S. E. 512.

The presumption of payment arises after ten years from the time the right of action accrues, and the provisions of section 1-56 do not apply. Hall v. Gibbs, 87 N. C. 248.

Same—Section Not Retroactive. — A bond for the pay-
ment of money executed prior to this section, by the prin-
cipal and his sureties is exempted from the operation of the statute of limitations contained in this section. Knight v. Braswell, 70 N. C. 709.

Conditions Regulating Statute—Set-off. — A set-off in
favor of the obligor is not a part payment as to an endorser and does not repel the statute. Woodhouse v. Simmons, 73 N. C. 30.

Power of Sale in Deed of Trust.—See generally, Merri-
mon, Jr., Postal Co. v. Cable Co., 267 N. C. 149, 148 S. E. 250.

Whether Nets under Seal as a Question of Law or Fact.—
While ordinarily the bar of the statute of limitations is a mixed question of law and fact, where, in an action on a bond, the plaintiff is asserting the defendant's contention that the note was not under seal, but defendant offers no evidence in support of his contention that he did not adopt the printed word "seal" appearing on the note as his name, the question is one of fact, and comes a matter of law, and the court properly refuses to submit an issue as to whether the action was barred. Currin v. Currin, 219 N. C. 815, 15 S. E. (2d) 279.

IV. SUBS. (5) MORTGAGE FORECLOSURE.

The prior law, corresponding to this section created a presump-
tion that after ten years the mortgage was presumed to have
been satisfied which might have been rebutted and did not operate to absolutely bar the right. North Carolina Bank v. Williams, 209 N. C. 806, 185 S. E. 18.

Only Limitation upon Right to Foreclose. — This section
is the only limitation upon the mortgagee's right of action for foreclosure or sale. Parker v. Banks, 79 N. C. 480, 484.

Prerequisites to Bar. — In order to bar an action for re-
lief under this section two things must concur, namely, the lapse of ten years after the forfeiture or after the power
of sale became absolute or after the last payment, and the

Necessity for Possession. — The mere lapse of time, un-
accompanied by any possession, does not obstruct the right to

The statutory presumption of abandonment of an equi-
table claim to land, arising within ten years after the right
of action accrues, is fatal to the plaintiffs upon the facts of
this case. Howard v. Shuford, 209 N. C. 528; the Code, section 146; Williams v. Wallace, 207 N. C. 197, 151 S. E. 574.

Same — Remainderman before Lapse of Life Estate. —
The actual possession of the life tenant does not inure to
the remainderman. Thus, during the continuance of the life
estate the latter cannot avail himself of that actual
possession as against one who holds a mortgage on his in-
terest for the purpose of barring his right under the mort-

Where a remainderman, not being in possession, executes
a mortgage, the foreclosure of the mortgage is not barred
by the lapse of ten years after the forfeiture. No payment, such action being brought within ten years from the
time of the acquisition of the possession by the remain-

Character of Possession Necessary.—It is impossible to sup-
pose that the legislature intended a constructive possession,
for the "mortgagor or grantor" could never have such posses-
sion. In addition, it is a fundamental precept of law that
ownership and possession must be united and if it is a constructive possession, the law would have required the
mortgagor or possession by construction of law, as he has the legal
title, and, if a constructive possession was intended, there
was no use in requiring possession at all, as, if neither
party was in actual possession of the premises, the mortgage

Same—Section Applicable to Exclusion of 1-56.—Where
running of the statute. If it was intended that section 1-56 should apply to an action to foreclose, it must be dis-regarded altogether before section 1-56 has any application. Such a construction of section 1-56, would run whether regarded altogether before section 1-56 has any applciation.

There are several cases decided under section 1-56 in which the principle of section 1-47, sub. 3 has been adopted by analogy, and in which it was held that a party who, in the construction of the statute, has been barred of any equity therein by lapse of time, and that the statute runs only where the other party has had possession. Thurnborn v. Mezine, 133 N. C. 601, 45 S. E. 385, 95 Am. St. 660 was explained in Woodlief v. West, 136 N. C. 162, 168, 48 S. E. 578.

When Holding Becomes Adverse. — When the mortgagee of property is left in possession, he or his vendee holds it for the mortgagee, and his possession does not become adverse until the mortgagee shall have been in possession for a period of ten years. Woody v. Jones, 113 N. C. 253, 18 S. E. 205.

Absence from State as Suspending Section. — An action to foreclose a mortgage comes within the purview of section 1-55, where the possession of the mortgagor from the state suspends the running of the statute. Love v. West, 169 N. C. 13, 14, 84 S. E. 1048.

Effect upon Debt Secured. — The provisions of this paragraph only bar an action to foreclose the mortgage, and do not prevent the mortgagee securing his rights in the property in any other way. Fraser v. Bean, 96 N. C. 327, 2 S. E. 159.

Effect of Bar of Debt upon Foreclosure. — The fact that a note is barred by the three-year statute, section 1-52, of the period allowed for the enforcement of the note, does not prevent the mortgagee from foreclosing his mortgage securing the note, although the debt was due more than 10 years ago, interest has been paid on the debt within 10 years. Dixie Gro. Co. v. Hoyle, 204 N. C. 109, 167 S. E. 572.

Section Not Applicable to Power of Sale — The execution of a power of sale in a mortgage is not barred by the statute of limitations referring to actions to foreclose mortgages. Miller v. Coxe, 133 N. C. 587, 45 S. E. 940. In other words, this subsection of section 1-56 is not applicable to a sale under a power of sale, see 45-26. This section applies to actions for foreclosure of a mortgage or deed of trust and not to foreclosure under a power of sale, see 45-26. It is necessary for the defendant to bring the action for foreclosure that relation continued to exist after the day of forfeiture and under this subsection ten years possession of the defendant, after default, bars the plaintiff. Humphry v. Stephens, 191 N. C. 101, 131 S. E. 385.

When a party to an action involving the title to lands in dispute contends that a certain mortgage necessary in the paper title of the adverse party, is barred by this subsection, the plaintiff is entitled to have the adverse party's title examined and also to adduce evidence to show that the mortgage was barred before the sale. This is a necessary part of the plaintiff's case. Humphry v. Stephens, 191 N. C. 101, 131 S. E. 385.

Applicability to Consent Judgment Allowing the Equity. — Consent judgment providing that the defendant has an equity to redeem the land in controversy, on or before a certain day, and if this payment is made on or before that day the plaintiff will convey said land to the defendant, but in case of failure to pay within the time limited, the defendant shall stand absolutely barred and foreclosed of and from any and all equity or other estate, established the relation of mortgagor and mortgagee, the defendant overcame the decisions. Humphry v. Stephens, 191 N. C. 101, 104, 131 S. E. 385.

Power of Grantee to Plead. — The grantees of a mortgage are entitled to plead in a foreclosure action, the statute of limitations. Stancill v. Spain, 133 N. C. 76, 45 S. E. 466.

Cancellation of Barred First Mortgage by Second Mort- gage. — Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of ten years. Miller v. Coxe, 133 N. C. 573, 45 S. E. 940.

Cancellation Applicable to Mortgage of Surety. — Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of ten years. Miller v. Coxe, 133 N. C. 573, 45 S. E. 940.

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When a party to an action involving the title to lands in dispute contends that a certain mortgage necessary in the paper title of the adverse party, is barred by this subsection, the plaintiff is entitled to have the adverse party's title examined and also to adduce evidence to show that the mortgage was barred before the sale. This is a necessary part of the plaintiff's case. Humphry v. Stephens, 191 N. C. 101, 131 S. E. 385.

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Necessity of Pleading Section — Waiving Objection. — When a party to an action involving the title to lands in dispute contends that a certain mortgage necessary in the paper title of the adverse party, is barred by this subsection, the plaintiff is entitled to have the adverse party's title examined and also to adduce evidence to show that the mortgage was barred before the sale. This is a necessary part of the plaintiff's case. Humphry v. Stephens, 191 N. C. 101, 131 S. E. 385.

Part payment operating to start the running of the statute.
of limitations anew against the right of action to foreclose a mortgage or deed of trust, is any payment on the debt secured by the instrument, and the action to foreclose is not barred within ten years from such payment notwithstanding that the part payment is applied to only one of the notes secured, resulting in the bar of the statute of limitations anew against the right of action to foreclose as to an action on the other note. Demar v. Tarr, 221 N. C. 106, 19 S. E. (2d) 130.


Where a mortgagee in possession has a full defense to an action for ejectment brought by a purchaser after sale under a mortgage barred by the statute of limitations, the court will not interfere by injunction to prevent a sale threatened by the mortgagee. It would be otherwise if there were a contest as to the amount due under the mortgage. Huttuff v. Adrian, 112 N. C. 239, 17 S. E. 78.

Sale While Suit to Foreclose Pending.—Suit to foreclose a duly registered deed of trust was instituted prior to the bar of this section against the trustee, the cestuis and the assigns of the cestuis. While the suit was pending, the assignees of the cestuis sold the property, and upon discovering the transfer, plaintiff had the purchasers made parties defendant. The suit was brought within the period prescribed by statute had expired. It was held that the purchasers during the pendency of the foreclosure suit were chargeable with notice thereof and acquired only that close is not barred within ten years from such payment. The action to foreclose was barred after the lapse of ten years, from the date on which his cause of action accrued, where the mortgagee has been in the actual possession of the land conveyed by the mortgage. McNair v. Boyd, 163 N. C. 748, 79 S. E. 966; Cauley v. Sutton, 150 N. C. 327, 330, 64 S. E. 3; Simmons v. Ballard, 102 N. C. 105, 9 S. E. 495; and the dissenting opinion.

Possession presumed by virtue of section 1-42 is not sufficient to meet the requirements of this section, par. 4, for a sale under a mortgage barred by the statute of limitations. Where there was no actual possession the constructive possession in the lifetime of the mortgagor, and where such possession ceased to present their claims, where no personal service of such notice in writing is made upon the mortgagor's right to sue for redemption. Frederick v. Williams, 103 N. C. 189, 9 S. E. 298.

Nor did the prior statute contain a saving clause in favor of persons under disabilities. Houck v. Adams, 98 N. C. 519, 4 S. E. 502.

Applicability Where Action Not for Redemption. — The question as to whether the bar of this statute applies to repossess the mortgage and under a mortgage, the right of redemption is barred. Gray v. Williams, 130 N. C. 53, 40 S. E. 843.

Where the mortgagee has actual possession, either when the cause of action as to the mortgagee accrues or where it thereupon goes into and remains continuously in such possession for more than ten years, before an action to redeem is commenced, the statute of limitations, where pleaded and relied upon in the answer, is a complete defense. Bernhardt v. Hagamon, 144 N. C. 526, 57 S. E. 222; Crews v. Crews, 122 N. C. 679, 683, 3 S. E. 773.

Crews v. Talbert, 85 N. C. 479, 480, is a case illustrating the application of the prior statute.

§ 1-48. Actions to recover deficiency judgments limited to within one year of foreclosure.

No action shall be maintained on any promissory note, bond, evidence of indebtedness or debt secured by a mortgage or deed of trust on real estate after the foreclosure of the mortgage or deed of trust securing the same, except within one year from the date of sale under such foreclosure; but this section shall not extend the time of limitation on any such action. (1933, c. 529, s. 1.)

This section protects all substantial rights of the parties and its application held not to impair plaintiff's contractual rights. Orange County Building, etc., Ass'n v. Jones, 214 N. C. 30, 197 S. E. 618.

An action for a deficiency judgment after foreclosure is not barred by the statute of limitations on the ground that the property was sold for more than thirty years since the execution of the mortgage, the right of redemption is barred. Bray v. Middlebrooks, 114 N. C. 526, 18 S. E. 773; Bright v. Talbert, 214 N. C. 400, 197 S. E. 618.

§ 1-49. Seven years.—Within seven years an action—

1. On a judgment rendered by a justice of the peace, from its date.

2. By a creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon

[117]
the creditor. A creditor thus barred of a recovery against the representative of any principal debtor is also barred of a recovery against any surety to the debt. (Rev., s. 392; Code, s. 153; C. C. P., s. 32; C. S. 458.)

I. Subsection One.

II. Subsection Two.

Cross References.

As to judgment in a court of a justice of the peace, see § 7-106 et seq. As to requirement of advertisement for claims against estates of deceased persons, see § 28-47. As to personal notice to creditor by executor, administrator, etc., see § 28-49.

1. SUBSECTION ONE.

This section is not retroactive. Morris v. Syme, 88 N. C. 453, 455.

Where Statute Begins to Run.—Where a judgment was rendered by a justice of the peace and upon a rehearing granted by him a similar judgment was rendered, the statute of limitations began to run from the date of the latter, the first judgment having been vacated. Salmon v. McLean, 116 N. C. 209, 21 S. E. 178.

Judgment Docketed in Superior Court.—A judgment of a justice of the peace, duly docketed in the superior court, becomes a judgment in the superior court in every respect, and may be enforced by execution at any time within ten years from the date of such docketing under section 1-47. McIlhenny v. Wilmington Sav., etc., Co., 108 N. C. 311, 12 S. E. 100.

Where the judgment debtor made a motion, within ten years from docketing judgment, for leave to issue execution thereon, which was denied and thereupon within one year after such denial, but more than ten years from the date of docketing, he brought an action on the judgment, it was held, that the action was barred by the statute of limitations, see § 28-7 not being applicable to the facts. McIlhenny v. Wilmington Sav., etc., Co., 108 N. C. 275, 11 S. E. 553.

When Construed with Section 1-52.—Where this section standing alone would extend the time "by any creditor of a deceased person against his personal or real representative within seven years," etc., we must take it in connection with section 1-52, which provides that where the advertisement upon a contract, obligation or liability arising out of a contract express or implied, except those mentioned in the Act of 1715, which were within seven years from the date of such docketing under seal, section 1-47, par. 2, Joyner v. Massey, 97 N. C. 148, 1 S. E. 702, and with section 1-22, Redmond v. Pippin, 111 N. C. 91, 22 S. E. 58.

2. SUBSECTION TWO.

Prior Law.—Under the provisions of the Act of 1715, if the debt was due at the death of the testator, the personal representative, having within seven years from the death, otherwise both the heir and the executor would have been discharged, and if the action arose after the death, the action must have been brought within seven years after the cause of action arose, or the act would have been a bar, provided the personal representative has paid over the assets. Syme v. Badger, 96 N. C. 197, 2 S. E. 61. It was held that creditors should make their claim within seven years after the death of their debtor, or be forever barred; and according to every interpretation which has been put upon its terms, it would seem to indicate that creditors should make their claim within seven years after the death of the debtor, upon which suit was thereafter delayed for seven years, provided it appeared that in the meantime the estate had been fully administered and that nothing remained in the hands of the administrator, with which to satisfy the claim.


Purpose and Effect of Statute.—Our present limitations in favor of estates of deceased persons are unconnected with assets and are intended to stimulate the vigilance of creditors, and not to bar or to give the representative of the estate, the personal representative, the right to enforce specific performance or some lien or trust not covered by other provisions of the Code. Smith v. Brown, 101 N. C. 347, 7 S. E. 880. This is the only way to avoid the absurdity of barring a cause of action before it arises. When the creditor, seeking merely to collect his debt, is not barred as against the personal representative, he cannot be barred as against the land which that representative is to subject to execution. This section does not create a bar; it must be coupled with the advertisement, or personal notice, and when these have been made, the statute will begin to run from the date of the qualification of the executor or administrator. Love v. Lister, 222 N. C. 555, 24 S. E. 210.

When Statute Begins to Run.—It was not intended by this statute that the seven years should begin to run from the time of "making the advertisement." If that was the intention of the legislature, they would not in the same connection have employed the words "next after the qualification of the executor or administrator," as that is an event which must precede the advertisement, and which under the provisions of the law may do so by the space of twenty days. To give the act that construction there would be two events before which the time is to be computed. Cox v. Cox, 84 N. C. 138, 141.

In suits against an administrator, or personal representative of deceased persons, the time of the advertisement, or personal notice, and when these have been made, the statute will begin to run from the date of the qualification of the executor or administrator. Love v. Lister, 222 N. C. 555, 24 S. E. 210.

Statute as Absolute Bar.—After the time prescribed in this section, the statute is an absolute bar to creditors. Lawrence v. Norfleet, 90 N. C. 533; Worthing v. McIntosh, 90 N. C. 536; Worthing v. Brown, 102 N. C. 334, 449, 9 S. E. 294. From dissenting opinion.

Evidence of Laches.—In Strayhorn v. Aycock, 215 N. C. 43, 200 S. E. 912, plaintiff claimed proceeds of an insurance policy payable to estate of testator and contended policy was taken out by him to secure him for funds advanced testator. This action was not instituted until some fourteen years after testator's death. It was held that the rights of creditors having intervened, the record disclosed conduct on the part of the plaintiff barring the action for laches.

When Construed with Section 1-56.—Where this section standing alone would extend the time "by any creditor of a deceased person against his personal or real representative within seven years," etc., we must take it in connection with section 1-56, which provides that "suits against an administrator must be brought by creditors of the decedent within seven years next after the right of action vests in the plaintiff under his appointment. Lawrence v. Norfleet, 90 N. C. 533.

Prerequisite to Running.—The mere lapse of time—seven years—does not negative the prerequisite of advertisement, or personal notice, and when these have been made, the statute will begin to run from the date of the qualification of the executor or administrator. Love v. Lister, 222 N. C. 555, 24 S. E. 210.

This section is construed in Cox v. Cox, 84 N. C. 138, 141. Suits against an administrator must be brought by creditors of the decedent within seven years next after the right of action vests in the plaintiff under his appointment.


This statute is construed in Cox v. Cox, 84 N. C. 138, and it is held that while the advertisement is an indispensable prerequisite to the operation of the statute, the time must be computed from the qualification of the representative. Lawrence v. Norfleet, 90 N. C. 533, 535.

Effect of Failure to Present Claim.—The failure to present claims to the personal representative is an absolute bar (except against those laboring under disabilities) without any qualification as to the advertisement, this statute does not protect an administrator unless he has paid over the assets and is in actual possession of the remedy as advertised in conformity to the act. Compton v. Cherry, 53 N. C. 323; Cox v. Cox, 84 N. C. 138, 142.
Significance of Making Advertisement. — The words "and making the advertisement required," etc., were used simply to qualify the provisions of the act, and the act should be construed as if it read "within seven years next after the occurrence of the event which justifies the action against the personal representatives," and the plea of the statute of limitations cannot avail him. Cox v. Cox, 84 N. C. 134, 142. An executor or administrator who pleads the statute of limitations under this subsection, etc., but by his own delay, the courts judgment is not obtained until after the lapse of seven years, the real representative is not protected by the statute of limitations before the qualification before suit is brought, and that he has advertised according to law. Without proof of the advertisement, the plea of the statute will not avail him. Cox v. Cox, 84 N. C. 134, 142.

Same — Necessity for Affirmative Plea. — To enable the personal representative of a deceased person to avail himself of the protection of this subsection, in his pleading, he must allege in his plea, and prove upon the trial, that he made the advertisement, or gave the personal notice to the creditors, as prescribed in the statute. Love v. Ingram, 104 N. C. 437, 10 S. E. 540.

Pendency of Suit as Suspension. — If an action is brought by a creditor against the personal representative of his deceased debtor within seven years, etc., but by delays in the courts judgment is not obtained until after seven years, the real representative is not protected by the statute of limitations if it is sought to subject the decedent to the payment of the debt when the debt has been paid, or is barred by the lapse of seven years. Lee v. McKoy, 118 N. C. 518, 24 S. E. 210.

So much of the ruling in Syme v. Badger, 96 N. C. 197, 2 S. E. 61, that the death of the surety and the lapse of a time longer than that prescribed in the statute before the qualification of a personal representative did not suspend the operation of the statute, if the wards could, during that time, have proceeded against the guardian, Williams v. McNair, 98 N. C. 332, 4 S. E. 131, 133.

Effect of No Assets in Hands of Representatives. — This statute would not be good and avail him, unless he should, in that case, aver and prove that he had paid such assets to the persons entitled to the same. Little v. Duncan, 89 N. C. 416.

Heirs as Parties. — In order to save circumlocution the heirs at law may be made parties to the proceedings against the personal representative. Lilly v. Wooley, 94 N. C. 412, which was cited with approval in Syme v. Badger, 96 N. C. 197, 2 S. E. 61, and which has been approved since in Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701; Lee v. McKoy, 118 N. C. 518, 252, 24 S. E. 210.

§ 1-50. Six years. — Within six years an action—
1. Upon the official bond of a public officer.
2. Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, or the filing of the audited account as required by law.
3. For injury to any incorporeal hereditament.
4. Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to the holder of the certificate or duplicate certificate of stock in the corporation. (Rev., s. 393; Code, s. 154; C. C. P., s. 33; 1931, c. 169; C. S. 439.)

I. In General.
II. Subsection One—Public Officers.
III. Subsection Two—Guardian, etc.

Cross References.—As to official bonds generally, see § 128-8 et seq. As to right of action on bond of executor, administrator, or collector, see § 28-42. As to action on bond of guardian, see §§ 13-14. See also §§ 55-116.

I. IN GENERAL.

Editor’s Note.—The Act of 1931 which added subsection 4 to this section became effective on March 23, 1931. Prior Law.—Formerly there was no statute limiting the time in which actions must be brought on bonds, except the provision in favor of the surety. Humble v. Melbane, 89 N. C. 410, 415. The present statute takes the place of section 5, chapter 65 of the Revised Code. It is manifestly intended to serve the same purpose, and must receive the same construction as to the time when the statute begins to operate. Baker v. Monroe, 15 N. C. 412; Coomer v. Little, 119]
Application to Bond of Defaulted Clerk. — This section is applicable to an action on the surety on the bond of the clerk, and the superior court. State v. Martin, 186 N. C. 127, 118 S. E. 914.

Application to Action for Tort against Clerk. — In an action against a Clerk of the Superior Court, the defendant failing to index a docketed judgment as required, this section does not apply. Shackelford v. Staton, 117 N. C. 73, 23 S. E. 101.

Application to Registers of Deeds. — The statutory limit for bringing actions on the official bond of the registers of deeds seems to be six years, under this section. Thus the statute commences to run from the time of the failure to register. State v. Fountain, 205 N. C. 217, 171 S. E. 445.

When Statute Begins to Run. — An action upon an official bond may be brought within six years after a breach thereof; the statute does not begin to run from the date, but only from the breach of the bond. Commissioners v. MacRae, 89 N. C. 97. The six-year statute begins to run from the time of the breach of the bond. Upon the termination of a sinking fund commissioner's term the law required him to account for such investment. Thacker v. Fidelity, etc., Co., 216 N. C. 110, 23 S. E. 294. See also, Bank of Spruce Pine v. McKinney, 209 N. C. 608, 184 S. E. 596.

When the official bond of a public officer by valid contract limitation continues for more than five years, on the expiration of the official's term of office, the surety on the bond is entitled to recover the loss sustained during such time from the principal as well as the surety. Andres v. Powell, 97 N. C. 155, 9 S. E. 294; unless the action is on the bond as administrator of the testator of the defendant, but it is brought to compel the latter losing his remedy under the condition set out in subsection 6, the statute is an absolute bar to the next of kin or heir. Andres v. Powell, 97 N. C. 155, 161, 2 S. E. 235. From dissenting opinion.

Application to Action for Balance Due. — No statute of limitations applies to the next of kin or heirs, in an action on the official bond for balance due. State v. Fountain, 205 N. C. 217, 171 S. E. 445.

Application to Action for Account. — Where the action is not brought upon the official bond as administrator of the testator of the defendant, but it is brought to compel an accounting and settlement of the estate of the intestate of the plaintiff in his hands in his lifetime, the defendant is a trustee of an express trust, and the Statute of Limitations does not apply. Woody v. Brooks, 102 N. C. 334, 339, 9 S. E. 294.

Application to Action for Share. — The statute does not run in favor of administrators against the suit of the next of kin for their distributive shares. Woody v. Brooks, 102 N. C. 334, 339, 9 S. E. 294; unless the action is on the bond to recover the amount of such share. Vaughan v. Hines, 89 N. C. 97.

When Applicable to Action for Balance Due. — No statute of limitations is a bar to an action to recover a balance admitted by a personal representative to be due legatees or devisees under his will or his administration. If the defendant has disposed of such balance in some way authorized by law, or unless three years have elapsed since a demand and refusal to pay such admitted balance. Woody v. Brooks, 102 N. C. 334, 339, 9 S. E. 294.

Persons against Whom Section Absolute Bar. — An action must be brought against an executor or administrator by a creditor, legatee or next of kin of the decedent, within six years or be barred by the statute. Woody v. Brooks, 102 N. C. 334, 339, 9 S. E. 294.

Extent of Surety's Protection. — This statute protects the surety as well as the principal. Andres v. Powell, 97 N. C. 155, 156, 160, 2 S. E. 235; Kennedy v. Cromwell, 118 N. C. 1, 13 S. E. 135; see dissenting opinion.

Failure of Guardian to Pay Balance Due. — An action against a guardian for a balance due the ward after a final account has been admitted is barred by the six-year statute of limitations where the guardian has not filed a final account, but is barred by the six-year statute of limitations where the guardian has not filed a final account, and the latter losing his remedy under the condition set out in this subsection. Woody v. Brooks, 102 N. C. 334, 339, 9 S. E. 294.

Significance of Final Account and Audit. — The final account is the initial point at which the statute begins to run, to actions upon the bond for a breach of its obligations, but leaves the representative, in his fiduciary capacity, exposed to the demand of the fiduciary or creditor, the latter losing his remedy under the condition set out in this subsection. Woody v. Brooks, 102 N. C. 334, 339, 9 S. E. 294.

Until a final account is filed and audited there can be no balance due; there may be no balance due by such final account, unless the executor or administrator can show that he has disposed of it in some way authorized by law, or unless there has been a demand and a refusal to pay such admitted balance, the action is barred in three years after such demand and refusal. Woody v. Brooks, 102 N. C. 334, 339, 9 S. E. 294.

After the final account the statute runs against the next of kin, and an action against the administrator upon his official bond after six years has the effect of discharging his final account. Andres v. Powell, 97 N. C. 155, 156, 160, 2 S. E. 235. See dissenting opinion.

The fact is unavailable under this section, unless there has been an account audited for the guardian, or unless there has been a lapse of three years from the breach of the bond.
II. SUBSECTION ONE—RIGHT OF WAY.

1. IN GENERAL.


Law Prior to Section. — Before this section a railroad could acquire the prescriptive right to pond water on adjacent lands, solely by subjecting itself to the indignity of continuous for twenty years. Harrell v. Norfolk, etc., R. R. Co., 122 N. C. 822, 29 S. E. 56; Nichols v. Norfolk, etc., R. R. Co., 120 N. C. 495, 26 S. E. 703.

§ 1-51.

FIVE YEARS.—Within five years—

1. No suit, action or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit, action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within two years after it is in operation.

2. No suit, action or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit, action or proceeding is commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property. (Rev., s. 394; 1893, c. 152; 1895, c. 224; 1897, c. 339; C. S. 440.)

I. In General.

II. Subsection One—Right of Ways.

III. Subsection Two—Damages for Construction and Repair.

1. GENERAL.

§ 1-51.

CH. 1. CIVIL PROCEDURE—LIMITATIONS


Same—Effect of Failure to Make Final Settlement. — See note from Self v. Shugart, cited below.


The same is filed and there is no demand and refusal; Quare, whether the action is as to the executor, administrator or guardian himself is barred in six years or ten years. Kennedy v. Cromwell, 103 N. C. 1, 13 S. E. 135. See dissenting opinion.

Same—As Applied to Suit by Minor. — An action by the ward against the sureties on the bond of the guardian is barred as to both the principal and sureties on said bond three years after the execution of the bond. Sec. 1-52, par. 6. Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

§ 1-51. Five years.—Within five years—

1. No suit, action or proceeding shall be brought or maintained against a railroad company owning or operating a railroad for damages or compensation for right of way or use and occupancy of any lands by the company for use of its railroad unless the action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within two years after it is in operation.

2. No suit, action or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit, action or proceeding is commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property. (Rev., s. 394; 1893, c. 152; 1895, c. 224; 1897, c. 339; C. S. 440.)

I. In General.

II. Subsection One—Right of Ways.

III. Subsection Two—Damages for Construction and Repair.
§ 1-51

CH. 1. CIVIL PROCEDURE—LIMITATIONS § 1-51

defendant a right to commit a wrong. The sum recoverable is the damage done to the estate of the plaintiff by the appropriation to the easement of so much of his land, or such use of the easement, as may be necessary to the easement of so much of his land, or such use of the easement, as may be necessary to the easement. Beach v. Wilmington & Weldon R. Co., 120 N. C. 498, 502, 26 S. E. 703.

Allowance of Interest.—It is within the power of the lower court, to allow interest on the amount found since the actual use thereof as may be necessary to the easement. Beach v. Wilmington & Weldon R. Co., 120 N. C. 498, 502, 26 S. E. 703.

III. SUBSECTION 7—DAMAGES FOR CONSTRUCTION AND REPAIR.

Amendment of 1895. — The Act of 1893 chap. 152, was merely a statute of limitation. The Act of 1895, chap. 224, so far as the amendment to the Act of 1893, provides that all actions against railroad corporations for injuries from construction or repair of any railroad, shall be commenced within five years after the cause of action occurs; and that "the jury shall assess all the amount of damages which the party aggrieved is entitled to recover by reason of the trespass upon his property." Lassiter v. Norfolk, etc., R. R. Co., 126 N. C. 509, 512, 36 S. E. 48.

The provision in the Act of 1895 incidently providing for a statute of limitations, is other wise that the plaintiff can recover them in addition to the just compensation to which he is entitled for the value of the easement if it is conveyed to the defendant. It is true that, if entitled thereto, he can recover them in either case. Lassiter v. Norfolk, etc., R. R. Co., 126 N. C. 509, 513, 36 S. E. 48.

Right of the Plaintiff to Compensation for the Present Damage. —Where the railroad is damaging plaintiff, and does not wish to acquire the easement under this section, it may pay for the damage done and then abate the cause of the injury. Lassiter v. Norfolk, etc., R. R. Co., 126 N. C. 509, 514, 36 S. E. 48.

Suits to recover permanent damages. —In the case of Beasley v. Abezdeen, etc., Co., 147 N. C. 362, 61 S. E. 453, it was held that the assessment of "permanent damages" in a case against a railroad for injuries to plaintiff’s land in construction or repair of its roadbed, is made compulsory by this subsection. Pickett v. Atlantic Coast Line R. R. Co., 159 N. C. 586, 75 S. E. 1105.

Same—Permanency of Injuries. —In the case of O’Neil v. Raleigh, etc., R. R. Co., 159 N. C. 586, 75 S. E. 1105, it was held that the nature and permanency of the injuries sustained, made the assessment of permanent damages compulsory.

Destruction of Cultivation—Extinguished. — In the case of O’Neil v. Raleigh, etc., R. R. Co., 159 N. C. 586, 75 S. E. 1105, it was held that the assessment of permanent damages is made compulsory by this subsection. Pickett v. Atlantic Coast Line R. R. Co., 159 N. C. 586, 75 S. E. 1105.

The word "permanent," as applied to injuries and damages, is apt to mislead, as it is not used only in cases where the damage is all done at once, as, for instance, in the tearing down of a house, but also to those cases where the damage is continuing and prospective. In these latter cases the damage is called "permanent," because it proceeds from a permanent cause and will probably continue as long as the cause continues. Such is the case where the cause is apparent and the damage necessarily continuing or recurrent. The interest and inconvenience of the public will not permit the abandonment of the nuisance, but the nuisance will have an indefinite succession of suits. Beach v. Wilmington etc., R. R. Co., 120 N. C. 498, 502, 26 S. E. 703.

The liability referred to the word "permanent" as applied to damages is pointed out in Beach v. R. R., 120
N. C. 498, 502, 26 S. E. 733, where the nature of such an easement is discussed. Whether the damage is permanent or may not appear from the pleadings. If the damage is in itself irreparable, or if it will probably recur from a given state of things which the defendant refuses to change, and which the court from motives of public policy will not make him change, permanent damages are allowed as the only way of doing justice to the plaintiff, and at the same time preventing interminable litigation. As far as the plaintiff is concerned, permanent and recurring damages are allowed to the same to him, if they equally result in the destruction of his property. The latter are in some respects worse than the former, as they merely protract his agony, and may cause his death. For instance, if a farmer knows that the railroad has acquired a right to flood his land, lie will not plant it; whereas if he relies upon their subsequent forbearance from unlawful injury, he may suffer not only the loss of everything that has been put into the crop, but the loss of his labor, seed and fertilizer. In other words, the loss of the crop means the loss of everything that has been put into the crop. In damage to a crop caused by di-

§ 1-52. Three Years.—Within three years an action—

1. Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.

2. Upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it.

3. For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.

4. For taking, detaining, converting or injuring any goods or chattels, including action for the specific recovery.

5. For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereinafter enumerated.

6. Against the sureties: of any executors, administrator, collector or guardian on the official bond of his principal; within three years after the breach thereof complained of.

7. Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

8. For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the rendition of the judgment, or the issuing of the last execution thereon.

9. For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

10. For the recovery of real property sold for the nonpayment of taxes, within three years after the execution of the sheriff's deed. (Rev. Code, s. 155; C. C. P., s. 34; 1895, c. 165; 1889, cc. 209, 218; 1899, c. 15, s. 71; 1901, c. 558, s. 23; 1913, c. 147, s. 4; C. S. 441.

I. In General.

II. Subsection One—Contracts.

III. Subsection Two—Liability Created by Statute.

IV. Subsection Three—Trespass upon Realty.

V. Subsection Four—Goods or Chattels.

VI. Subsection Five—Liability of Executors, etc.

VII. Subsection Seven—Bail.

VIII. Subsection Eight—Clerk Fees.

IX. Subsection Nine—Fraud or Mistake.

X. Subsection Ten—Liability Sold for Taxes.

Section Not Retroactive. — A bond for the payment of money executed prior to this section, by the principal and his sureties, is exempted from the operation of the statute of limitations as contained in this section. Knight v. McAdenville, 70 N. C. 830, 184 S. E. 8.

Burden of Proving Section. — When the statute of limitations is pleaded the burden devolves upon the plaintiff to show that the cause of action accrued within the time limited. Parker v. Hardison, 121 N. C. 57, 36 S. E. 48, also, Hooper v. Carr Lbr. Co., 215 N. C. 306, 1 S. E. (2d) 818.

Effect of Equity upon Claim. — The enforcement of an equity will never be denied, on the ground of lapse of time, where the party seeking it has been in continuous possession of the estate to which the equity is an incident. Math v. Duggar, 69 N. C. 372.

Effect of Disability. — This statute does not begin running against a person under disability, such as infancy, until the disability is removed; hence it does not begin running until then notwithstanding that the cause may have otherwise accrued prior to that time. Settle v. Settle, 141 N. C. 553, 574, 54 S. E. 446.

Insane Persons Presumed to Have Plead Section. — See section 1-16.

Section Supplemented by Section 1-22. — This statute cannot avail as a defense where within six months after the death of the intestate, the plaintiff had qualified as her administrator and had commenced a special proceeding, in the county where the lands of the intestate were situated, to subject them to the payment of debts. Harris v. Davenport, 132 N. C. 599, 44 S. E. 399.

Part Payment by Joint Debtor. — A part payment by one joint debtor before the applicable statute of limitations has run against the demand will start the statute anew as well against the co-obligor as against him who made the payment. Saiied v. Aybeyounis, 217 N. C. 644, 9 S. E. (2d) 399.

Subsection Five—Injury to Person or Rights of Another. — Where plaintiff's cause of action based upon the alleged wrongful and unlawful act of defendant in swearing out a warrant against plaintiff charging plaintiff with larceny, accrued within three years prior to the issuance of summons in this suit, it was not barred by this section. Jackson v. Parlier, 216 N. C. 402, 4 S. E. (2d) 823.

Where plaintiff has taken a voluntary nonsuit and brings the identical action again, if the former action has not been barred by this section, the second action is in time if brought within one year from the time of the voluntary nonsuit. Van Kempen v. Latham, 201 N. C. 505, 150 S. E. 759.

When Proper to Decide Application in Appellate Court. — Upon the appeal it is unnecessary to decide whether this section or section 1-56 applies where there is an insufficient finding of fact to sustain a plea of either, and for this reason, a new trial must be had. Dayton v. Asheville, 185 N. C. 12, 115 S. E. 827.

Application to Action to Recover Share of Estate. — An action by an administrator to recover his intestate's share of an estate, is governed by § 1-56, which provides that actions not otherwise provided for shall be brought within ten years, and not this section. Hunt v. Wheeler, 116 N. C. 21, 21 S. E. 531.

Section Not Applicable. — Where the plaintiff did not sign the note and was not bound thereby, having executed only his sureties, in addition to the legal security for the debt, this section has no application. Carter v. Bost, 206 N. C. 830, 184 S. E. 817. See § 1-47, analysis line IV.

Bar Applies to Remedy. — The bar is applied under this

[ 183 ]
section, not to the mode in which relief is sought, but to the relief itself. Spruill v. Sanders, 79 N. C. 466, 471.


II. SUBSECTION ONE—CONTRACTS.

Application to Agreement to Arbitrate.—An agreement to submit a controversy to arbitration is a contract between the parties, and an action thereon, when it is not under seal, in respect to the running of the statute of limitations, is governed by the three-year statute. Sprinkle v. Sprinkle, 159 N. C. 81, 74 S. E. 739.

Action for Money Had and Received.—An action by a county board of school directors for fines and penalties collected by a city is in the nature of one for money had and received with respect to the money paid in fines and penalties to the city. Asheville v. Asheville, 128 N. C. 249, 251, 38 S. E. 874.

Action for Dividends Accrued on Cumulative Preferred Stock.—The right of a stockholder to have dividends accrued on her cumulative preferred stock at the time of the reorganization of the corporation declared and paid in accordance with the stipulation of the certificate before dividends are set aside or paid on any other stock is based on contract, and the request for an injunctive relief is merely an attempt to announce a cause of action against the corporation if dividends are paid on the new stock before accrued dividends on her stock are paid, and her action instituted within three years thereafter is not barred. Clark v. Henrietta Trust Co. of Greensboro, 204 N. C. 749, 167 S. E. 682.

Guarantee of Prior Indorsement.—The statute of limitations which has otherwise run will not be repelled by the giving of a guarantee of payment, or the right of indemnification to the payee thereon, if the payee before his acceptance only one of them signed as surety thereon, and that surety signing as surety without the knowledge of the payee, always holding the instrument after the lapse of three years. Barnes v. Crawford, 201 N. C. 434, 160 S. E. 627.

This section applies to sureties on a note under seal, and to in preceding sections. One of these not mentioned in the statute of limitations under this section. Davis v. Alexander, 207 N. C. 417, 177 S. E. 417.

Statute Bars Remedy of Claim and Deliver.—Where there had been no new promise or payment for the purchase price for over three years prior to the institution of the action, the three-year statute of limitations, under this section, is the correct one to be applied, and the surety on the mortgage, Lumberton Piano Co. v. Loven, 207 N. C. 56, 176 S. E. 293.

Parol Evidence Admissible to Show in What Capacity Parties Signed Note.—In an action by the payee of a se- cured note, to recover for payments on the note, it was held, when it was signed by several makers, it may be shown by the trial by parol evidence that with the knowledge of the payee before his acceptance only one of them signed as the original obligor, and that other persons signed as sureties, in writing, entitling the sureties to their release from the defense of the statute of limitations under this section. Furr v. Trawick, 205 N. C. 417, 173 S. E. 854.

Same.—Effect of Payment after Statute Has Run.—Where a chattel mortgage on crops secures the payment of the maker's note and the mortgagee endorses the note, and mort- gagee is barred by this section will not extend the period of indemnity for this purpose.

Indemnity or Fidelity Bond.—Where the liability of the insurer is expressly limited in an indemnity or fidelity bond to losses occasioned and discovered during a specified time, the exception will not extend the period of time after which this is a statute of limitations and can have no effect upon the valid contractual relations existing between the indemnitor and indemnitee. Hood v. Rhodes, 204 N. C. 158, 159, 167 S. E. 558.

Breach of Express Trust.—Since occurrences which constitute a breach of an express trust amount in effect, and usually in fact, to a breach of contract, a cause of action for such breach is barred at the expiration of three years from such breach, under this section. Teachy v. Gurley, 214 N. C. 285, 199 S. E. 83.

Statute of limitations of the payment of a note is an obligation arising out of contract by which the guarantors assume liability for payment of the note in case the makers thereof do not pay the note according to its tenor, and suit against the guaran- tors is barred by this section after three years from the maturity of the note. Wachovia Bank, etc., Co. v. Clifton, 201 N. C. 414, 162 S. E. 774.

Accrual of Cause.—A cause of action did not accrue at the date of the warranty, but at the date on which it was finally determined that a plant was not free from all defects and was in no condition to be sold to the company. Faw v. Moncrief Furnace Co., 200 N. C. 377, 381, 156 S. E. 929.

Demand Necessary if Fiduciary Relation Exists.—Where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until a demand and re- fusal. Efird v. Sikes, 206 N. C. 500, 562, 174 S. E. 513.

Statute Not Suspended by War Measures.—An action to recover damages for a breach of contract for the sale of goods arising during federal war control of railroads is barred by our State statute of limitations after three years from the time of its accrual. Vanderbilt v. Atlantic, etc., R. Co., 193 N. C. 565, 137 S. E. 847.

Unpaid Subscription to Corporate Stock.—While as to the stockholders the three-year statute of limitations on the amount unpaid on subscriptions to the capital stock of a corporation has run, it is still valid as to the directors, it is otherwise as to the creditors where the corporation has become insolvent, for in the latter case the capital stock is regarded as a trust fund for the benefit of creditors, and the statute will begin to run from the date of the receiver's filing of the petition, representing the creditors, under the order of the court. Windsor Redrying Co. v. Gurley, 197 N. C. 431, 147 S. E. 676.

Same.—Construed with Other Sections.—The application of this section with regard to the unpaid balance due a corporation by a subscriber to its capital stock, will be controlled by the language of the Articles of Incorporation. Redr- ino Co. v. Gurley, 197 N. C. 56, 147 S. E. 676.

Action on Check Given for Taxes.—A plea of the three- year statute of limitations will bar recovery in a civil ac- tion to recover damages on a check drawn by a tax collector, when the action is n't instituted within three years of the date the check was issued. Miller v. Neal, 222 N. C. 540, 23 S. E. (2d) 852.
Evidence of Matter Not Alleged.—Where defendant by answer denies liability on a note on the ground that it was not properly submitted to the jury under authority of Efird v. J. J. Beamer & Co., 122 N. C. 30, 21 S. E. (2d) 829.

Jury Question.—In an action by trustee to compel an accounting of the proceeds of sale by a trustee, the question of whether the action was barred under subsection 1 was properly submitted to the jury under authority of Efird v. J. J. Beamer & Co., 122 N. C. 30, 21 S. E. (2d) 829; Bynum v. Life Ins. Co., 222 N. C. 742, 24 S. E. (2d) 613.

III. SUBSECTION TWO—LIABILITY CREATED BY STATUTE.

Section Absolute Bar.—After the prescribed time in section 1-50, subsection 2, and this subsection, the Statute is an absolute bar to the next of kin. Vaughn v. Hines, 59 N. C. 445; Spruill v. Sanderson, 79 N. C. 465; Woody v. Brooks, 102 N. C. 334, 343, 9 S. E. 294. From dissenting opinions.

Liability of National Bank Stockholder for Assessment.—Though original liability of a national bank stockholder is contractual in nature, being based upon his original stock subscription, his liability under a stock assessment fixing amounts payable thereto is not contractual and the same with respect to running of limitations. Briley v. Crouch, 115 F. (2d) 443.

Partial payments by national bank stockholder on stock assessment did not toll the running of this section against his liability. Id.

Action for Failure to Accept Check.—An action against a bank, where, after the initial duty to check a check and against another bank which took over the assets of the former is barred as against the latter bank by this section, where not commenced within five years after the transaction and four years after the transfer of the assets, Standard Trust Co. v. Commercial Nat. Bank, 240 Fed. 383.

Action to Recover Delinquent Taxes.—Neither the three nor the ten years' statute of limitations applies to an act authorizing the State or city to recover delinquent taxes unless such act expressly so provides. Wilmington v. Cronly, 122 N. C. 385, 30 S. E. 9.

Application to Tort against Clerk Failing to Index Judgment.—In an action against a clerk of the Superintendence Court for failing to index a docketed judgment as required by section 1-233, this section is applicable. Shackleford v. Staton, 117 N. C. 73, 23 S. E. 101.

Application to Petition to Have Damages Assessed.—Where the charter of a railroad company provides that when the company has appropriated land without authority, no action shall be brought by the owner except a petition to recover damages, and fixes no limitation of time when such petition shall have to be commenced, Standard Trust Co. v. Commercial Nat. Bank, 240 Fed. 383.

Application to Tort for Damages Caused by Continuing Trespass.—An action against a telegraph company for the erection of a pole on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation. Hodges v. Western Union Tel. Co., 133 N. C. 867, 22 S. E. 722; Culbreth v. Downing, 121 N. C. 205, 28 S. E. 294.

Prior to the passage of this Act, in such cases, the lapse of time was a bar to the action; then a continued trespass on a grant of a would arise. Parker v. Norfolk, etc., R. Co., 119 N. C. 677, 22 S. E. 722; Culbreth v. Downing, 121 N. C. 205, 28 S. E. 294.

Same.—Application to Adjusted Actions.—In changing the period of limitation a reasonable time must have been given to accrued actions which would otherwise be barred by the new regulation. A reasonable time for the commencement of an action to recover damages for permanent damages to his land resulting from defendant's sewage disposal plant that the measure of damages should have been predicated upon the difference in value at the time plaintiff again entered the property and the difference in value at the time plaintiff again entered the property and the difference in value at the time plaintiff entered the property, free and clear, was constitutionally protected. Ballard v. Cherryville, 210 N. C. 728, 189 S. E. 334.

Negligence in Logging Operations.—Where plaintiff instituted this action to recover for damages resulting from the overlying on his lands of waters of a river alleged to have resulted from the negligent acts and omissions of defendant in its logging operations, even if it be conceded that the alleged negligence of the defendant toward plaintiff could be construed to constitute an assault toward plaintiff by defendant, plaintiff must show that defendant was in possession and control of the upper lands within the statute of limitations; see, Cooper v. Harr. Lbr. Co., 215 N. C. 398, 1 S. E. (2d) 818.

Continuing Trespass Defined.—Speaking of this section in Sample v. Roper Lumber Co., 150 N. C. 161, pp. 165-166, 63 S. E. (2d) 731, 732; By another standard, the phrase 'continuing trespass' as used in reference to wrongful trespass upon real property, caused by struc- tures permanent in their nature and made by companies in the exercise of some quasi-public franchise. Apart from this, the term 'continuing trespass' was not used in reference to wrongful trespass upon real property, being entire and complete, causes continuing damage, and was never intended to apply where every subsequent act amounted to a distinct and separate renewal of wrong. Teeter v. Postal Tel-Cable Co., 172 N. C. 783, 785, 90 S. E. 941.

Same.—As Applied to Telegraph Line.—Where a telegraph company has constructed its line of poles and wires along a railroad right of way on the lands of the owner more than three years, the owner's action for trespass and for permanent damages to his land resulting from the erection and maintenance by defendant telegraph company of its transmission lines over his land, the action for trespass is barred by the three-year statute of limitation because the trespass being a continuing trespass as to damages for the construction of the old line is barred by the statute, but the wrongful maintenance of the old and the building of the new line was a separate and independent trespass for which permanent damages may be awarded. Teeter v. Postal Tel. Cable Co., 172 N. C. 783, 90 S. E. 941.

An action against a telegraph company for the erection of poles on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation. Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572.

Where the owner of land seeks to recover for trespass and for permanent damages to his land resulting from the erection and maintenance by defendant telegraph company of its transmission lines over his land, the action for trespass is barred by the three-year statute of limitation because the trespass being a continuing trespass as to damages for the construction of the old line is barred by the statute, but the action for permanent damages as compensation for the easement is not barred until defendant has been in continuous use thereof for a period of twenty years so as to acquire the right thereto by prescription. Love v. Postal Telegraph-Cable Co., 221 N. C. 469, 20 S. E. (2d) 337.

The law will not permit recovery for negligence which has become a fait accompli at a remote time not within the period specified by subsection 3, although injury may result from it within the period of limitation. Davenport v. Western Union Tel. Co., 133 N. C. 677, 22 S. E. 722, citing Cooper v. C & O. Ry. Co., 215 N. C. 398, 1 S. E. (2d) 818.

Allegations that a drainage district failed to cause a canal to be followed by the owner of a certain property, and stopped the canal on the lands of defendant, and failed to keep the mouth of the channel properly cleared out, resulting in plaintiff's land being flooded, commencing imme-
diately after the canal was finished and continuing practically every year thereafter, stated a cause of action for conversion of timber on lands, the burden is on the plaintiff to prove that the timber was and the statute of limitations, as stated by the court, is 12 years. Davenport v. Pitt County, 109 N. C. 63; Moore v. Garner, 101 N. C. 374, 7 S. E. 732; Hobbs v. Price, 111 N. C. 394, 395, 16 S. E. 683. This was not done, and the action was not barred by the statute of limitations. Moore v. Goodwin, 109 N. C. 218, 13 S. E. 772.

Effect of Payment by Principal.—Payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations. Moore v. Goodwin, 109 N. C. 218, 13 S. E. 772.

Effect of Surveys Being Foreign Corporation.—The statute of limitations, for six years, applies to actions against foreign guardian bond by reason of such surety being a foreign corporation when it is shown that it continuously had a general office in this state, as a jurisdiction of our courts for executing judicial bonds and collecting premiums thereon for the company and had complied with the section authorizing service of process on the Insurance commissioner. Anderson v. United States Fidelity Co., 174 N. C. 417, 93 S. E. 498.

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Intervening Disabilities.—When this statute begins to run, the subsequent marriage of the female plaintiff will not stop or alter the execution of the judgment. Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135. See § 1-17 and note.

When Statute Begins to Run.—Demand.—From the date of the death of the decedent, or from the date of the judgment brought in 1903 to recover permanent damages caused by the negligent widening of defendant's canal, where it appears that the entire wrong was done in 1898 and 1899, the action was barred under this subsection. Cherry v. Lake Drummond Canal, etc., Co., 140 N. C. 422, 53 S. E. 138.

When the action has not been brought within three years from the accrual of the cause, or that otherwise it has not been done, a judgment of nonsuit is proper. Tillman v. Wyrick, 106 N. C. 84, 87, 10 S. E. 916.

VI. SUBSECTION SIX—SURETIES OF EXECUTORS, ETC.

Purpose of Section.—This section and the other related sections are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and, after settlement, either by the acts of the parties or a decree of court. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294.

When the action has not been barred by the provision of subsection 2, expressly applies to actions on the "official bond," this section to sureties only. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

Effect of Surveys Being Foreign Corporation.—The statute of limitations, for six years, applies to actions against foreign guardian bond by reason of such surety being a foreign corporation when it is shown that it continuously had a general office in this state, as a jurisdiction of our courts for executing judicial bonds and collecting premiums thereon for the company and had complied with the section authorizing service of process on the Insurance commissioner. Anderson v. United States Fidelity Co., 174 N. C. 417, 93 S. E. 498.

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tlemet made under the supervision of a Court, and sanctioned by a decree, must be brought within three years from the rendition of such decree, if the plaintiff (petitioner) be under no disability, and the case involve no equitable element. 

Action to recover for alleged breach of bond as administration. — This subdivision having no provision relating to discovery of the breach of the official bond as is provided for in cases under subsection (9). Hicks v. Purvis, 208 N. C. 657, 657 S. E. 2d

Ward's Suit against Sureties.—A suit by a ward against the sureties on the bond of his deceased guardian comes within the terms of this section and must be brought within the three year limit. Norman v. Walker, 101 N. C. 24, 7 E. 468.

The running of the statute under this section as against the sureties if the fact of the breach was not suspended by the payment of interest by the guardian on the amount due by him to each of the plaintiffs. The liability of the sureties on the bond is a conditional liability, dependent upon the failure of the guardian to pay the damages caused by his breach of the bond. The guardian and the sureties are not in the same class. For that reason the payment by the guardian of interest on the amount due by him to his former wards did not suspend the statute of limitations which began to run against each of his wards. State v. Fountaine, 150 N. C. 277, 137 S. E. 2d.


VII. SUBSECTION SEVEN.—JAIL

Effect of Bail Being Out of State.—The language and meaning of this section is clear. Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principles which may govern a similar rule in other jurisdictions. State v. Thomas, 106 N. C. 505, 511, 11 S. E. 622.

Not Applicable to Referee.—The claim of a referee for payment of services rendered in a cause which is still pending in the courts upon exceptions to his report is not barred by this section. Farmers' Bank v. Merchants', etc., Bank, 204 N. C. 376, 168 S. E. 2d 42.

An action to correct a mistake should now be brought within the time limited in this section. Lanning v. Commissioners, 106 N. C. 505, 511, 11 S. E. 622.

IX. SUBSECTION NINE.—FRAUD OR MISTAKE

Amendment of 1879.—Mistake.—This act was amended by the act of 1879, by inserting after the words "or mistake." So that prior to the act of 1879, there was no statutory bar of three years to an action for relief on the ground of mistake. Mask v. Tiller, 89 N. C. 423, 425.

This amendment of this section struck a provision limiting this section to cases solely cognizable in a court of equity. There are many cases decided prior to the amendment construing this section to be no bar. There are also cases determining it to have been a mistake in its passage but they are restricted to those arising before the statute became effective. See Dunn v. Beaman, 126 N. C. 766, 770, 56 S. E. 172; Alpha Mills v. Watters, 126 N. C. 769, 56 S. E. 172; Watters v. Parker, 78 N. C. 128; Jaffray v. Bear, 103 N. C. 165, 9 S. E. 323; Egerton v. Logan, 81 N. C. 172; Spruill v. Sanders, 79 N. C. 466; Day v. Day, 84 N. C. 468; Batts v. Winslow, 73 N. C. 258. See also dissenting opinions in Rahnweiler v. Anderson, 78 N. C. 133, 144.

The amendment applied to an action for a false warranty in a sale made before the amendment, so that, in actions where the contract is upon the ground of fraud was sought, the cause of action was not deemed to have accrued until the discovery of the fraud complained of. Alpha Mills v. Watertown, etc., Co., 116 N. C. 797, 803, 21 S. E. 917; Rouss v. Ditmore, 122 N. C. 775, 778, 30 S. E. 335.

Purpose and Construction of Section.—The statute of limitations was extended from one year to three years to prevent fraudulent and unjust claims from being asserted after a long lapse of time. It ought not, therefore, to be so construed as to become an instrument to encourage fraud, if it makes the requirements of the public interest in the case or the spirit should govern the construction of the facts and circumstances of a transaction so as to take it out of the operation of the statute, gross injustice would be worked by it. Mask v. Tiller, 132 N. C. 416, 71 S. E. 783.

When Applied to Exclusion of § 1-56.—This section cannot be applied where the allegations and proof are insufficient to maintain it. When the reference in the amendment to the word "mistake" as to which applies. Shankle v. Ingram, 133 N. C. 254, 255, 25 S. E. 578.

Applies to Actions at Law and Suits in Equity.—While this section ordinarily applies to actions for relief on the ground of fraud in cases solely cognizable by courts of equity, by statutory amendment and the decisions of our courts it now applies to all actions for relief on the ground of fraud or mistake. Stancill v. Nevirle, 203 N. C. 467, 166 S. E. 319.

FRAUD or Mistake Pre requisite to Application.—This section does not apply to an action to recover money for which there is no evidence or allegation of fraud or mistake. Barden v. Stickney, 132 N. C. 416, 417, 43 S. E. 912; Bonner v. Stotesbury, 139 N. C. 3, 51 S. E. 783.

FRAUD or Mistake Begins the Running of the Statute.—This statute runs from the discovery of the fraud or mistake, "or when it should have been discovered in the exercise of ordinary care"; and as it is the duty of plaintiff, as executor, to have laid off the land to the heirs and/or devisees, and that could, by a simple calculation from the deed, have discovered that the description embraced 108 acres, and as for twenty years after the value owners had no notice of the boundaries, the statute had become a bar to the action. Sinclair v. Teal, 155 N. C. 458, 72 S. E. 487. See also Stubbs v. Mota, 113 N. C. 458, 459, 18 S. E. 387; Peacock v. Barnes, 14 N. C. 215, 216, 4 S. E. 791.

In an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of ordinary diligence. Williams v. Furniture Stores, 216 N. C. 732, 1 S. E. (2d) 512.

It is incumbent upon the plaintiff to show that he not only was ignorant of the facts upon which he relies in his action, but could not have discovered them in the exercise of proper diligence or reasonable business prudence. Latham v. Latham, 184 N. C. 55, 113 S. E. 623. See also, Johnson v. Phoenix Life Ins. Co., 219 N. C. 714, 22 S. E. 2d.

This statute begins to run from the time of discovery of a breach of the trust relationship and not from the time the relation was brought to an end. Egerton v. Logan, 81 N. C. 174.

In an action to reform a timber deed for an alleged mutual mistake of the parties, the statute will run three years after the party making the claim should have known it was not ascertained by the words "or mistake." So that prior to the act of 1879, there was no statutory bar of three years to an action for relief on the ground of mistake. Jones v. Bankers Life Co., 216 N. C. 46, 80 S. E. 882. See also Lanning v. Commissioners, 106 N. C. 505, 511, 11 S. E. 622.

Where plaintiff acquired title to real estate, subject to a contract to cut timber within 3 years, thinking the time for execution of the contract to cut timber had been extended to 3 years, the action was barred by this section. Blankenship v. English, 222 N. C. 91, 21 S. E. (2d) 891.

Where insurance company rejected third application of insured for additional insurance on grounds that insured was no longer a satisfactory risk it was held that insured should have been put on notice thereby that company's policy had lapsed 12 months after it was tendered to insured and refused because of illness, was false and that insured's claim, if any he had, has atrophied as a result of his procrastination and the time of the application was barred by this section. Jones v. Bankers Life Co., 131 F. (2d) 989, 994.

Upon the question of fraudulent concealment of funds, this section runs from the date of the facts constituting the fraud or mistake and not from the discovery of such fraud, unless the rights hereto unknown to him. Bonner v. Stotesbury, 139 N. C. 3, 51 S. E. 783.

Where a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of the bank, and did not in truth begin to run upon the actual discovery of the in insolvency (or the receiver) that the bank was insolvent at the time the incorrect statement were put forth. Houston v. Thornton, 122 N. C. 365, 375, 29 S. E. 827.
Applying this section to an action to set aside a deed to lands made by the husband to the wife for fraud on the former's creditors, this section by correct interpretation is not determinative, but the cause of action for reformation of the plain language of the former's creditors, this section by correct interpretation is not determinative, but the cause of action for reformation of the plain language of the

Evidence did not show that guardian knew or should have known of the fraud and its failure to institute suit did not bar the ward. Johnson v. Pilot Life Ins. Co., 217 N. C. 126, 7 S. E. (2d) 445.


Evidence that guardian knew or should have known of the fraud and its failure to institute suit did not bar the ward. Johnson v. Pilot Life Ins. Co., 217 N. C. 126, 7 S. E. (2d) 445.


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purchaser, first discovered after the action on the contract. Section 58, supra, is an act for damages
under this section as amended by ch. 269, Acts of

When Replication Required. — When the date of the accru-
ing or of the performance of a duty in a contract or the
statute of limitations is pleaded, the court can, of course,
pass judgment, unless matter in avoidance is pleaded as a
new promise, or the like. It is only in such cases that a
replication is required, whenever the statute of limitations
was pleaded, 174 N. C. 377, 7 S. E. 722, though under the former practice a replication
was required, whenever the statute of limitations was
pleaded, 174 N. C. 377, 7 S. E. 722, though under the former practice a replication
was required, whenever the statute of limitations was

Burden of Proof. — In an action to set aside a sheriff's
deed given for the nonpayment of taxes is not
adverse possession will ripen into an absolute one, under
the nonpayment of taxes, and a tenant in common to pay
the nonpayment of taxes, and a tenant in common to pay.

paragon, shall be presented to the chairman of

Enforcement Ruling Not Cured by Other Defects. — The
permissible to pass upon this question. Little
in the contract, as affecting the pre-exist-
the provisions of this section, requiring that
the principle that the statute does not begin to run till the
the nonresidence of plaintiff. — The nonresidence
be presented his claim within a

1. All claims against counties, cities and towns
of this state shall be presented to the chairman of
the board of county commissioners, or to the chief
officer of the cities and towns, within two years
after the maturity of such claims, or the holders
shall be forever barred from a recovery thereon;
provided, however, that the provisions of this par-

2. An action to recover the penalty for usury.
3. The forfeiture of all interest for usury. (Rev.,
     s. 396; Code, ss. 756, 3836; 1874-5, c. 293; 1876-7,
     c. 91, s. 3; 1895, c. 69; 1934, c. 234; 1937, c. 359;
     c. 442.)
I. Subsection One.—Political Subdivisions of State.
II. Subsection Two.—Penalty for Usury.
III. Subsection Three.—Forfeiture of All Interest for Usury.

As to power of county, to be sued, see § 153-2, paragraph 1.
As to power of city or town, to be sued, see § 160-2, paragraph 1. As to requirement of demand before suit, see
§ 31-54. As to penalty and forfeiture for usury, see §
24-2.

I. SUBSECTION ONE—POLITICAL SUBDIVISIONS OF

Local Modification.—Cartaret, Haywood: 1933, c. 386;

Editor's Note.—The 1937 amendment added the proviso to
subsection l.

The 1937 amendment to this section does not operate retro-
actively, and any county, city or town which had
barred for face value of unpaid coupons on bonds issued by
county, in township's behalf. Valleytown Tp. v. Women's
Cathedral Order, etc., 175 F. (2d) 692, reversing 22 F. Supp.
190.

Purpose of Section. — "The obvious purpose of the law
is to enable those municipal bodies mentioned in it to
assert and make a record of its valid outstanding obliga-
tions, and to separate them from such as are spurious or

Constitutionality. — Under the interpretation of this sec-
tion, it may admit of question whether the condition en-
graved by it upon the contract, as affecting the pre-existing
rights of the creditor, does not impair its obligation
within the prohibition of the federal constitution.
Wharton v. Commissioners, 82 N. C. 12, 16. See post this
note. "Nature and Effect of Section."

Nature and Effect of Section. — The language of this sec-
tion is plain and explicit, and there is room for but one
construction of it. The court has said that the provision of
the statute is not a strict, nor is it limited to the time in
which an action may be prosecuted, but that it imposes
upon the creditor the duty of presenting his claim within a
prescribed period of time, and, upon his failure to do so,
forbids any recovery in any suit thereafter commenced.
Wharton v. Commissioners, 82 N. C. 12, 16. See Moore

In the case last cited, the court held that the statute of limitation, and such claims against the county should be
presented within two years after maturity." Lanning v.
Commissioners, 106 N. C. 505, 511, 11 S. E. 622, citing Rous-
ter v. Commissioners, 92 N. C. 140, 3 S. E. 739; Moore v. Commissioners, 87 N. C. 209, 215.

In Board v. Greenvile, 132 N. C. 4, 43 S. E. 472, 473, the court said: "It is unnecessary to inquire or to decide whether the statute is strictly one of limitation, or whether it merely imposes a duty upon the holder of the claim, instead of a right of recovery, the preclusion of which is a condition precedent to his right of recovery. In either view of the nature of the statute the claimant, by its very words, is 'barred from a recovery' of any part of the claim for which the statute has imposed the two years immediately preceding the date of his demand, and this conclusion as to the effect of the statute is all sufficient for the disposition of this appeal." It is not necessary to decide whether it is strictly a statute of limitation, for it imposes this as a duty on the claimant as a condition upon which he may successfully maintain his action."


What Plaintiff Must Allege and Prove. — Where a claim has been made on the city for services rendered, and it nowhere appears when the services were rendered, an action to recover therefor must not only show that the claim had been presented in the statutory period, but that the amount claimed had matured within that time; and when he has failed to make this necessary allegation in his complaint, a demurrer thereto should be sustained. Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13.

Same—When Defect Attacked by Demurrer. — Where upon the face of a complaint it does not appear that claim was made upon a city's office, the defendant must show on the answer that no such claim was ever presented. Where a defendant charged with the unaccounted for expenditure of public funds where he failed to make an allegation therefor in his complaint, a demurrer should be sustained. Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13.

Same—When Action Amendable. — Where the complaint does not state the time of the defendant's ratification as required by section 1-21, the action may be amended by setting out the matters required by the statute. Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13.

Nonsuit as Extending Time Under Section 1-25. — One who began suit within the time prescribed, took a nonsuit and began a second action within one year after the nonsuit, but more than two years after the maturity of the claims, was not barred. Wharton v. Commissioners, 83 N. C. 429.

Application to Claim of Sheriff. — A sheriff must present his claim against a county to the county and the allowance or disallowance thereof must be made within two years prescribed in the section. Lanning v. Commissioners, 106 N. C. 505, 11 S. E. 622.

Action for Services Rendered as Attorney.—Where plaintiff instituted this suit to recover for services rendered defendant county by plaintiff as an attorney, plaintiff alleging as a basis of recovery services rendered in a certain civil action and services rendered relating to the settlement of a controversy arising out of the taxing of a period of more than a year, subsequent to the termination of the civil action, and defendants alleged that final judgment in the civil action was entered within two years after the termination of the present suit, that plaintiff's cause of action for services rendered therein accrued at the time of the rendition of the judgment, and that plaintiff's cause of action for services rendered therein is barred, the plea of the statute of limitations relates solely to the claim for services rendered in the civil action, and is not a plea in bar which would bar the claim for services rendered in the action against defendants, since the claim for services rendered in the action against defendants accrued within the two years immediately preceding the date of the demand, and this conclusion as to the effect of the statute is all sufficient for the disposition of this appeal.


II. SUBSECTION TWO—PEI ALTY FOR USURY.

Origin of Section. — The right of action to recover for usurious interest paid must be lost if the action is brought within two years after the payment in full of such indebtedness in this respect changing what is now section 24-2, which provides that the action to recover the penalty for each usurious transaction is therefore barred under this section, upon the expiration of two years from the date of the payment. Sloan v. Piedmont Fire Ins. Co., 189 N. C. 690, 128 S. E. 2, 3.

There is no section of the statute of limitations began to run at the date the cause of action accrued, and as such could have been brought at any time before the commencement of this action, the statute commence.

Effect of Defendant Being Out of State. — This two years having elapsed from the date the cause of action accrued until the commencement of this action, subject to the jurisdiction of the courts of this state and for that reason, two years next from the last item therein. English Lumber Co. v. Wachovia Bank, 179 N. C. 211, 102 S. E. 205.

Effect of Defendant Being Out of State. — Where the transaction constitutes a mutual running account an action for the recovery of the balance due is barred after two years next from the last item therein. Swift v. Smith, 177 S. E. 183. See also, Ghornley v. Hyatt, 208 N. C. 478, 181 S. E. 242.

Same—Mutual Running Account. — Where the transaction constitutes a mutual running account an action for the recovery of the balance due is barred after two years next from the last item therein. Swift v. Smith, 177 S. E. 183. See also, Ghornley v. Hyatt, 208 N. C. 478, 181 S. E. 242.

Bar of Counterclaim.—Where more than two years has elapsed from the payment of alleged usury until the institution of an action on the debt alleged to have been tainted with usury, the defendant's counterclaim for twice the
amount of usury charged is barred. Farmers' Bank, etc., Co. v. Redwine, 204 N. C. 125, 167 S. E. 687.

Necessity of Pleading.—This section need not be specifically pleaded. Roberts v. Ins. Co., 118 N. C. 429, 24 S. E. 780.

III. SUBSECTION THREE—FORFEITURES OF ALL INTEREST FOR USURY.

Editor's Note.—The Act of 1931 which added subsection 3 to this section provided that it should not affect pending limitations for the forfeiture of interest, even if it be commenced after the expiration of the period prescribed in the statute. Pinnix v. Maryland Cas. Co., 214 N. C. 760, 199 S. E. 235.

Cross Reference.—See also § 1-158, 95-31, 123 S. E. 201.

Local Modification.—Cleveland, Rutherford: See §§ 114-239, 123 S. E. 201.

Necessity for Affirmative Plea.—In an action for slander, the plaintiff may recover, though the proof shows the defendant's cause of action was not barred. Jackson v. Parks, 214 N. C. 529, 199 S. E. 214.

§ 1-54. One year.—Within one year an action—
1. Against a public officer, for a trespass under color of his office.
2. Upon a statute, for a penalty or forfeiture, where the action is given to the state alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposes a different limitation.
3. For libel, assault, battery, or false imprisonment.
4. Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.
5. An application for a widow's year's allowance.

Cross Reference.—As to actions in the nature of quo warranto, see § 1-514 et seq. See also § 18-175. As to bills of discovery, see §§ 162-261. As to permitting escape of prisoners, see § 14-257. As to widow's year's allowance and application therefor, see § 30-15.

Subsection One—Extent to Which Application Limited.—Tobacco in an Auction Tobacco Warehouse during a Bona Fide Controversy.—Where the evidence is competent, the controversy between a person and a railroad company, through its agents, has participated in the unlawful appropriation or sale of a town's funds, the mere fact that the court have not dismissed the action as to the members of the municipal board participating in the commission of the wrongful act, under the plea of this section, will not likewise or necessarily bar the action against the railroad company, under the same plea, under an alleged urpity between them. Brown v. Southern R. Co., 188 N. C. 52, 53, 123 S. E. 633.

Action against Justice of Peace.—A summons was issued to recover a penalty against a justice of the peace for performing the marriage ceremony without the delivery of the license therefor to him, G. S. § 51-6, within less than a year from the time he had performed it, it was held, the time of this section was not violated. Wooley v. Bruaton, 184 N. C. 438, 114 S. E. 628.

Subsection Two—Application to Clerk of Court.—An action against a public officer, if not brought within one year, is barred by the statute of limitations. State v. Nutt, 79 N. C. 263.

Subsection Three—Disability Preventing Bar.—An action for assault and battery is barred upon the plea of this section, if not commenced within the time prescribed by the statute. Wooley v. Bruaton, 184 N. C. 438, 114 S. E. 628.

Subsection Three—Action for Libel.—Where, in an action for libel, defendants admit that the article was published in defendant magazine on a certain date, and plaintiff shows that the action was instituted one day less than a year thereafter, defendant is not entitled to nonsuit upon his plea of the one-year statute of limitations. Harrerell v. Goerch, 209 N. C. 741, 184 S. E. 469.

Subsection Three—Action for False Imprisonment.—Where it appeared that plaintiff's cause of action based upon the wrongful imprisonment of plaintiff in an insane asylum was instituted less than one year from the date plaintiff was discharged as insane, plaintiff's cause of action was not barred. Jackson v. Parks, 214 N. C. 529, 199 S. E. 214.

§ 1-55. Six months.—Within six months an action—
1. For slander.
2. Upon a contract, transfer, assignment, power of attorney or other instrument transferring or affecting unearned salaries or wages, or future earnings, or any interest therein, whether said instrument be under seal or not under seal. The above period of limitation shall commence from the date of the execution of such instrument.
3. For the wrongful conversion or sale of leaf tobacco in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This paragraph shall not apply to actions for the wrongful conversion or sale of tobacco which has been stolen from the lawful owner or possessor thereof. (Rev., § 28-175; Code, s. 315; 1931, c. 155; 1942-1943, c. 643, s. 2; C. S. 444.)

Same.—Where Mislead by Petition.—If the defendant has been misled by allegation of a different date from the one proved, so that he failed to set up this statute in his answer, the judge would, of course, allow him to amend his answer. Pegram v. Stoltz, 67 N. C. 144.

An action for slander begun more than six months after the publication, will be barred by the statute of limitations under this section, the right of action accruing from the date of publication, regardless of the fact that it is begun within six months from the date of publication by suit of the author of the words. (Rev., § 28-175; Code, s. 315; 1931, c. 155; 1942-1943, c. 643, s. 2; C. S. 444.)
§ 1-56

CH. 1. CIVIL PROCEDURE—LIMITATIONS § 1-56

Application Illustrated. — Where the plaintiff brought an action for slander more than six months after the cause accrued, and then afterwards amended his complaint so as to include words spoken within six months before the beginning of the action, but more than eighteen after the filing of the amended complaint, and the defendant pled the statute of limitations, it was held, (1) the plaintiff's complaint was not amended so as to set up a new cause of action, and this was also barred. Hester v. Mullen, 107 N. C. 724, 12 S. E. 447.

§ 1-56. All other actions, ten years.—An action for relief not herein provided for must be commenced within ten years after the cause of action has accrued. (Rev. c. 399; Code, c. 138; C. C. P. s. 37; C. S. 445.)

I. In General.

II. Actions to Which Applicable.

I. IN GENERAL.

Purpose of Section. — This section was intended as a sweeping statute of repose and to cure omissions in former statutes. Brown v. Morsey, 124 N. C. 292, 296, 32 S. E. 687.

From concurring opinion.

This section was intended to be a universal statute of repose for the purposes of those specifically enumerated in the preceding sections of the statute of limitation. It could have no other purpose. It being almost impossible to enumerate all cases for which a statute of repose was needed, this section was passed to embrace, in its very words, any "action for relief not herein provided for." Woodfield v. Wester, 136 N. C. 163, 109, 48 S. E. 578. From dissenting opinion.

See to same effect Ex parte Smith, 134 N. C. 495, 502, 47 S. E. 16; Wyrick v. Wyrick, 106 N. C. 84, 85, 10 S. E. 916.

When Statute Begins Running.—When a covenant of warranty and seizin was breached at the time of delivery of the deed, this section begins running against an action for such breach from the time of the delivery. Shankle v. Irongate. 31 N. C. 254.

This section begins to run against an action by the vendor to recover possession from the vendee when the possession of vendee becomes hostile by a refusal to surrender after demand and notice. Overman v. Jackson, 104 N. C. 4, 10 S. E. 87.

An action to impeach the final account of a personal representative must be brought within ten years from the filing and auditing thereof as provided in this section. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

In an action by one who claims as entering of "Cherokee Lands," the cause of action is barred in ten years from the reception of the certificate. Frazier v. Gibson, 140 N. C. 272, 134 N. C. 603; Philip v. Buchanan Lumber Co., 151 N. C. 519, 66 S. E. 603.

This statute does not begin to run until there is a person in whose name the action is to begin the suit, that is, until the appointment of an administrator. This is a well recognized rule. Murray v. The E. G. Co., 7 Eng. C. L. 66; Godley v. Taylor, 14 N. C. 178.

Application Immaterial Where Period Has Not Run.—Where ten years has not elapsed it is not necessary to determine whether this section applies. Burgwyn v. Daniel, 115 N. C. 119, 120 S. E. 526.

Charging Section with Section 1-52.—Where, if the action had not been barred by the provisions of subsections 4 and 9 of section 1-52, it would have been barred under this section at the expiration of the time, it was not error to tell the jury that the action was barred in three years, or in ten years. Osborne v. Wilkes, 108 N. C. 651, 13 S. E. 285.

Sec. Not Affected by Section 1-52.—This section applying to an action against an executor or administrator for the final accounting and settlement, is not affected by the provisions of sec. 1-52, as to actions on their official bonds. Pierce v. Faison, 130 N. C. 177, 110 S. E. 857.

Practice. — Under the former practice of an objection that the equity of plaintiff seeking to declare a trust in land was barred could be taken by demurrer; under the present practice it may be taken by a motion to dismiss the action. Marshall v. Hammock, 195 N. C. 498, 502, 142 S. E. 776.


II. ACTIONS TO WHICH APPLICABLE.

Creditor's Action against Purchasing Partners. — The question as to whether an action by the creditors of a partnership to hold the owners of the legal estate (who purchased the interest of one partner in the partnership property) for account of the partnership was here barred by this section, was raised but not decided. Ross v. Henderson, 77 N. C. 170.

Passive Trust—Actions by Children against Trustee.—When the named children were the owners of the legal estate of a part of the estate "to collect and apply the rents and hires, and interests thereof, to the support of his certain named son and his family during the son's life and then to convey to the children," it constitutes an active trust against the life of the son which becomes passive at his death, at which time the relationship of the parties would be adverse to each other, and start the running of the statute of limitations against the beneficiaries. In re legal disability, and bar their action for an accounting and settlement after ten years, especially when the relationship of trustee has been openly repudiated. Latham v. Latham, 133 N. C. 162, 169, 48 S. E. 578.

Claim for Admeasurements of Dower.—This section is applicable to the claim for admeasurements of dower against the heirs, or one claiming under them. Brown v. Morrisey, 124 N. C. 292, 296, 32 S. E. 687.

Action to Test Validity of Stockholder's Election.—There is no statute of limitations applicable to an action brought by citizens to test the validity of an election of directors for the purpose of a proceeding to make real estate assets, to which the administrator de bonis non of A became a party, and filed a complaint to recover the amount due on said final account held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. Jones v. Commissioners, 107 N. C. 248, 12 S. E. 294.

Action of Cotenants to Protect Title.—Where one tenant in common in possession has obtained for himself the outstanding title to the locus in quo, equity will declare him to have acquired an estate in fee simple. Brown v. Morrisey, 124 N. C. 292, 296, 32 S. E. 687.

Impeachment of Final Account of Representative.—When a final account of a representative was filed and audited, an action to impeach such account it must be brought within ten years from the filing and auditing of the same. The period of limitation is not specifically declared, but such a case falls within this section. Woody v. Brooks, 102 N. C. 334, 339, 9 S. E. 294.

When the administrator of A died eight years after filing an ex parte account, the plaintiff qualified as his executor within one month, and within seventeen months began a proceeding to make real estate assets, to which the administrator de bonis non of A became a party, and filed a complaint to recover the amount due on said final account held relative to subscribing stock to a railroad company, it did not bar the action. Wyrick v. Wyrick, 106 N. C. 84, 10 S. E. 916.

Right to Surcharge and Restate Final Account.—There was no express Statute as to the length of time necessary to presume a release of the right to surcharge and restate a final account of a representative, and audited, but the reason stated in Woody v. Brooks, 102 N. C. 334, 9 S. E. 294, it did not bar the action. Wyrick v. Wyrick, 106 N. C. 84, 10 S. E. 916.

Action for Balance Due Heirs.—Where the distributees, who until they became of age, had a guardian, did not bring suit for an alleged balance due under the testator's will within ten years, it was not error to tell the jury that the action was barred by either section 1-50, par. 2 or this section. Culp v. Lee, 109 N. C. 675, 14 S. E. 74.

Partition Proceedings.—Where a petition in partition is duly presented to an administrator and is carried into possession of their respective shares, in accordance with the judgment of partition therein entered, and it is therein provided that the widow of the intestate should receive a certain sum monthly in lieu of dower, which sum is made a lien upon the lands, an action by the widow to enforce her claim against the land is barred after the lapse of more than ten years from the judgment and decree, and the fact that a second decree of confirmation was entered in the case several years thereafter for the purpose of recording the papers, the original papers having been destroyed by fire, did not make the result final. Aldridge v. Dixon, 205 N. C. 480, 171 S. E. 777.

Recovery of Real Estate.—This section does not apply to actions for the recovery of real estate because Secs. 1-49, 1-60 apply to its exclusion. Williams v. Scott, 122 N. C. 545, 551, 29 S. E. 877.

Same.—Defendant in Ejectment.—The ten years statute...
of limitations does not apply to defendants in ejectment who claim the land by adverse possession, where they have recognized plaintiff's claim and title thereto within that time. Ritchie v. Fowler, 132 N. C. 788, 44 S. E. 616.

Same—To Declare Senior Grantee a Trustee.—An action brought by plaintiff, claiming under the junior grantee of public land, can be laid as against them, and the court declared to be trustees for plaintiff, and to require them to convey to plaintiff such title as they claimed, was barred, where not brought within 10 years from the registration of the senior grant, by this section. Ritchie v. Fowler, 132 N. C. 788, 44 S. E. 616.

Same—To Declare Vendor a Trustee.—Since the other statutes of limitations do not expressly mention the trust relationship existing between vendor and vendee, it is not included under this section, and it would then be allowed only where the possession was adverse or where it was necessary to prevent some wrong or gross injustice. Bradsher v. Hunter, 172 N. C. 162, 90 S. E. 130.

Same—Enforcement of Parol Trust in Favor of Wife.—Section apparently not applicable, see Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 68.

Same—To Recover Possession of Vendee.—In an action to recover possession by vendor against a vendee who enters under the contract, the only statute of limitation applicable is that of this section. Overman v. Jackson, 104 N. C. 4, 10 S. E. 87.

Same—Against Remainderman.—Where a remainderman, not being in possession, executes a mortgage, the foreclosure thereof or from the last payment, such action being brought within ten years from the time of the acquisition of possession by the remainderman. Woodlief v. Wester, 136 N. C. 162, 48 S. E. 578.

Same—Contract Action for Breach of Covenant.—An action in contract for the breach of covenants of seisin and warranty in a deed, and not in tort for fraud, is not governed by this statute, where there was fraud or mistake in the deed, nor upon the theory that there is no possession by either the mortgagor or mortgagee. Overman v. Jackson, 104 N. C. 111, 9 S. E. 495.

Same—Where Possession by Either Party.—Where there is no possession by either the mortgagee or mortgagee or by the vendee or vendee in possession of the premises, an abandonment by section I-52, subsec. 9, is by this section. Shandall v. Ingram, 133 N. C. 254, 45 S. E. 578.

Same—By Sale of Conveyance.—Where a conveyance is taken by the assignee of a deed, and not in possession at the time of the conveyance, the deed is not found by the assignee or his representatives to be void. Frazier v. Cherokee Indians, 146 N. C. 778, 59 S. E. 10.

Same—To Declare Defendants in Execution Equitable Owners.—A suit to declare one of the defendants in execution to be an equitable owner of the property purchased by him, and under which he has furnished the price, and his codefendants, is barred by the ten-year statute of limitations. Sexton v. Farrington, 172 N. C. 162, 117 S. E. 68.

Same—Suit to Call for Grant of State Lands.—A suit to call for the grant of State lands, or to call for the grant without including the proper consideration or description in the conveyance by the grantee in favor of those claiming under and by virtue of a junior grant. Frazier v. Cherokee Indians, 146 N. C. 778, 59 S. E. 10.

Same—Taking of Land without Compensation.—Where in an action to recover damages from a city for the taking of plaintiff's land for a public use without compensation, in which the city pleaded the statute of limitations and there is no finding by the jury as to the time the first substantial injury, etc., was sustained by the plaintiff, the cause will be remanded for a new trial, and upon this appeal it is held that it is unnecessary to decide whether the three-year or ten-year statute would be applicable to a suit of this kind. Davis v. Asheville, 185 N. C. 12, 113 S. E. 827.

Enforcement of Decree.—An action to enforce the execution of a decree of a court confirming a report that an alley was to be laid off in certain lands is barred by this statute. Hunter v. West, 172 N. C. 169, 90 S. E. 133.

Alimony—Accrual of Right.—In proceedings for alimony under the provisions of § 50-16, the right of a wife for alimony accrues at the time pendente lite arises to her, in application of the statute of limitations, when the action is commenced, and not from the time of the separation from her husband. Garris v. Garris, 188 N. C. 321, 124 S. E. 314. See note of this case under § 10-4.

Action to Declare Trust in Land.—In Marshall v. Hammon, 195 N. C. 496, 142 S. E. 776, this section was held applicable to plaintiff's right of action to declare a trust in land. Shandall v. Ingram, 133 N. C. 254, 45 S. E. 578.

Action for Delinquent Taxes.—Neither the three nor the ten years' statute of limitations applies to an action authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. Wilkinson v. Crouly, 132 N. C. 331, 49 S. E. 9.

Application to Judgments of State Courts.—The words "any State" appearing in sec. 1-47, subsec. 1, must be taken to mean the judgment of a court of any State including our own, but it could make no material difference even if not construed to include this state, since, every action for recovery of delinquent taxes, under such a construction of this section, would be commenced within the same period of ten years after the cause of action shall have accrued. McDonald v. Dickson, 85 N. C. 248, 252.

SUBCHAPTER III. PARTIES.

Art. 6. Parties.

§ 1-57. Real party in interest; grantees and assigns.—Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section does not authorize the assignment of a thing in action not arising out of contract. An action may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action, notwithstanding the conveyance of the grantor is void, by reason of the actual possession of a person claiming under a title adverse to that of the grantor, or other person, at the time of the delivery of the conveyance. In case of an assignment of a thing in action the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment; but the assignee cannot apply to a negotiable promissory note or bill of exchange, transferred in good faith, upon good consideration, and before maturity. (Rev. s. 400; Code, s. 177; C. C. P., s. 55; 1874-5, c. 256; C. S. 446.)

I. Real Parties in Interest.

A. In General.

B. Personal Actions.

C. Actions Concerning Reality.

II. Actions by Grantees.

III. Assignments.

Cross References.

As to bonds of executors, administrators, and collectors, and right c. action on such bonds, see §§ 28-34, 28-42. As to bonds of guardians and right of action thereon, see §§ 31-13, 31-14. As to actions on official bonds and bonds in trust, see §§ 319-337, 319-338. As to negotiable instruments, rights of holder, see § 25-57 et seq.

As to real party in interest in assignment see hereunder part III of this annotation.

I. REAL PARTIES IN INTEREST.

A. In General.

Purpose.—The provision requiring every action to be prosecuted in the name of the real party in interest, was necessary to let in all defenses, equitable as well as legal, against the real party in interest, and save a

[133]
resort to another action, so as to harmonize with the constitution. Art. II, [IV Sec. 1. Abrams v. Cureton, 74 N. C. 477.]

Enabling Act.—The section does not confer a right of action; it only enables the enforcement of a right of action already accrued. Usry v. Suit, 91 N. C. 417.

Strikes.—No strike is a matter of public wrong; there is no middle ground; for whenever the action can be brought in the name of the real party in interest it must be so done. Rogers v. Gooch, 87 N. C. 444. See also, McGuinn v. High Point, 219 N. C. 148, 13 S. E. 2d 543.

Who Is Real Party in Interest. — The real party in interest is the party who would be benefited or injured by the judgment in the case. An interest which warrants bringing an action is not a right of action involved merely, but some interest in the subject matter of the litigation. 5 Western Taw Monthly 80.

The requirement that an action must be maintained by the real party in interest, under the provisions of this section, as the real party in interest, maintain an action against a third person by the injured employee or his personal representative. Betts v. Southern Ry. Co., 71 N. C. 243, 16 S. E. 2d 780.

Exception Does Not Apply to Fire Insurance Companies.—If the exception in this section ("But this section does not apply to fire insurance companies, on paying a loss, from suing the one whose negligence caused the loss, it was repealed by Laws 1899, ch. 154, sec. 43 (see now § 58-177), which provides that the insurer against fire insurance companies, on paying a loss, may bring an action against the one whose negligence caused the loss, to recover the amount paid for the same,") is not a sound discretion to be exercised where the circumstances render it proper that the action be prosecuted in the name of the transferee rather than in that of the original consignee to transfer the title by delivery of the bill of lading, to sustain the plaintiff's right to maintain his action as the real party in interest. Lawshe v. P. R. R., 119 N. C. 1437, 51 S. E. 343.

Rights of Insured.—When an insurer against fire has completely indemnified the insured, he is subject to the rights of the insured, in respect of the indemnity, under this section, as the real party in interest, maintain an action against the wrongdoer. Cunningham v. Railroad, 139 N. C. 437, 51 S. E. 162.

Employer Subrogated to Rights of Injured Employee.—Where an employee has accepted compensation awarded by the Industrial Commission for an injury sustained by him in the course of his employment he cannot maintain an action in his own right against the one whose negligence caused the injury, for the employee insurance carrier were subrogated to the right of action against the third person, and the injured employee is a "real party in interest.


And May Sue Third Persons.—Under this section an insurance carrier who has paid compensation to an injured employee may proceed in an action which has been instituted against a third person by the injured employee or his personal representative. Betts v. Southern Ry. Co., 71 N. C. 243, 16 S. E. 2d 780.

Endorsor Subrogated to Rights of Payee.—Where a person presenting a note to a bank is required to endorse the note, the note is received by the bank and taken by it in payment of the note, and the check is not paid and is charged to the bank, the endorser is subrogated to the rights of the payee under this section, as the real party in interest.

Taylor v. Everett, 188 N. C. 247, 124 S. E. 316.

Rights of Undisclosed Principal on Contract.—An undisclosed principal holding the business rights and interest under a contract, may sustain the action thereon. Peanut Co. v. R. R., 135 N. C. 148, 71 S. E. 71; Williams v. peanut Co., 160 N. C. 109, 156 S. E. 521.

Liability of Bank Directors to Each Other.—Where directors of a bank have paid the liability of others under an agreement, each one of them may maintain his action against each of the defaulting members under this section, and such is not a misjoinder of parties prohibited by statute. Taylor v. Everett, 188 N. C. 247, 124 S. E. 316.

Agent as Real Party in Interest.—Where, under agreement with his principal, the agent of a manufacturer is obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he has paid his unlawful charges on a shipment, he is the party aggrieved, within the meaning of this section, as the real party in interest, to recover the excess, and also the penalty when entitled thereunto. Tilley v. R. R., 172 N. C. 563, 90 S. E. 309.

Assignment for Collection.—An agent for the collection of rents is not the real party in interest. Martin v. Mask, 158 N. C. 436, 74 S. E. 343.

A rental agent may not maintain a suit in ejectment or for the collection of rents, either in his own right, or on behalf of the lessor, and a bond given to indemnify a bank from any loss it might sustain by reason of its taking over the assets and discharging the liabilities of another bank is assignable. North Carolina Bank, etc., Co. v. Lockert, 214 N. C. 1, 197 S. E. 551.


The assignee of a choice in action may bring an action therein in his own name, and a bond given to indemnify a bank from any loss it might sustain by reason of its taking over the assets and discharging the liabilities of another bank is assignable. North Carolina Bank, etc., Co. v. Lockert, 214 N. C. 1, 197 S. E. 551.

Transferor of Claim. — A plaintiff having transferred the claim, upon which his action was subsequently brought, to an attorney at law, for collection, and with directions only to prosecute the action against the said plaintiff, an action will not lie in the name of the plaintiff on the claim, he not being the real party in interest.Owens v. Heek, 92 N. C. 415.

Transferee of Claim. — The discretion conferred by § 1-74 is a sound discretion to be exercised where the circumstances render it proper that the action be prosecuted in the name of the transferee rather than in that of the original plaintiff; and one circumstance calling for the exercise of
the discretion is the fact that the transferee, as in this case, has parted with all interest to the transferee, since this section requires that the action be prosecuted in the name of the real party in interest. Hood v. Bell, 84 F. (2d) 138.

Action on Note by Liquidating Agent.—In an action on a note, when a successor in interest of a liquidating agent of the payee, the bank and the Reconstruction Finance Corporation, to which the note had been pledged as collateral security are both interested parties and may jointly sue the makers of the note. Hood v. Progressive Stores, 209 N. C. 36, 182 S. E. 694.

Shippers Are Real Parties in Interest in Action for Discrimination in Rates.—Where certain carriers by truck sought injunctive relief against certain cities and against certain commodities, it was held that the basis for injunctive relief must be a threat to interfere with the right of the petitioner, not of a third party and that the shippers would be the real parties in interest not the contract truck carriers. Carolina Motor Service v. Atlantic Coast Line R. Co., 210 N. C. 36, 185 S. E. 479, 184 A. L. R. 1165.

Action on Fidelity Bond.—Where stockholders and directors gave their note to the bank for the amount of a shortage due to embezzlement by a cashier to prevent liquidation, and the bank neither surrenders nor assigns the fidelity bond, the bank is the real party in interest. People's Bank v. Fidelity, etc., Co., Co. 4 F. Supp. 379, 382.

Lessor Must Bring Action of Summary Eviction.—Although action of the lessor may make the oath in writing required in summary eviction under § 1-57, the action must be prosecuted in the name of the lessor as the real party in interest, and it may not be maintained in the name of the owner of the lease or the assignee. Rentale Co. v. Justice, 211 N. C. 54, 188 S. E. 609.

Title to Public Office.—Taxpayers may not maintain an action to determine title to a public office, neither claimant to such office maintaining an action in his own name as a real party in interest. Freeman v. Board of Com'rs, 217 N. C. 289, 7 S. E. (2d) 354.

Suit by Retiring State Officer. — Where a state officer has parted with all interest to the transferee, since this action was brought by a husband, without making the wife a party thereunto, for slander of title, being a real party in interest. Plotkin v. Bank, 188 N. C. 711, 125 S. E. 541.


Claim under Workmen's Compensation Act.—It is required by the statute in question that a real party in interest be involved, and where an order made by the court be vacated on the ground that they had not been duly made parties or given consent that judgment be rendered out of term, etc. It is otherwise if the plaintiff who has been named as a beneficiary who has neither been duly made a party nor given consent to the agreed case or the further action of the court thereon. Bank v. Doe, 200 N. C. 293, 17 S. E. (2d) 166.

Negligent Mutlication of Dead Body. — In order of their priority of inheritance of the personal property of the deceased, the next of kin may maintain an action to recover damages for the negligent mutilation of his dead body. Floyd v. R. R., 167 N. C. 55, 83 S. E. 854.

Chapter 1. Civil Procedure.—Parties

Section 1-57

Conveyance of Land Pendente Lite. — Where it is sought by the owner thereof, to ratify and confirm the act of conveyance of land to the lien of one claiming under his mortgage, and pendente lite has conveyed the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest. Plotkin v. Bank, 188 N. C. 711, 125 S. E. 541.

When a party has commenced an action concerning an interest in lands, the cause may be continued by his successors in interest as the real parties in interest. Barbee v. Cannady, 191 N. C. 529, 132 S. E. 372.

Action by Remaindermen. — An action brought by remaindermen, during the lifetime of the first taker, to recover the land will not lie, because they are not the real parties in interest. Blount v. Johnson, 165 N. C. 26, 80 S. E. 885.

Vacation to Grant Vacant Real Estate Not Interested. — Where the state has no interest in the land, as where title would not revest in the state, an action to vacate a grant must be brought by the party in interest in his own name. The state was bound by its own prior conveyance. Plotkin v. Bank, 173 N. C. 391, 118 S. E. 475. See also, Carte v. White, 101 N. C. 30, 7 S. E. 473; State v. Bevers, 86 N. C. 588; and Henry v. McCoy, 131 N. C. 586, 44 S. E. 354.

Action by Tenant. — Against any third person, the tenant is entitled to the possession of the land and the crop, and for any injury thereto while it is being cultivated, he may maintain an action on his landlord's behalf.

He is the real party in interest. State v. Higgins, 126 N. C. 1113, 36 S. E. 113; Bridges v. Dill, 97 N. C. 222, 1 S. E. 767.

Where the land has become saleable growing thereon the tenant is not the owner thereof in the sense that he may
maintain an action against one who has negligently destroyed it by fire, except only for its value for purposes on the lease premises. Chauncy v. Atlantic Coast Line Co., 54 N. C. 415, 6 S. E. 357.

Action of Tenant for Trespass. — Under the provisions of this section, the court has the power to order the owner of the title to be made a party in the tenant's action for trespass, so that he may be held jointly to both the possession and to the inheritance. Tripp v. Little, 186 N. C. 215, 119 S. E. 825.

Foreclosure as Party. — The rents arising from the real estate of a feme covert belong to her under the constitution of 1868, Art. 10, sec. 6, therefore an action therefor must be brought by the wife, she being the real party in interest. Thompson v. Wiggins, 109 N. C. 299, 14 S. E. 301.

A suit by mortgagee to correct mortgage, which through fraud or mistake or the negligence of the register of deeds in cross-indexing has failed to give a priority of lien to one of several mortgages entitled thereto, will be entertained in equity, as he is a real party in interest. Gray v. Ector, 121 N. C. 346, 26 S. E. 653.

Reformation of Deed of Trust. — Where a substituted trustee brings an action to reform a deed of trust and certain mortgage notes which are negotiable, the holders of the notes are necessary parties. First Nat. Bank v. Thomas, 294 N. C. 599, 169 S. E. 189.

II. ACTIONS BY GRANTEES.

Constitutionality. — This section permitting a grantee of real estate to maintain an action in his own name is not unconstitutional. It is concerned only with the mode of prosecution, and the courts have discretion to decide the manner in which the equitable interest may be asserted. Mc? v. Eddings, 75 N. C. 584; Buie v. Carver, 75 N. C. 563.

Rights of Grantee in Ejectment Suit. — An action of ejectment may be maintained by a grantee in his own name whenever the grantor has a right to sue, notwithstanding the person in actual possession claims under a title adverse to that of such grantor. Osborne v. Anderson, 89 N. C. 263; Johnson v. Prairie, 94 N. C. 775; Buie v. Carver, of N. C. 561; Bland v. Beays, 145 N. C. 168, 58 S. E. 993. As to summary ejectment, see sec. 42-26, and the note thereeto.

III. ASSIGNMENTS.

Effect in General. — A construction was given to this section in Harris v. Burnwell, 65 N. C. 584, where Pearson, C. J., says, "it abrogates the principle of the common law, that a chose in action cannot be assigned—confers an unlimited right to assign 'anything in action' arising out of contract, and subjects the assignee to any set-off or other defense existing at the time of or before notice of the assignment; the only saving being in regard to 'negotiable promissory notes and bills of exchange transferred in good faith and upon good consideration before due.' This language is as broad as it well can be; so that a note assigned by a holder in due course, a half bank note, or a bill of exchange transferred to any set-off or other defense that the maker had against any one or all of the assignees at the date of the assignment, may be avoided.

General Rule. — It would seem that something of a general rule concerning the relation of this section to assignability was laid down in Woodcock v. Bostic, 118 N. C. 830, 24 S. E. 362, in which Montgomery, J., says: "If an assignee can make no possible use of the thing assigned to him, the assignment is a vain thing. If the courts would not and could not entertain a suit at the hands of an assignee against the person in actual possession, in respect of the thing transferred, how can it be said that such a thing is assignable? The law could not say that a matter, the thing transferred, can ever be assigned, and it appeared that the judgment was brought by another, the plaintiff was made during the pendency of the appeal, the court would have no jurisdiction of the cause at all."

Assignment of a Judgment Pending Appeal. — Where an assignment of the judgment for one of the defendants against the plaintiff was made during the pendency of the appeal, the court would have no jurisdiction of the cause at all. Vaughan v. Jeffreys, 119 N. C. 144, 26 S. E. 94; Guthrie v. Moore, 182 N. C. 24, 108 S. E. 334. See also Capell v. Littler, 64 N. C. 17; Mason v. Goodwin, 162 N. C. 561.

Past Due Notes Subject to Defenses. — A note taken after it is due is subject to any set-off, or any other defense existing at the time of or before notice of assignment; Vaughan v. Jeffreys, 119 N. C. 144, 26 S. E. 94; Guthrie v. Moore, 182 N. C. 24, 108 S. E. 334. See also Capell v. Littler, 64 N. C. 17; Mason v. Goodwin, 162 N. C. 561.

Action on Assignment Non-Negotiable Note. — The assignee of a non-negotiable note can maintain an action thereon; and so can the owner where there is no written assignment. Wilcoxon v. Logan, 91 N. C. 180.

When Judgments Treated as Contracts. — While judgments are not treated as contracts for all purposes, they are so treated for the purpose of distinguishing them from causes of action arising ex delicto, and are not embraced by this section, forbidding the assignment of things in an action not arising out of contract. Moore v. Norvell, 94 N. C. 270, 26 S. E. 812.

Assignment of Contract Not a Party. — The vendee under a contract for the sale and delivery of cotton cannot maintain an action thereon where it unconstitutionally appears from his own evidence and he has assigned the contract by third parties, not to the action, and has no further interest therein. Vaughan v. Davenport, 157 N. C. 156, 72 S. E. 842.

Executive Contracts Assignable. — As a general rule, executory contracts of an ordinary kind are now assignable, except that contracts involving a personal relation, or imposing liabilities which by express terms or by necessary construction of the law must remain in the hands of the person, such person, and not the nominal assignee, should be substituted as plaintiff. Field v. Wheeler, 120 N. C. 270, 26 S. E. 812.

Installments of Penalties. — Installments of a penalty payable in the future are not assignable. Gill v. Dixon, 131 N. C. 37, 48 S. E. 538.

name of the state. (Rev., ss. 401, 402; Code, ss. 1212, 1213; R. C., c. 35, ss. 47, 48; C. S. 447.)

Editor's Note. — The three provisions permitting the plaintiff to reply fraud to a plea of release in a suit for penalty; the defendant to plead satisfaction in a suit on bonds; and that the sum due, with interest and costs, and discharges penalty bonds, were secs. 932, 933, 934 of the Code of 1893 and secs. 1521, 1522, 1523 of the Revisal of 1905. They were again inserted by Public Laws 1925, c. 21. See §§ 1-59 to 1-63.

The construction of this section in Norman v. Dunbar, 53 N. C. 319, is that the suit should be in the name of the person claiming the penalty, and to whom, upon a recovery, it belongs, while in the subsequent case of Duncan v. Philpot, 64 N. C. 479, it is held that it should be prosecuted in the name of the state. Goodwin v. Fertilizer Works, 119 N. C. 153, is that the suit should be brought in good faith by any person to recover a penalty prescribed by statute against railroads for failure to make returns can only be recovered in an action under a law of this state, or of the United States, in good faith by any person to recover a penalty against railroads for failure to make returns in good faith, may reply that the said money had been expended in any suit upon such bond, the said money shall be deemed and taken to be in full satisfaction and discharge of said bond, and the court shall give judgment accordingly. (Rev., s. 1523; Code, s. 934; R. C., c. 31, s. 102; 4 Anne, c. 16; 1925, c. 21; C. S. 447(c).)

§ 1-61. Payment into court of sum due discharges penalty of bonds.—If at any time, pending an action on any bond with a penalty, the defendant shall bring into court, where the action shall be pending, all the properties, money, and interest due, and also all such costs as have been expended in any suit upon such bond, the said money shall be deemed and taken to be in full satisfaction and discharge of said bond, and the court shall give judgment accordingly. (Rev., s. 1522; Code, s. 933; R. C., c. 31, s. 101; 4 Hen. VII, c. 20; 1925, c. 21; C. S. 447(b).)

§ 1-62. Action by purchaser under judicial sale. —Any one given possession under a judicial sale confirmed, where the title is retained as a security for the price, is the legal owner of the property for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession, in the same manner as if the title had been conveyed to him on day of sale, unless restrained by some order of the court directing the sale; and the suit brought is under the control of the court ordering the sale. (Rev., s. 403; Code, s. 942; 1858-9, c. 50; C. S. 448.)

No Rights Acquired by Bidder before Confirmation. — In Attorney-General v. Navigation Co., 86 N. C. 307, it is said: "The doctrine has been settled in this state, that the bidder at a judicial sale acquired no right before the confirmation of the report of the commissioner who made the report under the order of the court." In re Deceased, 111 N. C. 114, 55 S. E. 1025, holds: "The sale then, not having been confirmed, the commissioner's deed has not yet divested the title out of the petitioner. While a formal direction to make a title is not always necessary, a confirmation of the sale cannot be dispensed with." Both cases being quoted, approved and followed in Vanderbilt v. Brown, 126 N. C. 499, 50, 59 S. E. 36.

But when confirmation is made, the bargain is then complete, and it relates back to the day of sale. Vass v. Arrington, 54 N. C. 119, 122, 129, 33 S. E. 330.

Collection of Purchase Price. — The remedy to enforce a decree under confirmed sale of land for the collection of the purchase price of the land is by motion in the cause. Davis v. Pierce, 167 N. C. 135, 55 S. E. 182.

§ 1-63. Action by executor or trustee. — An executor or administrator, the principal and interest due by the condition or defeasance of such bond, though such payments were not made strictly according to the condition or defeasance; or if such obligor, his heirs, executors or administrators have before action brought made satisfaction to the plaintiff of the principal and interest due by the condition or defeasance of such bond, in other manner than by performance thereof, yet the said payment or satisfaction may be pleaded in bar of such action, and shall be effectual as a bar thereof, in like manner as if the money had been paid at the day and place, according to the condition or defeasance, and so pleaded. (Rev., s. 1522; Code, s. 933; R. C., c. 31, s. 101; 4 Hen. VII, c. 20; 1925, c. 21; C. S. 447(b).)
whose name, a contract is made for the benefit of another. (Rev., s. 494; Code, s. 179; C. C. P., s. 57; C. S. 449.)

An express trust is defined to be a trust created by the direct and positive acts of the parties, by some writing or deed, or will. 22 N. Y. 389; 23 Ind. 112. See Hepburn's cases on Code Pl. 546, 552 n.

It often seems difficult to distinguish between such trustees and those with whom or in whose name contracts are made for the benefit of others, and many of the Code states (including North Carolina) in this section) make the term "party to an express trust" cover this latter class of persons. Bliss Code Pl. § 55.

As illustrations of the former may be mentioned: An assignee for the benefit of creditors, 4 Abb Pr. 106; an obligee in possession of money upon trust for the benefit of others, 1 C. S. 330; trustees appointed to take and collect subscriptions for colleges and other similar purposes, 34 Howard 320; an answer setting forth that B is the real owner of a note sued upon, but that it was assigned to the plaintiff, is to be taken as meaning that the plaintiff is trustee of an express trust, and so is properly plaintiff. Rankin v. Alliso, 116 N. C. 166, 108 S. E. 500.

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Speaking Demurrer Not Allowed. — Where the holder of a promissory note in due course, etc., sues thereon, who, as it appears, is a trustee of an express trust to collect certain certificates of deposit, and apply the proceeds to its payment for the benefit of himself and the holders of the certificates, a demurrer that the plaintiff is, in fact, acting as agent of the holders of the certificates, and that they are in truth parties, is a speaking demurrer, and bad. Union Trust Co. v. Wilson, 182 N. C. 166, 108 S. E. 500.

Qualities of Trustee to Be Raised on Appeal.—See note to § 1-57. Cited in Orr v. Twiggs, 210 N. C. 578, 187 S. E. 791.

§ 1-64. Infants, etc., sue by guardian or next friend.—In actions and special proceedings where any of the parties plaintiff are infants, idiots, lunatics, or persons non compos mentis, whether in suits of original action or proceeding, they must be represented in court by their general or testamentary guardian, or by a next friend appointed by the court, as a necessary party, to appear by their legal representative, and to maintain the action or proceeding for the benefit of such infants, or persons non compos mentis, as the case may be. The court may appoint such guardian or next friend in its discretion, whenever it deems such representation necessary, and cause to be given such directions as it deems proper, to be observed by the guardian or next friend, as to the management of the infant's or person's estate, for the benefit of which proceedings are instituted, or for the benefit of which such infant or person is represented in court.

§ 1-64. Infants, etc., sue by guardian or next friend.—In actions and special proceedings where any of the parties plaintiff are infants, idiots, lunatics, or persons non compos mentis, whether in suits of original action or proceeding, they must be represented in court by their general or testamentary guardian, or by a next friend appointed by the court, as a necessary party, to appear by their legal representative, and to maintain the action or proceeding for the benefit of such infants, or persons non compos mentis, as the case may be. The court may appoint such guardian or next friend in its discretion, whenever it deems such representation necessary, and cause to be given such directions as it deems proper, to be observed by the guardian or next friend, as to the management of the infant's or person's estate, for the benefit of which proceedings are instituted, or for the benefit of which such infant or person is represented in court.

Court's Duty to Exercise Care in Making Appointment.—In Morris v. Gentry, 89 N. C. 248, 254, it was said, "It is the duty of courts to have special regard for infants, their rights and interests, when they come within their cognizance. The law makes this so, for the good reason, they cannot adequately take care of themselves. It is a serious mistake to suppose that a next friend or a guardian ad litem should be appointed upon simple suggestion; this should be done upon proper application in writing, and due consideration by the court. The court should know who is appointed, and that such person is capable and able to act, and to appear by their general or testamentary guardian, if there are any within the state; but if the action or proceeding is against such guardian, or if there is no such guardian, then said persons may appear by their next friend. The duty of the state solicitors to prosecute in the cases specified in chapter entitled Guardian and Ward is not affected by this section. (Rev., s. 405; Code, s. 180; 1893, c. 5; C. C. P., s. 55; 1870-1, c. 233; 1871-2, c. 95; C. S. 450.)

Presumption of Proper Appointment. — Where the lands of infants are sold under an order of the Superior Court upon an ex parte petition, in which the infants are represented by their next friends, the court proceeded with the sale without a newborn notice to the infants, and the court failed to see to it that the infants were adequately taken care of and represented in court.

Appointment of Next Friend in Justice's Court. — When the holder of a promissory note in due course, etc., sues thereon, who, as it appears, is a trustee of an express trust to collect certain certificates of deposit, and apply the proceeds to its payment for the benefit of himself and the holders of the certificates, a demurrer that the plaintiff is, in fact, acting as agent of the holders of the certificates, and that they are in truth parties, is a speaking demurrer, and bad. Union Trust Co. v. Wilson, 182 N. C. 166, 108 S. E. 500.

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he was designated as guardian and not as next friend. Ex parte Huffstetler, 203 N. C. 796, 798, 167 S. E. 65.

Foreign Guardian Sues as Next Friend. — A guardian appointed in another state has no authority to represent his wards in suits and proceedings in this state, but when he brings suit for them as guardian it will be treated as if he were next friend. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Foreign or Domestic Corporation Can Not Be Appointed Next Friend. — Where the party has been appointed as guardian, or has appointed a person to act as next friend, the court, on the application of the attorney or person who procured the appointment, may, after notice, hear and dispose of the application, granting the appointment, or vacating it, and imposing such conditions as may be proper.

Widow of Deceased Minors Can Not Sue For and by Next Friend. — Where the widow or next friend of a minor absent from the state, has not been properly appointed, the court has no authority to make a new appointment, or to authorize a new suit to be brought in another state, for the benefit of the minor.

Interest of Guardian or Next Friend. — Any person who is a next friend or guardian of the infant, in a suit or proceeding, is a real party in interest. The right of the infant to sue or to be sued, and his right to be represented by next friend or guardian ad litem, is subject to the right of the next friend or guardian ad litem to be appointed, and to the right of the infant to make a new appointment. The court may, of its own motion, or on the application of any party, make such discoveries, or render such orders, as may be necessary to enable the infant to present his case, or to enable the court to ascertain his interest, or to enable the court to determine the interest of the infant, as may be necessary. The court may, in any suit or proceeding in which such irregularities exist, make such orders, as may be necessary, to enable the infant to present his case, or to enable the court to ascertain his interest, or to enable the court to determine the interest of the infant, as may be necessary.

§ 1-65. Infants, etc., defend by guardian ad litem. — In all actions and special proceedings when any of the defendants are infants, idiots, lunatics, or persons non compositi mensis, whether residents or nonresidents of this state, they must be defended by their general or testamentary guardian, if they have one within this state; and if they have no general or testamentary guardian in the state, and any of them has been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem to defend the interest of the infant, idiot, lunatic, or person non compositi mensis. The guardian so appointed shall, if the cause is a civil action file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him.

Cross Reference. — As to service of summons on minor or insane, see § 41-11; when infants are 2 and 3.

Editor's Note. — This section and section 1-97, par. (2) were reenacted to afford protection to infants, persons non compositi mensis, etc., against the able and the cunning who might seek to take advantage of their handicaps. There can be no question but what the requirement as to service of summons upon persons falling within the purview of these sections should be strictly observed.

However, the question inevitably arises as to what is the legal effect of failure to make such service. In Allen v. Shields, 72 N. C. 504, it is doubted by the court whether personal service on an infant is indispensable, with a strong intimation that it is. But it appears that our authorities are fairly uniform on the point, and the doctrine has, in this state, and also generally prevailed, that the infant has been summoned, and an answer having been filed by his general guardian, or guardian ad litem, the failure to serve on the minor personally was only an irregularity, to be corrected, if at all, by motion in the cause. Groves v. Ware, 182 N. C. 553, 556, 109 S. E. 568; Harris v. Bennett, 160 N. C. 339, 76 S. E. 217; Gilson v. Gilson, 153 N. C. 185, 65 S. E. 55; Rackley v. Womack, 147 N. C. 201, 57 S. E. 970; Test v. Lassiter, 139 N. C. 145, 91 S. E. 968; Matthews v. Joyce, 85 N. C. 512.

Should Be Strictly Observed. — The provisions of the statute in regard to the appointment of guardians ad litem should be strictly observed, but mere irregularities in observing them, not affecting a substantial right, will necessarily defeat judgments rendered, or declarations of final rights in the proceeding in which such irregularities exist. Ward v. Lowndes, 96 N. C. 367, 2 S. E. 591; White v. Morris, 107 N. C. 419, 31 S. E. 877; Syme v. Trice, 96 N. C. 243, 1 S. E. 490.

When Infant Reaches Majority Pendente Lite. — Where in an action an infant is the defendant, and a guardian ad litem is appointed for him at full age before the trial, the judgment is binding on both plaintiff and defendant. Hicks v. Bean, 112 N. C. 462, 464, 14 S. E. 490.
Enforced as Mandatory. — In Moore v. Gidney, 75 N. C. 34, 39; Bynum, J., speaking for the court, says: "Infants and their guardians ad litem must be respectively informed of and these forms enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory, and not directory only. Those who venture to act in the face of the risk of their action being declared void, or set aside."

The object of the appointment of a guardian ad litem is to protect the interest of the infant defendants in which protection he is entitled at every stage of the proceeding. Gray v. Floyd, 214 N. C. 77, 81, 197 S. E. 873.

When Clerk May Appoint. — In a special proceeding by and against a minor, the clerk, when the suit is brought, may appoint a guardian ad litem for an infant defendant, where the executor is the general guardian of such infant. Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968.

Removal of the Officers. — In Raway v. Lassiter, 139 N. C. 145, 152, 51 S. E. 968, it was said: "The Superior Court has, independently of this section, the power to appoint a guardian ad litem for an infant defendant. It may at any time during the progress of the cause, for sufficient reason looking to the proper protection of the infant’s interests, remove a guardian theretofore appointed and appoint another.

The object to be obtained is the protection of the infant, whose interests are represented by the court. If the guardian ad litem is the officer of the court, and we can see no good reason or conflict with well-settled principles why it may not for any good reason appoint such guardian.

Nominal Plaintiff Disqualified to Represent Infant. — Where an infant feme covert cestui que trust who has no general guardian, appears in a proceeding for the appointment of a trustee by guardian ad litem, the husband need not appear. Roseman v. Vann, 194 N. C. 497, 139 S. E. 578.

Ward Protected by Court. — Where a guardian ad litem has been duly appointed to represent a party, who is under disability, in an action, the court will protect his interest, and any decree or judgment in the cause shall operate as if there had been personal service on such persons, practical harm would result therefrom to the ward where a guardian ad litem has been appointed, and the service of the summons or other process upon the guardian ad litem may be appointed on motion at the time of his appointment as guardian ad litem, so long as his name is inscribed on the record, and he accepts the service of summons and process thereon.

Vacation of Irregular Judgment. — Where it appears that there was no service of process upon infant defendants, and no guardian was appointed to protect their interests, a judgment rendered against them is absolutely void ab initio, and may be set aside at any time for irregularity. Larkins v. Bullard, 88 N. C. 35, 36; Mason v. Miles, 63 N. C. 564. See also, Pearson v. Nesbit, 14 N. C. 315; White v. Albertson, 14 N. C. 214.

Appointment Valid When Infant Not Regularly Served. — The appointment of a guardian ad litem is valid, although the infant has not been regularly served with process, where he has only accepted service thereof. Cates v. Pickett, 97 N. C. 21, 1 S. E. 763.

Jury Trial Waived. — It is competent for the attorney and guardian ad litem to waive a jury trial for infants, even where they have not been regularly served with summons. White v. Morris, 107 N. C. 93, 12 S. E. 80.

Mere Colorable Interest Disqualifies. — A mere colorable interest, if at all adverse, is sufficient to disqualify either a guardian ad litem or his attorney from appearing for infant defendants. Ellis v. Massenburg, 126 N. C. 134, 35 S. E. 240; Molyneux v. Huey, 81 N. C. 106.

Supreme Court May Appoint. — The Supreme Court may appoint a guardian ad litem, where the clerk has failed to attend to his appointment as guardian ad litem, so long as his name appears on the record. Ellis v. Massenburg, 126 N. C. 134, 35 S. E. 240; Molyneux v. Huey, 81 N. C. 106.

Applied in Wyatt v. Berry, 205 N. C. 118, 170 S. E. 121; as an infant defendant was a person in holding, in Hoed v. Hoeld, 205 N. C. 141, 105 S. E. 768; Robeson v. Hodges, 105 N. C. 49, 11 S. E. 263.

Appointed guardian ad litem in actions begun by publication. — In all actions and special proceedings wherever any of the defendants are infants, idiots, lunatics, or persons non compos mentis, and it shall become necessary to appoint a guardian ad litem for an infant defendant, where they have not been regularly served with summons. Applied in Wyatt v. Berry, 205 N. C. 118, 170 S. E. 121; as an infant defendant was a person in holding, in Hoed v. Hoeld, 205 N. C. 141, 105 S. E. 768; Robeson v. Hodges, 105 N. C. 49, 11 S. E. 263.

§ 1-66. Appointment of guardian ad litem in actions begun by publication. — In all actions and special proceedings wherever any of the defendants are infants, idiots, lunatics, or persons non compos mentis, and it shall become necessary to appoint a guardian ad litem for an infant defendant, where they have not been regularly served with summons.

A plaintiff of record, though nominal and made so without his consent, is utterly disqualified to appear for any infant defendants. His most faithful performance of duty and energetic and persistent defense, in every way commendable, and approved by the Court, do not relieve the impropriety of his appointment as guardian ad litem, so long as his name appears on the record. Ellis v. Massenburg, 126 N. C. 134, 35 S. E. 240; Molyneux v. Huey, 81 N. C. 106.

A plaintiff of record, though nominal and made so without his consent, is utterly disqualified to appear for any infant defendants. His most faithful performance of duty and energetic and persistent defense, in every way commendable, and approved by the Court, do not relieve the impropriety of his appointment as guardian ad litem, so long as his name appears on the record. Ellis v. Massenburg, 126 N. C. 134, 35 S. E. 240; Molyneux v. Huey, 81 N. C. 106.

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§ 1-68. Who may be plaintiffs.—All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative. This is a form of alternative pleading explained in 9 N. C. Law Rev. 24.

There May Be Several Plaintiffs Whose Interests Are Not Identical.—In a suit for damages to a truck where, as well as the cause of action of the corporate plaintiff for the loss of his security by reason of the damage to said truck, both arose out of the same transaction or transaction connected with the same subject of action, namely, the damage to the same truck proximately caused by the same negligent act of the same defendant, it was held that both parties could be joined as plaintiffs. Clearly both parties had an interest in the subject of this action and in obtaining the relief demanded and, as between the original parties to the action, may, in some instances, be made defendants, jointly, severally, or in the alternative. This is a form of alternative pleading explained in 9 N. C. Law Rev. 24.

Editor's Note.—The Act of 1931 inserted the words "jointly, severally, or in the alternative" appearing in the first sentence of this section, and added the last sentence.

Interest in Controversy.—In Wade v. Sanders, 70 N. C. 278, Pearson C. J., while construing the phrase "any person who claims an interest in the controversy adverse to the plaintiff," added that the phrase did not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same action. It is only intended to make "any person who claims an interest in the controversy adverse to the plaintiff" a wider scope. Bryant v. Kenlaw, 90 N. C. 337, 342.

This section contemplates that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original parties to the action, may, in some instances, and must in others, be made parties plaintiff or defendant. But it does not imply that any persons who may have a cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, or whose interest is adverse to the interests of the parties as to entitle them to intervene in the proceedings, are material or interested, that it is proper to make them parties. McDonald v. Morris, 89 N. C. 99, 100; Batchelor v. Macon, 67 N. C. 181, 184; Harkey v. Houston, 65 N. C. 133, 139.

§ 1-69. Who may be defendants.—All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. In an action to recover the possession of real estate, the landlord and tenant may be joined as defendants. Any person claiming title of, right, or interest, can arise by allowing them to come in at the beginning, by commencing the proceeding." See also, Ex parte Moore, 64 N. C. 98.

Editor's Note.—The Act of 1931 inserted the words "jointly, severally, or in the alternative" appearing in the first sentence of this section, and added the last sentence.

Trustee as Plaintiff.—A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the cestui que trust. Nash v. Sutton, 109 N. C. 559, 560.

Non-residents Not Barred.—Non-residents may be parties plaintiff in the courts of this state. Thompson v. Washburn Union Tel. Co., 107 N. C. 449, 456, 12 S. E. 427; Waiters v. Breder, 48 N. C. 64; Miller v. Black, 47 N. C. 342.

Uninterested Party as Co-Plaintiff.—It is wholly immaterial that a person with no interest or claim in the subject of the action, and the relief sought, is a defendant. Perkins v. Berry, 103 N. C. 131, 134; Colgrove v. Koontz, 76 N. C. 363.

Creditors as Plaintiff.—In Pelletier v. Saunders, 67 N. C. 261, 262, Rodman J., who delivered the opinion, said, "In a proceeding for the sale of lands, the creditors are not barred. Nevertheless, as they have an interest, as well as in the taking of the administration accounts as in the terms on which the land shall be sold, and the

a guardian ad litem is appointed, he shall file an answer in the action or special proceeding, admitting or denying the allegations thereof. The costs and expenses of the answer, in all applications to sell or divide the real estate of said infants, shall be paid out of the proceeds of the property, or in case of division shall be charged upon the land if the sale or division is ordered by the court, and, if not ordered in another manner the court directs. (Rev., s. 407; Code, s. 182; 1870-1, c. 235, s. 4; C. S. 453.)

Minors Not Properly Represented Not Bound.—Where, in a proceeding to caveat a will, the interests of minors are involved, who are not properly represented, the issue of defective representation of the minors is an independent ground for the removal of any person who claims an interest in the subject of the action and the relief sought. Id.

Joinder where they have a common interest in the subject of action, and in obtaining the relief demanded may be made defendants, either jointly, severally, or in the alternative, except as otherwise provided. (Rev., s. 410; Code, s. 184; C. C. P., s. 61; 1931, c. 344, s. 2; C. S. 456.)
of the executor, and make themselves parties before final judgment. Wadford v. Davis, 192 N. C. 484, 485, 35 S. E. 35.

Under this section and section 1-73, a court has power to allow a judgment creditor of a corporation to interplead to an action in the nature of a quo warranto brought by the Attorney-General to annul and vacate the charter of the corporation. Attorney-General v. Simonton, 78 N. C. 57.

A creditor of the deceased has a right, to come in and become a party plaintiff, for the purpose of excepting to an admeasurement of dower, in the course of a petition by the widow. Ex parte Moore, 64 N. C. 90, 91.

Same — Plaintiff in a Creditor's Bill. — A plaintiff in a creditor's bill, seeking to have his judgment annulled and vacated, cannot be made a party defendant, for the removal of an insolvent trustee; for the appointment of a receiver; to declare a conveyance to the principal defendant void, and that a prior mortgage shall be made a party defendant, for the purpose of excepting to an admeasurement of dower, in the course of a petition by the widow. Ex parte Holloman, 163 N. C. 124, 79 S. E. 40.

Same — Adverse Holder to Title to Both Parties. — In an action for the recovery of real estate, a third party who filed a counterclaim and adverse holder to title to both parties, is not bound to assert title adverse to the principal defendant, if a party to the action. Colgrove v. Koone, 76 N. C. 363.

Same — Authority of Clerk. — The clerk of the Superior Court, under § 1-69, may exercise the authority to permit persons claiming an interest in the land to be made a party defendant. Empire Mfg. Co. v. Spurll, 169 N. C. 618, 86 S. E. 522.

Before allotment of dower is made in the lands of a deceased husband dying intestate his heirs at law should be made parties plaintiff or defendant. Holt v. Lynch, 201 N. C. 369, 164 S. E. 274.

Surety. — Where a contractor gives a surety bond for the faithful performance of a contract for the cutting of timber, it is not necessary to first ascertain by action or otherwise who is the principal defendant in the action for the recovery of the contract price, to make his surety a party to action for damages for its breach, the surety being a proper party for the complete determination or settlement of the question involved. Watson v. King, 118 N. C. 527, 20 S. E. 416.

Junior Mortgagee. — In an action to set aside a sale under a deed of trust the junior mortgagee should be made a defendant. Lockbridge v. Smith, 197 N. C. 743, 151 S. E. 729.

Assignee of Judgment and Levy Officer. — In an action against the makers of a note and to have a judgment obtained by one of the makers against the payee applied to the payment of the note, it was held that the assignee of the judgment and the sheriff, who was about to obtain execution on the judgments, were properly made parties defendant, and that the trial court had no power to permit the makers and the relief sought against the other defendants was but incidental. North Carolina Joint Stock Land Bank v. Kerr, 206 N. C. 610, 175 S. E. 402.

In an action against a stockholder in an insolvent bank to collect the statutory assessment on his stock parties who had contracted to pay the liabilities of the bank in case of insolvency and save the stockholders from liability should have been made parties defendant on motion of defendant stockholder. Hood v. Burrus, 207 N. C. 560, 178 S. E. 362.

Joinder of Beneficiaries in Deeds of Trust. — In an action against a beneficiary in a deed of trust for the recovery of conveyances of property by deeds of trust and mortgages as made to hinder, delay and defraud him in the collection of his judgment under execution, the joinder of all the beneficiaries was not necessary parties, as it was not objectionable as a misjoinder and demurrer to the complaint alleging such conveyances entered on the records of the register of deeds of trust and parties, and that it failed to state a cause of action is properly overruled. Moorfield v. Roseman, 198 N. C. 805, 153 S. E. 399.

Action against Town or Officials. — Plaintiff sought to recover against a town on a contract or, if the town were not liable on the contract, to recover against individual defendants as mayor and clerk, for wrongfully inducing him to enter into an unauthorized contract. It was held that the facts alleged were not in the alternative, but that the complaint alleged the claim and made a definite and connected story, and under the provisions of this section, plaintiff, being in doubt as to those from whom he had to recover, should be permitted to sue the general officers of defendants in the alternative under § 1-123, and defendants' demurrer for misjoinder of parties and causes is properly overruled. Peitman v. Zebulon, 219 N. C. 473, 14 S. E. (2d) 246.

Review on Appeal. — The action of the trial judge in making necessary parties of a corporation to an action by a creditor for the recovery of property sought to be recovered is appealable without regard to the making of proper parties is addressed to his sound discretion and not reviewable. Williams v. Hooks, 200 N. C. 419, 156 S. E. 533.

Applied to State v. Griggs, 219 N. C. 700, 14 S. E. (2d) 856.

§ 1-70. Joinder of parties; action by or against one for benefit of a class.—Of the parties to the action, those who are interested in it as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. When the question is one of a common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. Any and/or all unincorporated, beneficial organizations, fraternal benefit orders, associations and/or societies, or voluntary fraternal beneficial organizations, orders, associations and/or societies issuing certificates and/or policies of insurance, foreign or domestic, now or hereafter doing business in this state, or playground for the benefit of the residents of the community were made parties, the judgment in the action is binding upon the minors and all members of the community who are parties, and allegations of the party are made as to the benefit of the class, and the munity were made parties, the judgment in the action is binding upon the minors and all members of the community for use as a community house or playground for the benefit of the residents of the community and a voluntary association instituted involving title to the property in which representative members of the community were made parties, the judgment in the action is binding upon the minors and all members of the community for the benefit of the class, and the representatives of the class are made parties. Carswell v. Cresswell, 217 N. C. 40, 42 S. E. (2d) 58.

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§ 1-71. Persons severally liable.—Persons severally liable upon the same obligation, including the parties to bills of exchange and promissory notes, or any of them may all or any of them be included in the same action at the option of the plaintiff. (Rev. s. 412; Code, s. 186; C. C. P., s. 63; C. S. 459.)

Cross Reference.—Act 79, and several debtors, see § 1-113.

Makers and Endorsers of Bills and Notes.—The makers and endorsers of bills of exchange and promissory notes, or any of them may all or any of them be included in the same action at the option of the plaintiff. (Rev. s. 412; Code, s. 186; C. C. P., s. 63; C. S. 459.)

Judgment as a Merger.—Between the parties to an action wherein a judgment is rendered in the former action, and the note or instrument sued upon is made a party to the judgment, or as to sureties or endorsers who are not parties to the judgment, there is no merger or extinguishment of the note or instrument. Bank v. Eureka Lumber Co., 123 N. C. 24, 47 S. E. 279.

Action on Surety Bond.—In an independent action by plaintiff in claim and delivery to recover upon the defendant's surety bond for the deterioration, etc., of property wrongfully detained, the surety may be sued alone without joining the principal defendant in the former action. Moore v. Edwards, 192 N. C. 446, 135 S. E. 302.

In an action against one surety on an official bond, the other sureties need not be joined. Brown v. McKee, 108 N. C. 387, 391, 13 S. E. 8. See also, Syme v. Bunting, 86 N. C. 175; Flack v. Dawson, 86 N. C. 42.

Cited in Bost v. Metcalfe, 219 N. C. 607, 14 S. E. 761.

Action for Trust Funds Loaned by Guardian.—Where a guardian lent trust funds to a firm of which he was a member and took their note payable to himself, it cannot be objected that the guardian is not made a party to a suit brought by the firm to recover the principal in which the guardian had assigned it, as under this section, persons severally liable may all or any be included as defendants. Gudger v. Baird, 66 N. C. 438, 441.

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Cited in Bost v. Metcalfe, 219 N. C. 607, 14 S. E. 761.
§ 1-73

CH. 1. CIVIL PROCEDURE—PARTIES

§ 1-73


Parties.—In Rutty v. Claywell, 91 N. C. 306, 308, it was said: "The result is to render contracts joint in form, several in legal effect, and to neutralize, if not to displace, those provisions which operate only upon contracts that are joint in form, severally in legal effect, thereby passing the inherent quality of being joint as well as several in law, cannot render available provisions which, in terms, are applicable to such as are joint only. It is solely to remove the resulting inconveniences of an action, presented § 1-73, judgment against part of those whose obligation is joint only, that the remedy is provided, and it becomes needless when the obligations of other parties, the court must cause them to be brought in. McKeel v. Holloman, 163 N. C. 132, 134, 79 S. E. 445; Maxwell v. Bar-}
§ 1-74, Abatement of actions.—1. No action abates by the death, or disability of a party, or by the transfer of an interest therein, if the cause of action survives, or continues in the hands of the deceased, except in suits for penalties and for damages merely vindictive, or in case of the disability of a party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued, by, or against, his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

2. After a verdict is rendered in any action for a wrong, the action does not abate by the death of a party.

3. At any time after the death or disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it directs and upon application of any person aggrieved, may order that the action be abated, unless it is continued by the proper parties, within a time fixed by the court, not less than six nor more than twelve months from the granting of the order.

4. No action against a receiver of a corporation abates by reason of his death, but, upon suggestion of the facts in the record, it continues against his successor, or against the corporation in case a new receiver is not appointed. (Rev., s. 415; Code, s. 188; 1901, c. 2, s. 85; C. C. P., s. 64; R. C., c. 1, s. 4; c. 46, s. 43; C. S. 461.)

Cross References.—As to survival of actions, see § 28-172. As to actions which do not survive, see § 28-175. As to receivers for corporations, see § 55-147 et seq.

Section Changes Common Law Rule.—The rule of the common law that a personal right of action dies with the person has been changed by this § 28-172 and, except in the instances specified in § 28-175, an action originally maintainable by or against a deceased person is now maintainable by or against his personal representative, or against his assigns. (Rev., s. 415; Code, s. 188; 1901, c. 2, s. 85; C. C. P., s. 64; R. C., c. 1, s. 4; c. 46, s. 43; C. S. 461.)
Right of Counterclaim Survives to Executor.—Under the laws of New York State, and of North Carolina and under this section which provide that, on the death of any person, the personal representative of him may set up a counterclaim in an action brought in North Carolina against the owner of such claim by the executors of a general partner in such firm of factors doing business in New York, arising out of a consignment of goods to such firm for sale, may be set up as a counterclaim in an action brought in North Carolina against the administrator de bonis non of the estate of a person doing business in New York, where the injury does not cause death by this section, provided the action is not for personal injuries which do not survive. Watts v. Vanderhill, 167 N. C. 567, 84 S. E. 831.

Actions for Personal Torts.—At common law, a right of action for personal injuries arising out of a collision of railroad trains survives the tort feasor, and the doctrine is not changed where the injury does not cause death by this section, provided that no action shall abate by death, etc., or that the cause of action shall continue, etc., these provisions relating to such actions as survive, and not to actions for personal injuries, which do not survive. Watts v. Vanderhill, 167 N. C. 567, 84 S. E. 831.

Right of Counterclaim Survives to Executor.—Under the laws of New York State, and of North Carolina and under this section which provide that, on the death of any person, the personal representative of him may set up a counterclaim in an action brought in North Carolina against the owner of such claim by the executors of a general partner in such firm of factors doing business in New York, arising out of a consignment of goods to such firm for sale, may be set up as a counterclaim in an action brought in North Carolina against the administrator de bonis non of the estate of a person doing business in New York, where the injury does not cause death by this section, provided the action is not for personal injuries which do not survive. Watts v. Vanderhill, 167 N. C. 567, 84 S. E. 831.

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Death of Part of Plaintiffs.—Where two or several of plaintiffs died and, there being no personal representative within a year thereafter, no motion was made to continue the action as to them, but the cause remained upon the docket and was proceeded with by the remaining plaintiffs, whose rights were finally determined, and the defendants did not apply to have the action abated as to the deceased parties, the court was bound to allow the personal representative of such deceased parties to file a supplementary complaint and prosecute the action, his motion to be allowed to do so having been made before the final judgment which was rendered in the cause. State v. Flythe, 114 N. C. 274, 19 S. E. 701.

Judgment Ex Mero Mctu.—A judgment is necessary to abate an action where the court may, ex mero motu, enter a judgment when it appears that plaintiff failed for a year to prosecute his action against the representatives or successors in interest of the original defendant, whose rights have been determined by judgment or decree; there had been no discontinuance of the action. Rogerson v. Leggett, 145 N. C. 7, 58 S. E. 596.

b. n. or c. t. a. as party in proceeding for final settlement, see § 28-168.

Continuity of Action. — In an action begun by or against a party in his right or interest, and in which the action is by or against his representative or successor in interest, this section requires that, in such instances, the summons shall be returnable before the clerk and in effect the action shall be a new and independent trial, thus recognizing the continuity of the action and the trial thereof in the county in which it had been brought. Latham v. Latham, 178 N. C. 12, 13, 100 S. E. 131.

Duty of Adverse Party. — When either party to a suit dies before judgment, it is the duty of the adverse party to suggest the death to the court. Wood v. Watson, 107 N. C. 52, 69 S. E. 49.

Upon the suggestion of death of defendant, it is the duty of the clerk to issue summons to the representatives or persons who succeed to the rights or liabilities of the deceased party; and the law does not contemplate that a plaintiff may keep his action in semidormant condition until it suits his pleasure or interest to call the heir at law into court, when by such conduct he has become disabled to make his defense. Rorer v. Leggett, 145 N. C. 7, 58 S. E. 596.

Presumption When Administrator Defends. — Where the record shows that a party through his counsel assumed the defense of an action as administrator, the regularity of his admission as a party in place of his intestate is sufficiently established, though the death of the intestate as having occurred during the progress of the cause was not suggested, as the service of the notice issued to him appeared to have been made. Alexander v. Patton, 90 N. C. 57.

Administrator of Obligee on Bond Made a Party. — Where the obligee on a bond given for the support of another for life, and for a valuable consideration, has failed to comply therewith, and the obligee has since died, leaving the obligor responsible under the terms of the bond for moneys due for the former's reasonable support, the action upon the bond, brought by the obligee, does not abate upon his death, and the superior court clerk has the authority to make his administrator a party under this section. Martin v. Martin, 162 N. C. 41, 77 S. E. 1104.

Action for Account. — In an action for an account and settlement, the death of the defendant being suggested, his executor comes in and is made a party defendant. Grant v. Bell, 91 N. C. 495.

Judgment Set Aside Where No One Authorized to Represent Estate at Trial. — Where it appears that at the time of trial there was no one authorized to represent the estate, this constitutes a meritorious reason for setting aside the judgment, not essential to jurisdiction.

These sections relating to venue all refer to "actions" and have no reference to the writ of habeas corpus which has been denominated a "high prerogative writ." McEachern v. Pate-Pacheco, 210 N. C. 102, 184 S. E. 434.

Venue a Matter of Legislative Control. — The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of common-law. Interstate Cooperative Co. v. Eureka Lumber Co., 151 N. C. 455, 456, 66 S. E. 434. It deals with procedure and is not jurisdictional, in the absence of statutory provision to that effect. Southern Railway Co. v. Ainsworth, 151 N. C. 506; Latham v. Latham, 178 N. C. 12, 13, 100 S. E. 131; Clark v. Carolina Homes, 189 N. C. 703, 128 S. E. 20, 25.

This subchapter is in restraint of the common law, as, without such express enactment, the plaintiff might make a choice of venue anywhere within the state. State v. Stone, 52 N. C. 382.

Contract Stipulation Regarding Venue. — There is a difference between the venue of an action, the place of trial, and jurisdiction of the court over the subject-matter of the action, and the parties to such contract may, in advance of any disagreement arising thereunder, designate a jurisdiction exclusive of others, and confine the trial therefor in opposition to the will of the Legislature expressed by this section; and a motion to remove a cause brought in the proper jurisdiction on the ground that the contract otherwise specified it, will be denied. Gathier v. Charlotte Motor Car Co., 183 N. C. 498, 109 S. E. 362.

Determining Nature of Transaction. — In Council v. Bailey, 154 N. C. 54, 59, 69 S. E. 760, it is said; "This Court has recently held in Bridges v. Ormond, 148 N. C. 375, 62 S. E. 422, that such a motion as this one (as to proper venue) must be considered with reference to the questions as to whether the jurisdiction of the court was exercised by the pleadings, and does not depend on their decision solely upon the allegations of the complaint."

Applicability to Trials before Justices. — In Fisher v. Bullard, 109 N. C. 574, 13 S. E. 799, the Court said: We do not find a statute subordinating the provisions of the Code of Civil Procedure (this section), as to the place for trial, applicable to trials before a justice." But section 7-149 provides that the whole chapter on civil procedure is applicable in certain attachment cases before justices. Mohn v. Creesey, 193 N. C. 568, 571, 137 S. E. 718.

An action by an administrator is not within any of the subdivisions of this section. Whitford v. North State Life Ins. Co., 154 N. C. 43, 52 S. E. 69.


II. ACTIONS RELATING TO REAL PROPERTY.

A suit to set aside a deed of trust for lands, and to establish a prior lien thereon in plaintiff's favor, involves an estate heating way on trains, see § 69-104; for receiving stolen goods, see § 14-71; for discrimination against the Atlantic and North Carolina Railroad, see § 60-8. As to venue in partition proceedings, see § 46-2. See note under § 1-82.

I. IN GENERAL.

Editor's Note. — That the differences between venue and jurisdiction have been the source of some confusion in North Carolina, as elsewhere, is apparent from a perusal of the cases pertaining to the subject of this article. In order to bring out these distinctions existing between these two subjects the following excerpt, appearing in most of the later text treatises, is quoted insofar as it is applicable to North Carolina.

Lile, in his admirable treatise on Equity Pleading and Practice contrasts jurisdiction and venue as follows:

"1. Jurisdiction connotes the powers of the court—venue the otherwise specified it, will be denied. Gathier v. Charlotte Motor Car Co., 183 N. C. 498, 109 S. E. 362.

Determining Nature of Transaction. — In Council v. Bailey, 154 N. C. 54, 59, 69 S. E. 760, it is said; "This Court has recently held in Bridges v. Ormond, 148 N. C. 375, 62 S. E. 422, that such a motion as this one (as to proper venue) must be considered with reference to the questions as to whether the jurisdiction of the court was exercised by the pleadings, and does not depend on their decision solely upon the allegations of the complaint."
or interest therein, within the intent and meaning of this section. Henrico Lumber Co. v. Dare Lumber Co., 180 N. C. 150, 152, 154, 156, 158. Where the wife of a debtor is made party defendant in an action in the nature of a creditors' bill in order to set aside his deed to her for fraud and subject the land to the satisfaction of a claim, it is not essential to the proof of the plaintiffs' claims that the action be brought in the county in which the property is located. Wofford-Falk Co. v. Commonwealth, 173 N. C. 660, 66 S. E. 341, 342.

§ 1-76

Setting Aside Sale.—A suit by a purchaser of land to set aside the purchase and to cancel certain of his notes for money judgment against the owner alleging a fraudulent representation by the owner as to the quantity of land in dispute in one of the lots, without which he would not have purchased, the controversy involves an interest in the land which can be moved from the county where it is located. Vaughan v. Fallin, 133 N. C. 318, 111 S. E. 513.

An action to impress a parol trust upon lands and for an accounting accounting involves a determination of an interest in lands, and the proper venue, under this section, therefore, is in the county in which the land is situated. Williams v. McKearney, 208 N. C. 361, 119 S. E. 746.

Action on Note Secured by Deed of Trust.—An action against the endorser of a negotiable note, secured by a deed of trust on land, is not an action involving an estate in land, and, therefore, does not have venue in the county where the land is located. White v. Rankins, 205 N. C. 104, 173 S. E. 282.

Specific Performance.—The fact that there are other questions to be tried in the county where the land is situated, does not alter the venue of the recognition of the suit to be one defendant (trustee) to sell and another defendant to convey land in one of the lots. Wofford-Falk Co. v. Commonwealth, 173 N. C. 660, 66 S. E. 341, 342.

An action to subrogation to the rights of the vendor and to recover the purchase price, latter, with intention to bring the action is pending. Falls, etc., Mfg. Co. v. Brower, 105 N. C. 440, 111 S. E. 313.

Conversion as Aggravation of Damages.—Where the intention of the pleading was to sue for a trespass on the land, and the cause of action was not one of conversion, the refusal of the lower court upon motion to remove the same to the county in which the land was situated, was erroneous. Rackan v. Fain & Co., 173 N. C. 686, 92 S. E. 612.

Setting Aside Grant or Patent.—This section applies to the exclusion of section 146-27, which controls where there are separate transactions affecting distinct pieces of property lying wholly in different counties. Kanawha Hardwood Co. v. Waldo, 161 N. C. 196, 76 S. E. 680.

Docketed judgments confer no estate or interest in real estate, and do not produce the subdivision of the section, but merely the right to subject the realty to the payment of the judgments by sale under execution, and hence an action to set aside such judgment was inserted in aggravation of damages, the refusal of the lower court upon motion to remove the same to the county in which the land was situated, was erroneous. Advertising Works v. Roper Lumber Co., 161 N. C. 318, 75 S. E. 270.

Removal of Action to County Where Land Lies.—In an action for wrongful conversion of oysters taken from oyster beds, the defendant is not entitled to a change of venue to the county in which the beds are situated. Makely v. Kitchen Lbr. Co., 207 N. C. 144, 176 S. E. 195.

IV. FORECLOSURE OF A MORTGAGE OF REAL PROPERTY.

Editor's Note.—Section 46-2, in the article on Partition, is substantially the same as subdivision two of this section. The two provisions seem to constitute simply an illustration or application of the first subdivision of this section, as proceedings for partition certainly determine “a right or interest in real estate” in real estate in real estate in all cases.

This sub-section has never received a direct construction from the courts, but in The Matter of Skinner, 22 N. C. 63, decided prior to the merger of the courts of law and equity, it is held that there is no situs of the land for partition by a decree of the court of equity of either county.
Subrogation.—An action by the holder of certain notes given for the purchase of land against the purchaser of the land, and others, to be subrogated to the rights of the vendor, in the contract of sale of the land, which is substantially the same as an action "for the foreclosure of a mortgage of real estate," must be tried in the county in which the land is situated within the meaning of this subdivision. Fraley v. Portis, 53 N. C. 160, 5 S. E. 592.

In Connor v. Dillard, 129 N. C. 50, 39 S. E. 641, it is said: The action is "substantially for the foreclosure of a mortgage." (Granville v. Hulbert, 66 N. C. 160), and the judgment could be enforced only by subjecting a particular tract of real estate in another county. The enforcement of the judgment against that land is the sole object of the action. Falls, etc., v. Hulbert, 66 N. C. 160, 39 S. E. 345. The action had been for a mere personal judgment, though on a mortgage note, it could have been brought where plaintiff resides, and docketing the judgment would not convey to the plaintiff any estate in debtor's land. Gammon v. Johnson, 126 N. C. 64, 35 S. E. 185; McLean v. Shaw, 125 N. C. 491, 34 S. E. 634.

Land in Two Counties.—A foreclosure sale of land lying in two counties under a mortgage registered in both one county is authorized by this subdivision. King v. Portis, 81 N. C. 382.

Injunction.—The section of the Ohio code was not applicable to an injunction against a sheriff. A lien claimed to be invalid. 8 Circuit Court Reports 614, 619.

V. RECOVERY OF PERSONAL PROPERTY.

Editor's Note.—In Smithdeal v. Wilkersen, 100 N. C. 52, 6 S. E. 71, it was held that the requirements of subsection 4 of this section, were restricted to personal property, "dis- trained for any cause." Thereupon the 1889 construction section made the venue for the "recovery of personal property" in all cases in the county where the property is situated. Brown v. Cogdell, 136 N. C. 32, 48 S. E. 515.

It is not held that the venue of actions for the recovery of personal property is in the county where the property is situated, though the ancillary remedy of claim and delivery is not resorted to. Brown v. Cogdell, 136 N. C. 32, 48 S. E. 515.

Recovery as Sole Object.—Where the recovery of personal property is not the sole or chief relief demanded, it need not be brought in the county in which the property is located. Woodard v. Sauls, 134 N. C. 274, 46 S. E. 507; Bowen Piano Co. v. Newell, 177 N. C. 533, 98 S. E. 774.

As an action being for an accounting, and the question of ownership of notes and bonds being raised only incidentally, it need not be brought in the county in which they are situated. Clay v. McNeill, 167 N. C. 212, 48 S. E. 356.

Setting Aside Transfer.—An action to set aside the transfer of personal property as fraudulent, and for the appointment of a receiver, is not an action for the recovery of such property, and hence need not be brought in the county where the same is located, as provided by this subdivision of the section. Baruch v. Long, 117 N. C. 509, 23 S. E. 447.

§ 1-77. Where cause of action arose.—Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:

1. Recovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offense committed on a sound, bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such body of water, and opposite to the place where the offense was committed.

2. Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer. (Rev., s. 140; Code, s. 191; C. C. P., s. 67; C. S. 461.)

Cross References.—As to suit on official bond, by board of county commissioners, of sheriff, etc., see § 155-18. As to neglect of duty by member of board of county commis- sioners, a managers to such board, of action against registers of deeds, see §§ 161-16, 161-27. As to corporate powers of municipal corporation, see § 160-2. As to quo warranto, see § 1-514 et seq. As to mandants, see § 1-311 et seq.

Editor's Note.—In spite of the fact that section 1-76 provides that actions for injuries to realty must be brought in the county where the land lies, it is held that damage to lands occasioned by the acts of public officers in counties other than where the land lies, must be brought, as provided in this section, where the cause arose. For example in Cecil v. High Point, 165 N. C. 431, 81 S. E. 616 it was held that commissioners, 67 N. C. 130; Jones, did incorporate town damages to the lands of an owner situated in an adjoining or different county, caused by the improper method of emptying its sewage into an insufficient stream of water, is properly in the county wherein the town is situated, for such cause arose by reason of the official conduct of municipal officers and consequently is regulated by this section.

This interpretation is not irreconcilable with the provision of the preceding section; it merely constitutes an illustration of the doctrine that the courts will be reluctant to declare any part of a statute invalid. The rule should be harmonized with other seemingly inconsistent parts—in this instance by interpreting this section as an exception to the preceding section whenever necessary, i. e. whenever the recovery of personal property fairly comes within the meaning of this subsection.

By His Command or In His Aid.—The words, "in his command," were meant to extend the immunity to all who assisted and took part in the act with his assent, though not by his direct orders, for all such stand upon the same foot- ing. Harvey v. Brevard, 98 N. C. 93, 3 S. E. 911.

The obligors on a bond to indemnify a sheriff against loss, etc., in seizing and selling property under execution, are not included in that class of persons "who by his command, or in his aid shall do anything touching the duties of such office." Harvey v. Brevard, 98 N. C. 93, 3 S. E. 911.

Officers of Counties and Cities.—The Supreme Court has repeatedly and uniformly held that actions against county commissioners and other county officers and officials, and the county of which they are officers, and cities and towns are of the like nature, and should stand upon the same footing as to actions against them. Johnston v. Board, 67 N. C. 101; Almstead v. Commissioners, 67 N. C. 322; Jones v. Statesville, 69 N. C. 412; Steele v. Commissioners, 70 N. C. 137; Jones v. Statesville, 97 N. C. 86, 88, 2 S. E. 346.

In Jones v. Statesville, 97 N. C. 86, 2 S. E. 2, 346, this section was construed by this Court, in the following language, to embrace a municipal corporation: "The defendant is a munici- pal corporation, public in its nature; it is an artificial per- son, created and recognized by the law, invested with im- portant corporate powers, public and, in a sense, artificial in their nature, and charged with public duties, which it executes by and through its officers and agents. We there- fore think that the action of the county was a county action, the meaning of and are embraced by the statutory provision first above recited (this section)," Brevard Light, etc., Co., v. Board, 151 N. C. 588, 566, 66 S. E. 569.

Action against Municipality Is Action against Public Officer.—The municipal corporation, as such, and its officers and agents, an action against a municipality is an action against "a public officer" within the meaning of this section. Murphy v. High Point, 12 S. E. (2d) 1.

Action against Municipality.—The venue of an action against a municipality is the county where the cause of action, or some part thereof, arose. Murphy v. High Point, 12 S. E. (2d) 1.

Where Cause of Action Arose.—The complaint alleged damage to plaintiff's land resulting from the negligent operation of defendant municipality's sewage disposal plant. The action was instituted in the county in which the land
Fees and in which the municipality maintained and operated its sewage disposal plant and the municipality made a motion that the action be removed to the county in which it is located.

§ 1-78

Applicable to All Actions Against Administrators.—"The object of the statute," says Mr. Justice Reade, speaking for the Court, "was to have suits against these persons, whether upon the bonds of the administratrix or administratrix or for the purpose of holding him liable for any act of his, or for any liability of his intestate incurred in his lifetime, must be brought in the county where the bond was given. If the principal or any of his sureties is in such county.

The same case criticizes and refuses to follow the dictum in State v. Peebles, 100 N. C. 348, 351, 6 S. E. 788, where it was stated that the" "instituent" action is to bring an action. Here a difference is apparent from the language of this section, in that the words of this section, such an action must be instituted in the county where the bonds took out letters and where they make their returns and settlements and transact all the business of the estate in their hands." Stanley v. Mason, 9 N. C. 1; Foy v. Morehead, 69 N. C. 69; Biggs v. Jordan, 45 N. C. 452. The same principle is recognized, in reference to an action upon a guardian bond, in State v. Staton, 78 N. C. 235, where the same eminent judge delivers the opinion.

Under this section an action against an administrator of a decedent, where the action was once brought as to the administrator or for the purpose of holding him liable for any act of his, or for any liability of his intestate incurred in his lifetime, must be brought in the county where the bond was given. If the principal or any of his sureties is in such county.

To Foreclose Tax Liens.—An action against the estate of a deceased person to foreclose a tax sale certificate must be brought in the county where the land is situate. Guilford County v. Estates Administration, Inc., 213 N. C. 563, 194 S. E. 195.

Applies to Actions Not Against By Administrators.—This section applies to actions against administrators and not to actions brought by them. Whitford v. North State Life Ins. Co., 156 N. C. 42, 72 S. E. 85.

The clear inference from this section is that it was the purpose of the Legislature to make a distinction between actions by and against administrators, and when it is said that actions against administrators shall be brought in the county where the bond is filed, and nothing is said as to actions by administrator, it excludes the idea that actions instituted by the administrator are necessarily to be brought in the county in which letters are granted. Whitford v. North State Life Ins. Co., 156 N. C. 43, 72 S. E. 85.

The clear inference from this section is that it was the purpose of the Legislature to make a distinction between actions by and against administrators, and when it is said that actions against administrators shall be brought in the county where the bond is filed, and nothing is said as to actions by administrator, it excludes the idea that actions instituted by the administrator are necessarily to be brought in the county in which letters are granted. Whitford v. North State Life Ins. Co., 156 N. C. 43, 72 S. E. 85.

Istituted."—The word "institutes" as used in this section signifies the commencement of the proceedings—to institute an action is to bring an action. Here a difference is apparent from the language of this section, in that the words of this section, such an action must be instituted where they provide as they provide that the action shall be "tried." In consequence of this distinction it is held that this section has no application where an action has been commenced in another county since the death of the decedent, and his administrator has been made a party. Latham v. Latham, 178 N. C. 12, 100 S. E. 131.

Where plaintiff instituted an action in the county of his residence to collect damages resulting from an automobile collision, and the defendant died prior to service of process and thereupon defendant's administratrix as joined as a party defendant, the administratrix may not claim that the action is not properly pending because not instituted in the county in which she had given bond, since venue is governed by the status of the parties at the commencement of the action, and not by the death of the administratrix. State v. Staton, 78 N. C. 235, 47 S. E. 535.

Action for Account and Settlement. — Where an action involves an account and settlement of an estate, by the express words of this section, such an action must be instituted in the county in which the estate is located. In the case of Roberts v. Connor, 125 N. C. 45, 34 S. E. 107, does not conflict with this position. That was a suit which concerned the conduct of a bank as administrator, and the decision was on the express ground that the official acts and conduct of the executor were in no wise involved. Thomas v. Ellington, 162 N. C. 131, 132, 78 S. E. 12.

Cases against Administrators. — An action against an administrator of B, in Halifax County, and gave bond there. Afterwards A died in Northampton, and C qualified as his administratrix. In that county, B, an administratrix, in the county of the sureties on the bond of A, resided in Northampton, and were sued in Halifax County on the bond of A, by a
residents of Halifax: Held, that the action was properly brought in Halifax under this section. State v. Peobles, 101 N. C. 348, 6 S. E. 796.

An action against an executrix to recover on a guardianship bond executed by testator is properly brought in the county where the cause was instituted, and the sureties thereto resided and in which the administrators of the sureties qualified, and the motion of defendant executrix to remove as a matter of right to the county in which the sureties qualified is overruled. McCarter v. Garret et al., 85 N. C. 564. Hence the trial judge in the exercise of a sound discretion has the power to remove the cause to another county for trial since the wording of this section does not necessarily mean that the cause should be actually tried in the county where the bond was given and the residence of the sureties and not the solvency or insolvency of the sureties.

Quoted in Bohannon v. Wachovia Bank, etc., Co., 210 N. C. 679, 188 S. E. 390.

§ 1-79. Domestic corporations.—For the purpose of suing and being sued the principal place of business of a domestic corporation is its residence. (Rev., s. 422; 1903, c. 806; C. S. 466.)

Cross Reference.—As to actions against railroads, see § 1-81.

Editor's Note.—Prior to the passage of this section, there was no express statute regulating the venue in actions against domestic corporations and such actions were controlled by sec. 1-82. Farmers State Alliance v. Murrell, 119 N. C. 124, 25 S. E. 785. See also Clive v. Byson, etc., Co., 116 N. C. 83, 21 S. E. 791.

The purpose of this section was not to change the provisions of section 1-81 or to deny plaintiff's right to sue a domestic corporation in the county where the corporation is regularly engaged in carrying on business. In re Holmes, 115 N. C. 580, 18 S. E. 591. Hence the section being that actions on official bonds should be instituted in the county in which the bonds were given if the principal place of business of the corporation is in the county of the venue, the court declined to remove the action to another county which had jurisdiction under sec. 1-81. State v. Patterson, 213 N. C. 138, 195 S. E. 399.

In an action on a guardianship bond instituted in the county in which the bond was given and the sureties resided, the court may remove the action to another county where the administrators of the sureties were joined to prevent removal to the county in which the executrix of the principal on the bond qualified, is untenable, since the controlling factors are the residence of the sureties and not the solvency or insolvency of the sureties.

Quoted in Bohannon v. Wachovia Bank, etc., Co., 210 N. C. 679, 188 S. E. 390.

§ 1-80. Foreign corporations.—An action against a corporation created by or under the law of any other state or government may be brought in the superior court of any county in which the cause of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, reside, in the following cases:

1. By a resident of this state, for any cause of action.

2. By a nonresident of this state in any county where he or they are regularly engaged in carrying on business.

3. By a plaintiff, not a resident of this state, when the cause of action arose or the subject of the action is situated in this state. (Rev., s. 423; Code, s. 194; C. C. P., s. 361; 1876-7, c. 170; 1907, c. 460; C. S. 467.)

Cross References.—As to actions against railroads, see § 1-81. As to foreign corporations doing business in state, see sec. 1-82.

Does Not Affect Jurisdiction. — This section is under the subject of venue and not jurisdiction, and, though it enumerates certain cases, it does not purport to restrict the jurisdiction of the court or to prevent the exercise of such jurisdiction as therefores existed; and under our own decisions and those of New York, from which the statute was adopted, it does not interfere with the jurisdiction of our courts of transitory causes of actions.


In Robinson v. The Oceanic Steam Co., 112 N. Y. 322, construing the prototype of this section, it is said: "This section did not affect jurisdiction. It was assumed by the parties in all the cases in which actions could be brought against foreign corporations, and did not absolutely limit the power and jurisdiction of the courts mentioned. It specified the cases in which foreign corporations could compulsorily, by service or process in the mode prescribed by law, be subjected to the jurisdiction of the courts. It did not deprive the courts of any of their general jurisdiction." See Ledford v. Western Union Tel. Co., 179 N. C. 63, 101 S. E. 533.

Section 1-81 an Exception. — The enactment of section 1-81 does not repeal this section, but the latter will be confined to actions against corporations other than railroads. State v. Patterson, 213 N. C. 138, 195 S. E. 399.

Applicability to Justices Court. — This section refers only to actions of which the superior court has jurisdiction, and was not intended to give such courts jurisdiction of civil actions founded on contract wherein the sum demanded shall not exceed $200. Howard v. Mutual Reserve Fund Life Assn., etc., Co., 100 N. C. 463, 10 S. E. 765.

Cutting Timber. — Where a nonresident plaintiff sues to recover from a nonresident defendant the value of timber alleged to have been cut and removed by the defendant to a different county from the place where the timber was cut and brought in the county where the conversion is alleged to have occurred, to maintain his action in the latter county he must show that the defendant conducted business, or had property therein, or the cause of action arose in the county where the land is situated that being the county wherein the cause of action arose. Richmond Cedar Works v. Roper Lumber Co., 161 N. C. 603, 604, 77 S. E. 499.

An action for a penalty can be brought against a foreign defendant before a justice of the peace in any county in which the defendant does business or has property, or where plaintiff resides. Allen-Fleming Co. v. Southern R. Co., 145 N. C. 37, 58 S. E. 793.

Fraternal Lodge. — Where defendant, the head lodge, had a local lodge in the county of the venue, in which members were received, the usual business of such lodges transacted, and membership fees collected and remitted to it, held, the transactions of the local lodge were such usual or continuous business as contemplated by the statute, and brings his action in the county where the conversion is alleged to have occurred, to maintain his action in the latter county he must show that the defendant conducted business or had property therein, or the cause of action arose in the county where the land is situated that being the county wherein the cause of action arose. Ange v. Sovereign Camp, W. O. W., 171 N. C. 251, 11 S. E. 470.

Claim of State. — Where a receiver of an insolvent foreign corporation was appointed under the corporation act of 1901, a claim by the state which chartered the corporation for annual license fees, was provable; this section, as to actions against foreign corporations, not applying to this proceeding. Holshouser v. Copper Co., 138 N. C. 248, 48 S. E. 170.

Garnishment against Salesmen. — The courts of this state have jurisdiction to proceed against a foreign corporation in...
garnishment proceedings in an action brought in the state according to the laws of the state, the cause of action against it in favor of the salesmen having arisen here, is the subject of the action being situated here. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

(2) Actions for Death by Wrongful Act. — A foreign corporation may be sued by an administrator for the wrongful death of his intestate either in the county wherein the cause of action arose or that of the personal representative appointed herein. Hannon v. Southern Power Co., 173 N. C. 520, 93 S. E. 355.

§ 1-81. Actions against railroads. — In all actions against railroads the action must be tried either in the county where the cause of action arose or where the plaintiff resided at that time, or in some county adjoining that in which the cause of action arose, subject to the power of the court to change the place of trial as provided by statute. (Rev., s. 424; C. S. 468.)

Editor's Note. — This section was first enacted as a provision of section 424 of the Revisal. Section 424 (now §§ 1-81, 1-82) expressly added personal injuries. Propst v. Railroad, 139 N. C. 397, 51 S. E. 173; see note under § 1-76. This purpose of this section as originally enacted and as amended was primarily to serve the convenience of resident parties. Palmer v. Lowe, 194 N. C. 703, 705, 140 S. E. 769.

Construed with Other Provisions for Venue. — This section is general in its terms and subject to the provisions of section 1-76. Wofford-Fain & Co. v. Hampton, 173 N. C. 689, 117 S. E. 615.

Section 1-77, providing, among other things, that an action against a public officer be brought in the county wherein the cause of action arose, subject to the power of the court to change the place of trial, is general in its terms, and this section should be construed as an exception thereto, allowing an administrator to sue at his election in his own county for the wrongful death of his intestate. Hannon v. Southern Power Co., 173 N. C. 520, 93 S. E. 355.

Section Pertains to Venue Not Jurisdiction. — This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a nonresident plaintiff against a railroad company, incorporated in North Carolina. McGovern & Co. v. Atlantic Coast Line R. Co., 180 N. C. 219, 104 S. E. 354.

The word "personal" as used in this section means parties to the record. Rankin v. Allison, 64 N. C. 673.

Action for Personal Services to Administrator. — An action brought to recover for services rendered personally to an administrator or a receiver is a personal action against the administrator, etc., and can be brought at the election of the plaintiff in the county where either he or the defendant resides. Craven v. Bynum, 150 N. C. 107, 60 S. E. 373.

Action by Administrator. — An action by an administrator upon a life insurance policy of his intestate is properly brought in the county where the administrator resides, not against the administrator in person, but in the name of the decedent, words, "administrator, etc.," being descriptive of his title or the capacity in which he sues. Whitford v. North State Life Ins. Co., 156 N. C. 42, 72 S. E. 85. See notes of this case under section 1-78.

Personal Action against Administrator. — Where judgment was rendered against the estate of plaintiff's deceased guardian for money due the guardianship estate, and after reaching his majority plaintiff instituted this action alleging that defendant as executrix of the deceased guardian had paid over to herself, as sole devisee and legatee, money which plaintiff contended was wholly for the benefit of defendant as executrix but against her individually on a liability imposed upon her as legatee and devisee, and defendant's motion to remove from the county of plaintiff's residence to the county in which she was adjudged as executrix, was properly denied. Rose v. Patterson, 218 N. C. 212, 10 S. E. (2d) 678.

Action by Nonresidents on Foreign Judgment. — In an action against the defendant in the state, plaintiff's attachment of lands of defendant situate in a county in this state was rendered by judgment of a foreign court against defendant brought here by a nonresident plaintiff was entitled to maintain the action in any court of this state she might designate, the defendant's motion to remove to the county in which the real estate attached is not well taken, and of which attachment a copy is not properly filed. Austin v. Matheny, 216 N. C. 212, 10 S. E. (2d) 434.

Action by Receiver. — Where a receiver of a corporation...
§ 1-83. Change of venue.—If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose is not the proper one.
2. When the convenience of witnesses and the ends of justice would be promoted by the change.
3. When the judge has, at any time, been interested as party or counsel. (Rev., s. 425; Code, s. 195; C. C. P., s. 69; R. C., c. 31, ss. 115, 118, 1870-1, c. 20; C. S. 470.)

I. In General.

II. The Application for Removal.

A. Time of Demand.

B. Jurisdiction of Application.

III. Waiver of Right to Change.

IV. Appeal.

A. Where County Designated Not Proper.

B. Convenience of Witnesses and Ends of Justice Promoted.

Cross References.

As to motions, when and where made, etc., see § 1-577 et seq. See also, § 1-76.

I. IN GENERAL.

Section 1 relates to Venue Not Jurisdiction.—It has been held repeatedly that these statutes, sections 1-76 to 1-83, relate to venue and not jurisdiction, and that if an action is brought in the wrong county, it should be dismissed and removed for trial to the county wherein the bank conducts its business. Curlee v. National Bank, 187 N. C. 119, 121 S. E. 194.

An action on a note by the commissioner of banks, etc., is properly brought in the county in which the insolvent bank is situated and of which the liquidating agent is a resident, and defendants' motion for change of venue to the county of their residence is properly refused. Hood v. Progressive Stores, 209 N. C. 35, 183 S. E. 694.

Nonresident Plaintiffs.—The county of the residence of that plaintiff cannot be made a defendant, and the venue of the action is laid in the county wherein the building is situated, but comes removed to the county wherein the bank conducts its business. Curlee v. National Bank, 187 N. C. 119, 121 S. E. 194.

An action under § 209; .193 S. E. Wise v. Dudley, 219 Durham, in Durham County, North Carolina, and the defendant, in an action upon alleged breach of contract is determined by the place of residence of the defendant, in an action for alimony without divorce, where a husband forced his wife to leave his home at night and she was compelled to seek the shelter of his neighbor, she could acquire a separate domicile, and may sue the husband for alimony without divorce in the county of her residence and he cannot remove the case to the county of his residence. Hannon v. Southern Power Co., 173 N. C. 33, 190 S. E. 750.

In an action for alimony without divorce, although § 50-16 provides that "the wife may institute an action in the superior court of the county in which the cause of action arose," the venue, thus prescribed, is not exclusive, if either plaintiff or defendant reside in another county at the commencement of the action. Dudley v. Dudley, 219 N. C. 384, 14 S. E. (2d) 787.

Where Bank and Its Officers Sued Jointly.—Where in good faith a citizen and resident of one county, sues jointly in tort a national bank located in another county, and its officers, the defendant may not as of right have the cause removed for trial to the county wherein the bank conducts its business. Curlee v. National Bank, 187 N. C. 119, 121 S. E. 194.

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complaint of the plaintiff; we think the tenor and object of the two statutes are the same, i. e., to require the defendant to object to the jurisdiction in limine by moving to remove as soon as the defendant has had an opportunity to be heard by the clerk to have plaintiff's action against him removed to the proper county by filing an affidavit in writing that the trial be conducted in the proper county. 

II. WAIVER "F RIGHT TO CHANGE.

Effect of Failure to Comply with Section.—The matter of venue is not jurisdictional in the first instance, and the defendant will lose his right to have an action against him removed from the proper county to another if he fails to move to remove complies with the provisions of this section, and that before the expiration of the time for filing his answer he must demand in writing that the county in which he is to be found be the proper county. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

Venue cannot be jurisdiction and it may always be waived. Clark v. Carolina Homes, 189 N. C. 703, 128 S. E. 205. See also, Wynne v. Conrad, 220 N. C. 355, 17 S. E. (2d) 514. When venue was motion when neither "made in writ-
In Craven v. Munger Lumber Co., 170 N. C. 424, 426, 87 S. E. 216, it is said: "The statute is explicit that the judge 'may' remove the cause to another county when it appears that the convenience of witnesses or the ends of justice may be subserved thereby. Its language makes it a matter of discretion in the court, and in the only four cases in which the matter has ever been contested by appeal this Court has sustained the plain meaning of the words as giving "94 N. C. 787.""

A motion for the removal of a cause from one county to another for convenience of witnesses and to promote the ends of justice under this section is addressed to the sound discretion of the judge subject to the control of the courts when it is suggested on oath or affirmation that a fair and impartial trial cannot be had in the county in which the action is brought. The plain language of its subject matter makes it a matter of discretion in the court, and in the only four cases in which the matter has ever been contested by appeal this Court has sustained the plain meaning of the words as giving "94 N. C. 787."

What Constitutes Abuse of Discretion—Illustrated.—Under the provisions of secs. 1-82, 1-83, it is within the sound discretion of the trial judge to change the venue of an action sounding in tort, to another, when in his judgment the county in which it is removed, is not such an abuse thereof as to reverse his judgment on appeal. Curlee v. National Bank, 187 N. C. 119, 121 S. E. 194.

Second Appeal.—Upon refusal of defendant's motion to transfer a cause for improper venue, the defendant gave notice of appeal which he did not perfected and at such time as the subsequent term renewed the motion, but upon another ground—for the convenience of witnesses and to promote the ends of justice, it was held, and the appeal perfected. Held, the granting or refusal of the second motion was in the discretion of the trial judge, and upon the record the appeal will be held frivolous by this Court, and the judgment appealed from affirmed as therein properly made. Ludwig v. Mining Co., 171 N. C. 61, 87 S. E. 949.

§ 1-84. Removal for fair trial.—In all civil and criminal actions in the superior and criminal courts, when it is suggested on oath or affirmation, on behalf of the state or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by affidavits. The county from which the cause is removed must pay to the county in which the cause has been transferred the full amount paid by the trial county for jurors' fees, and the full costs in the cause which are not taxable against or cannot be recovered from a party to the action, and for which the trial county is liable. (Rev., s. 426; Code, s. 196; 1879, c. 45; 1899, c. 104, 508; 1806, c. 693, s. 12; 1917, c. 44; C. S. 471.)

Reasons for Removal.—An affidavit for the removal of a cause, which does not set forth the reason of affiants' believing that a fair and impartial trial cannot be had in the county, is insufficient. State v. Tyrty, 9 N. C. 248.

A statement that a fair and impartial trial cannot be had will not suffice. Id. p. 259.

Discretion of Trial Judge.—Change of venue on ground of local prejudice is addressed to the discretion of the trial judge. Stroud v. United States, 231 U. S. 15, 64 L. Ed. 103, 40 S. Ct. 50. See also State v. Davis, 203 N. C. 13, 26, 164 S. E. 736; State v. Godwin, 216 N. C. 49, 3 S. E. (2d) 347.

Counter Affidavit.—When the judge is not satisfied by the affidavits offered, it is immaterial that counter affidavits are not presented. Benton v. R. R., 122 N. C. 1059, 30 S. E. 333.

Appeal.—The findings of fact by the court that the defendants could secure a fair trial is conclusive, and the court's refusal to remove the cause for the convenience of witnesses and to promote the ends of justice is not reviewable. Albertson v. Terry, 109 N. C. 9, 13 S. E. 713, and cases cited. State v. Smarr, 121 N. C. 659, 28 S. E. 549; State v. Turner, 143 N. C. 651, 57 S. E. 158; State v. Johnson, 170 N. C. 780, 82 S. E. 237.

This is true, even though the judge further states in his order that his findings were based on his personal observation. Gilliken v. Norcom, 193 N. C. 352, 137 S. E. 136.

The rule of law governing motions for removal for the causes specified, is thus declared in Phillips v. Lents, 83 N. C. 240; "The distinction seems to be where there are no facts stated in the affidavit as grounds for removal, the ruling of the court below may be reviewed; but where there are facts set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final."


Admission of Facts.—The affidavit is required to make the facts appear to the Court, if they are admitted, or agreed on by the parties, this is sufficient, and it is not necessary that they should appear in the record or order of removal. Emry v. Hardie, 94 N. C. 787.

It is within the power of counsel to consent that the Court might hear and consider the facts as if stated in an affidavit. Kright v. Harbison & Co., 173 N. C. 532, 176 S. E. 257.

When it is stated in the order, that the motion is heard "as on affidavit," the implication is, nothing else appearing, that all the parties consented to accept the facts as stated in the affidavit. Hunter v. Hartsell, 172 N. C. 293, 185 S. E. 194.

Cited in McFadden v. Maxwell, 198 N. C. 223, 151 S. E. 250.

§ 1-85. Affidavits on hearing for removal; when removal ordered.—No action, civil or criminal, shall be removed, unless the affidavit sets forth particularly and in detail the ground of the application. It is competent for the other side to controvert the allegations of fact in the application, and to offer counter affidavits to that end. The judge shall order the removal of the action, if he is satisfied after thorough examination of the evidence as aforesaid that the ends of justice demand it. (Rev., s. 437; Code, s. 197; 1879, c. 45; 1899, c. 104, s. 2; C. S. 472.)

See notes preceding section.

§ 1-86. Additional jurors from other counties instead of removal.—Upon suggestion made as provided by § 1-84 or on his own motion, the presiding judge, instead of making order of removal may cause as many jurors as he deems necessary to be summoned from any county in the same judicial district or in an adjoining district by the sheriff or other proper officer thereof, to attend, at such time as the judge designates, and serve
as jurors in said action. The judge may direct the required number of names to be drawn from the jury box in said county in such manner as he may direct, and a list of the same to be delivered to the sheriff or other proper officer of the county, who shall at once summon the jurors so drawn to appear at the time and place specified in the order. In case a jury is not obtained from those so summoned the judge may, in like manner, from time to time, order additional jurors summoned in the county where the trial is being held, until a jury is obtained. These jurors are subject to challenge for cause as other jurors, but not for nonresidence in the county of trial, or service within two years, or not being freeholders, and all jurors so summoned are entitled to compensation for mileage and time, to be paid by the county to which they are summoned, at the rate now provided by law for regular jurors in the county of their residence. Provided, that when the judge shall determine that it is necessary to have a special venire drawn from an adjoining county, instead of directing the jurors to appear at the courthouse in the county where the trial is pending, he may order them to summon additional jurors in their own county, and in lieu of their receiving mileage in going from their own county to the county in which the trial is held, it shall be optional with the county where the trial is held to provide transportation to said jurors from their own county seat to the place of trial and return instead of paying mileage to the jurors in going from their county seat to the place of trial. (1913, c. 4, ss. 1, 2; 1931, c. 308; 1933, c. 248; C. S. 473.)

Local Modification.—Ashe, Durham: 1933, c. 248.

Cross Reference.—As to jurors generally, see § 9-1 et seq.

Editor's Note.—The Act of 1931 amended this section to allow the presiding judge "on his own motion" to cause additional jurors to be summoned from any county in "an adjoining district" to try a case in the county where it is pending and from which removal of the cause was sought because of the possibility of an unfair trial by a local jury. He was restricted to "any adjoining county in the same judicial district" by the former law. See 9 N. C. Law Rev. 379.

The proviso at the end of this section relating to special venires to save mileage allowance, was added by Public Laws 1933, c. 248.

Discretion of Judge. — The trial judge, when refusing defendant's motion to remove an action for homicide to another county, may, in the exercise of his sound discretion, have the jurors summoned from any adjoining county, or from any county in the same judicial district, or have jurors drawn from the jury box of such county. State v. Kincaid, 183 N. C. 709, 110 S. E. 612; State v. Baxter, 238 N. C. 90, 179 S. E. 450. Under this section the granting of a solicitor's motion that the jury be drawn from the body of another county is within the court's discretion. State v. Shipman, 202 N. C. 518, 163 S. E. 685. Applied in State v. Beard, 187 N. C. 673, 178 S. E. 242. In State v. Green, 207 N. C. 369, 177 S. E. 120.

§ 1-87. Transcript of removal; subsequent proceedings. — When a case is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court. (Rev. s. 428; Code, ss. 195, 198; R. C., c. 31, s. 118; 1805, c. 694, s. 12; 1810, c. 787; C. C. P., s. 69; C. S. 474.)

Time to Deposit. — When an action is ordered removed to another county, it is error in the Judge presiding in the Superior Court of the county from which the cause is removed, at the close of term of the Court in the county to which it was removed, to direct that the action be dismissed if the cost of the transcript be not paid in a time specified. The party procuring the order of removal has until the term of the Court to which the cause is removed to deposit his transcript. Fisher v. Cid. Copper Mining Co., 105 N. C. 123, 10 S. E. 1055.

Quoted in Clark v. Peebles, 100 N. C. 352, 6 S. E. 798.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

Art. 8. Summons.

§ 1-88. Civil actions commenced by.—Civil actions shall be commenced by issuing a summons; but no summons need issue in controversies submitted without action, and in confessions of judgment without action. (Rev., s. 429; Code, s. 199; C. C. P., s. 70; C. S. 475.)

Cross References.—As to submission of controversy without action, see § 1-250. As to confessions of judgments, see § 1-144. As to confessions of judgment without action, see § 1-144.

Secretary for Service of Summons. — Service of process or notice to appear is essential to make the jurisdiction of all courts, as sufficiently appears from the well known legal maxim, that no one shall be condemned in his person without notice, and without opportunity to be heard in his defense. Smith v. Woolfolk, 135 U. S. 143, 149, 9 S. Ct. 1194, 33 L. Ed. 357; Renaud v. Abbott, 116 U. S. 277, 288, 6 S. Ct. 1194, 29 L. Ed. 629.

Art. 8. Summons. — Service of process or notice to appear is essential to make the jurisdiction of all courts, as sufficiently appears from the well known legal maxim, that no one shall be condemned in his person without notice, and without opportunity to be heard in his defense. Smith v. Woolfolk, 135 U. S. 143, 149, 9 S. Ct. 1194, 33 L. Ed. 357; Renaud v. Abbott, 116 U. S. 277, 288, 6 S. Ct. 1194, 29 L. Ed. 629.

Service of summons is issued on defendant, who is required to appear at the time and place named and make his defense. Scott v. Jarrell, 180 N. C. 584, 861, 24 S. E. 668.

When necessary. — A civil action shall be commenced by issuing a summons, except, in cases where the defendant is not within reach of the process of the court and cannot be personally served, when it shall be commenced by the filing of the affidavit to be followed by publication. McClure v. Fellows, 131 N. C. 598, 42 S. E. 951, overruled. Grocery Co. v. Bag Co., 142 N. C. 174, 55 S. E. 467.

Same—Injunction Prior to Summons. — An injunction ordered by the judge upon reading the complaint, coupled with an order at the same time to issue a copy of the complaint and an order to serve a summons on the defendant, was irregular and premature, and therefore should be dissolved. Patrick v. Joyner, 63 N. C. 573. But this irregularity, if waived by the defendant, will not be noticed by the court sua sponte, see Horne v. Board, 122 N. C. 466, 29 S. E. 581; Armstrong v. Kinsell, 36 N. C. 151. An injunction is "ordered" within the meaning of this section when it passes from the clerk's office, or the office of a justice of the peace, under the sanction and authority of the officer, for the purpose of being served. Missouri v. Lewis, 197 N. C. 79, 80, 147 S. E. 729.

An action is pending from the issuance of summons until final determination by judgment. McPeters v. McPeters, 219 N. C. 731, 14 S. E. (2d) 831.

Suit Pending from Issuance of Summons.—A civil action is commenced when the summons is issued and, as this
section fixes the inception of the action, suit is pending from that time and not exclusively from the time when the summons is served. Atkinson v. Greene, 197 N. C. 118, 120, 147 S. E. 811; Morrison v. Lewis, 197 N. C. 79, 147 S. E. 819.

Delivery to Sheriff. — A summons is issued when it is delivered to the sheriff, or some one for him; this is the consummation and it then relates back to the time when the summons is made by publication, such service by publication shall be completed within fifty days from the date of its issue; and upon serving the same, the officer shall note in writing upon the copy thereof, delivered to the defendant, the date of service, but failure to comply with this requirement shall not invalidate the service, and, if not served within sixty (60) days after the date of its issue upon every defendant, must be returned by the officer holding the same for service, to the clerk of the court issuing the summons, without notation thereon of its non-service and the reasons therefor as to every defendant not served. In all cases where service of summons is made by publication, such service by publication shall be completed within sixty days from the order of publication. Provided, that in all actions for tax foreclosures, street assessment foreclosures and sidewalk assessment foreclosures, summons must be served by the sheriff to whom it is addressed for service within sixty (60) days after the date of its issue; and upon serving the same, the officer shall note in writing upon the copy thereof, delivered to the defendant, the date of service, but failure to comply with this requirement shall not invalidate the service, and, if not served within sixty (60) days after the date of its issue upon every defendant, must be returned by the officer holding the same for service, to the clerk of the court issuing the summons, without notation thereon of its non-service and the reasons therefor as to every defendant not served. (Rev., ss. 430, 431; Code, ss. 200, 203, 213; C. C. P., s. 74; 1876-7, cc. 85, 241; 1919, c. 304, s. 1; Ex. Sess. 1920, c. 96, s. 1; Ex. Sess. 1929, c. 92, s. 1; 1927, c. 66, s. 1; 1927, c. 152; 1929, c. 237, s. 1; 1933, c. 343; 1939, c. 15; C. S. 476.)

Local Modification.—Beaufort: 1937, c. 65.

Cross References.—As to amendments in the discretion of the court, see § 1-103. As to summons in courts of justices of the peace, see § 7-135 et seq. As to issuance of summons on Sunday, see § 103-3. As to duty of sheriff to execute summons, see § 162-15.

For an analysis of this section, see 13 N. C. Law Rev., No. 4, 1938, pg. 105.

Editor's Note.—In view of the importance of the changes in this section effected by recent sessions of the legislature, it is thought that an outline of the procedure under the various acts may be of service. Prior to the amendment of 1935 service was required to be completed within fifty days from the commencement of the action instead of from the order of publication. The 1929 amendment added the words 'demanding expiration of the period of service.' These words have been retained. The proviso does not affect litigation pending on February 8, 1939.

Self.—Under the Original Code of Civil Procedure. — "The original Code of Civil Procedure required the defendant to appear and answer within a certain number of days after service of summons, in no case to be less than twenty days, thus making the day of service the determining date and the pleadings were made up at the next succeeding term. This eliminated very much delay and expense in legal proceedings, for no cases could be on the docket before the judge at term for which an answer was filed. When summons was made returnable to the term instead of before the clerk, this act was said: 'This system has been continued in all the States, unchanged, in which the new procedure had been adopted, it is believed, except in this State. In this State, at that time, our people were much embarrassed by the results of the war, and instead of desiring expedition in the determination of actions there was a desire to put off as long as possible the rendition of judgments for debt. Accordingly, the General Assembly, in the year 1868 [the year of the passage of this act], enacted that in all cases, within which the issues of fact had been formulated before the clerk, and that all pleadings should be made up and perfected before him, and when an issue of law is raised an appeal should lie to the judge at chambers, and be promptly acted on by him and returned. And further, that when an issue of fact arose upon the pleadings, as in cases in which the issues of fact had been formulated before the clerk, and the pleadings were made up at the next succeeding term, the cause should be turned over to the judge at term for trial except those in which the issues of fact had been formulated before the clerk by the pleadings.' See Campbell v. Campbell, 179 N. C. 413, 415, 102 S. E. 737.

In Campbell v. Campbell, 179 N. C. 413, 102 S. E. 737, it was said: 'Reference is made to the system of procedure in this State, unchanged, in which the new procedure had been adopted, it is believed, except in this State. In this State, at that time, our people were much embarrassed by the results of the war, and instead of desiring expedition in the determination of actions there was a desire to put off as long as possible the rendition of judgments for debt. Accordingly, the General Assembly, in the year 1868, enacted that in certain cases, entitled, an act suspending the Code of Civil Procedure, in certain cases,' ch. 76 Laws 1863-9, ratified 22 March, 1869, was enacted, which provided that summons should be made returnable to the term instead of before the clerk. This act...
provided, sec. 13, that the suspending act should be temporary and in force only "until 1 January, 1971," But, owing to the generality, the act was sustained indefinitely, and then by oversight, though contradictory to the concept and intent of the Code of Civil Procedure (which required all process to be issued returnable before the clerk), it was held that the act was presented. A summons is a process issued by the court on the application or in the name of a plaintiff requiring a defendant to appear and answer the complaint. Since an appeal, the cause of action has not been obtained, it is believed, in any other State."

Same—Under Section 470 (G. S. 1-81) of the Consolidated Statutes.—By the Public Laws of 1919 what is commonly known as the "Crisp Act" was enacted. Formerly the summons was required to be returnable before the clerk at a date named therein, not less than ten nor more than twenty days from its issuance. The defendant was required to answer within twenty days of its return.

Same—Public Laws of 1923.—The Public Laws of 1923, c. 53, s. 2, read as follows: "When any summons is issued by any clerk of the Superior Court in North Carolina is not served upon any one or more of the defendants therein named ten days before the return day thereof, but is served before the return day thereof, such failure to serve the said summons shall not affect the pendency of the action, and as touching the defendant or defendants therein named upon whom service has not been made ten days before the return day named in the summons, the return day as to such defendants shall be the tenth day after the service of the summons on the said defendant or defendants."

The original return day under this act was the same as that pointed out in discussing the law under the Consolidated Statutes. Formerly it was claimed that if service was not made within ten days of the original return day then the return day was postponed automatically to ten days from the date of the service. For example if a summons issued on June 1 and served on June 10 were not perfected until June 15 the return day was extended to June 25.

This provision was amended by the act of 1927 which amended this section (as explained in a succeeding paragraph). The act was submitted to the following criticism in 1 N. C. Law Rev. 261: "The present change introduces again the element of uncertainty, since the plaintiff cannot know when the summons will be served, and his right to proceed at a definite time depends upon the diligence of the officer or other circumstances not within his control. It would seem desirable that the definite return day named in the summons should still control, not only for the sake of definiteness and uniformity in procedure, but because it enables the plaintiff to know when to look to the case, and at the same time gives reasonable protection to the defendant by giving him twenty days in all cases to answer, with the power in the clerk to extend the time for good cause shown." 1 N. C. L. R. 261.

This criticism probably prompted the passage of the 1927 Act.

Same—The Extra Session of 1921.—This act provided that the provisions of that section of the Crisp Act not altered by the Public Laws of 1927 are still in effect. This provision was omitted in the 1927 amendment, as the method of service is there specifically mentioned.

Same—Public Laws of 1927.—This section as amended by the 1921 Act constitutes more or less a reversion to the procedure extant before the passage of the "Crisp Act." There is no specified return day; appearance and answer are always thirty days after service (in conformity with the criticism cited above); service must be ten days after issuance; if not served within ten days it must be returned with reasons for non-service.

The rights of the defendant cannot be doubted by irregularity in making the summons require an appearance within less than the twenty days (now thirty after service) allowed by this section. Such summons is not necessarily repugnant, but on the other, or rather the first affords an additional and more effective method of service than the other, and the defendant is provided with a means of informing the court of his whereabouts. The meaning of return is also new.

Same—The Extra Session of 1920.—"In Campbell v. Campbell (179 N. C. 413, 110 S. E. 727) the summons was issued on July 21, returnable before the clerk on August 8; but since the defendant was a nonresident, and service was to be made by publication, the time of publication was extended by the court to August 23. It appears that the time was necessarily extended by operation of law, so that the return day for the defendant was August 23." See also N. C. C. P. § 1-89.

To meet this case, ch. 96, of the Public Laws, Extra Session 1920 enacted a proviso that the summons was to be returnable within forty days. This proviso was enacted by the Act of 1927, and the time is extended from forty to ninety days.

Same—Public Laws of 1929.—This act amended this section by striking out the following: "Upon the return of a summons not served for want of time to make service, as to any defendant or defendants not served, the Clerk shall, within thirty (30) days after issue, issue an alias or pluries summons, as the case may require."

Previous to this amendment the clerk was required to issue such summons if the process officer had not had time to serve the defendant within the thirty (30) days allowed by the statute, without the necessity of the plaintiff in the action applying therefor. Neely v. Minus, 196 N. C. 345, 145 S. E. 767. See note under § 1-89.

Notice that Relief Will Be Demanded.—Whether the omission of notice that "the plaintiff will apply to the court for the relief demanded in the complaint" would be futile under the words of the 1927 Act, the Court stated that this has become a material part of pleading.

Excuse for Failure to Answer or Demand in Time.—See note under § 1-104. R. 281. A summons must be served as now provided by law."

Summons in Quo Warranto Proceedings Must Meet Requirements of Section.—In order for a valid service of summons in quo warranto proceedings, the summons must be served on the clerk of the Superior Court in the county from which it was issued. "The term 'return' implies that the process is taken back to the place from which it was issued." In re Crittenden, 2 Plip., 215. It is the "bringing" that is required, a process which courts have said is not properly described as "return." Harmony v. Childress, 3 Yeag., 329. The summons must be served on the officer to make his return to the Superior Court of Northampton County, and as the return should not therefore be made elsewhere, it must be the return of the court. The plaintiff or the county cannot so serve the summons. Watson v. Mitchell, 108 N. C. 364, 12 S. E. 835.

When Summons Returnable.—Public Laws 1927 made material changes in the law theretofore existing. Formerly no summons was returnable before the clerk "at a date named therein not less than ten nor more than twenty days from the date of issuance," and if not served within ten days, it must be returned with reasons for non-service. It is now necessary that the true copy of the summons be served on the true copy of the complaint, and that the true copy of the complaint be served on the true copy of the defendant. The plaintiff or the county cannot therefore serve the summons. Watson v. Mitchell, 108 N. C. 364, 12 S. E. 835.

Meaning of Return.—The Code of 1883, sec. 200, expressly required a sheriff to whom a summons was directed to execute the same within ten days after the return day as to such defendants shall be the tenth day after the service of the summons on the said defendant or defendants.

This criticism probably prompted the passage of the 1927 Act. The summons must be served as now provided by law.
The similarity of this section and § 7-138 is striking and it follows that the two should be interpreted the same. Johnson v. Chambers, 219 N. C. 709, 770, 14 S. E. (2d) 789.

§ 1-90. Issued to several counties.—The plain-
tiff may issue a summons, directed to the sherif-
of any county where a defendant is most likely
to be found, noting on each summons that it is
issued in the same action. When the summons
is returned, it shall be docketed as if only one had
issued, and if any defendant is not served with
such process, the same proceeding shall be had
in the same action. When the summons
was issued out of a recorder's court to another county in
the same action, the recorder's court of Reidsville Township was author-
ized by this section. Williams v. Cooper, 222 N. C.
589, 591, 24 S. E. (2d) 404.

§ 1-93. Amount requisite for summons to run
outside of county.—No summons in civil suits or
proceedings shall run outside the county
where issued, unless the amount involved in the
litigation is more than two hundred dollars in
matters arising out of contract and more than
fifty dollars in matters arising in tort:
Provided, that this section shall not affect or limit the provi-
sions of §§ 7-138, 7-140 to 7-143. (1939, c. 81.)

Editor's Note.—The Public Laws of 1923 added the part of the section, relating to service in case of danger of in-
jury to the person. This applies to all courts, since the
words used are 'when the summons is issued by any court
of this state.' The first purpose is to relieve the officer
from liability to a penalty for failure to serve the sum-
mons to run outside of county, and the issuance of a summons to
another county addressed to the sheriff of that county was
authorized by this section. Williams v. Cooper, 222 N. C.
589, 591, 24 S. E. (2d) 404.

§ 1-94. When officer must execute and return.
—The officer to whom the summons is addressed
must note on it the day of its delivery to him and
serve it by delivering a copy thereof to each of the defendants. In all cases when a
summons is issued by any court of this state, and
the officer to whom said summons is directed
shall find that the person or persons against whom
said summons is issued cannot be served without
danger of injury to said person or persons on ac-
count of the condition of said person or persons
arising from illness, accident or otherwise, the officer
shall file with the clerk thereof a certificate from
a reputable physician certifying to this fact, and
said return shall relieve the said officer from any
liability by reason of failure to actually serve the
summons. The said officer shall as soon as pos-
sible make actual service of said summons, and
when actually served the cause of action shall be
deemed to have been commenced as of the date of
the original summons, and the defendant shall have thirty days from the date of actual service
within which to demur, answer or otherwise plead.
(Rev., s. 432; Code, s. 204; R. C., c. 51, s. 44; 1789,
c. 314, ss. 1, 2; 1813, c. 14, s. 2; C. S. 477.)

§ 1-91. When directed to officer of adjoining
county.—If at any time there is not in the county
a proper officer to whom summons or other proc-
sedure may be directed and the sheriff is directed to be served,
who can lawfully execute it; or if such officer
refuses or neglects to execute the same, the clerk
of the court from which it has issued or shall
issue, upon the facts being verified before him by
written affidavit, subscribed by the plaintiff or
his agent, shall issue such summons or process
to the sheriff of any adjoining county, who
has power to and shall execute the same in like
manner as if he were sheriff of the county. In all cases
where the sheriff of any county is inter-

tested, if there is no coroner in the county, proc-

cess may be issued to and shall be executed by
the sheriff of any adjoining county. (Rev., ss.
1530, 1531; Code, ss. 920, 980; R. C., c. 51, s. 55;
1779, c. 150; 1923, c. 4090; 882, c. 1132; 1846, c.
61; 1860-70, c. 175; C. S. 475.)

§ 1-92. Uniform pleading and practice in
inferior courts where summons issued to run out-
side of county.—In all cases in which any court
in North Carolina inferior to the Superior Court,
except courts of Justices of the Peace, shall issue
any summons to run outside the county of such
inferior court, the case in which such summons
is issued shall, as to the summons and the filing
of all pleadings, be subject to, and governed by,
the laws and rules applicable to actions in the
Superior Court of North Carolina. (1931, c. 420.)

Cross References.—As to when coroner acts as sheriff, see
§ 152-8. As to rules of pleading generally, see § 1-143.

The recorder's court of Reidsville Township was author-
ized by the statute creating it to issue a summons run-
ing out of the county, and the issuance of a summons to
another county addressed to the recorder of that county was
authorized by this section. Williams v. Cooper, 222 N. C.
589, 591, 24 S. E. (2d) 404.
When Discontinuance Occurs.—A discontinuance under this section occurs only when the summons has not been served. Rogers v. Leggett, 145 N. C. 7, 58 S. E. 596; Gomer v. Clayton, 214 N. C. 399, 199 S. E. 77.

The failure of service of the original summons in an action must be followed by an alias or pluries writ or a summons successively and properly issued in order to preserve a continuous single action referable to the date of its issue, for otherwise it is a discontinuance as to the defendant. And alias or pluries summons for the break in the chain is a new action. Hatch v. Alamance R. Co., 183 N. C. 617, 112 S. E. 329.

Under this section where in a civil action alias or pluries summonses are issued in the event of nonservice of the original, a break in the chain of summonses works a discontinuance, and where a summons is thereafter served it commences a new action. Neely v. Minus, 196 N. C. 345, 147 S. E. 771.

Where service of the original summons in this action was void because made on a Sunday and an "alias" summons thereafter issued was ineffective because not in the form prescribed by statute, upon the expiration of 90 days from the date of the original summons there was a discontinuance, and the court was without authority thereafter to order the issuance of an alias summons. Mints v. Frink, 217 N. C. 101, 6 S. E. (2d) 834.

§ 1-97. Service by copy.—The manner of delivering summons in the following cases shall be as hereinafter stated:

1. If the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing agent for the purpose of this section. Such service may be in any manner as hereinafter stated:

2. If against a minor under the age of fourteen years, to the minor personally, and also to his father, mother or guardian, or if there are none within the state, to any person having the care, custody or control of the minor, or to whose care, custody or control he resides, or in whose service he is employed.

3. If against a person judicially declared of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee or guardian has been appointed, to such committee or guardian, and to the defendant personally. If the superintendent or acting superintendent of an insane asylum informs the sheriff or other officer who is charged with the duty of serving a summons or other judicial process, or notice, on an insane person confided in such asylum, that the summons, or process, or notice, cannot be served without danger to the person or property of the insane person, the officer must return the same without actual service, but with an endorsement that it was not personally served because of such information; and when an insane person is confined in a common jail it is sufficient for an officer charged with service of a notice, summons, or other judicial process, to return the same with the endorsement that it was not served because of similar information as to the danger of service on such insane person given by the physician of the county in which the jail is situated.

4. Every unincorporated, fraternal, beneficial organization, fraternal benefit order, association and/or society issuing certificates and/or policies for a continuous single action referable to the date of its issue, for otherwise it is a discontinuance as to the defendant. And alias or pluries summons for the break in the chain is a new action. Hatch v. Alamance R. Co., 183 N. C. 617, 112 S. E. 329.
of insurance, whether foreign or domestic, now or hereafter doing business in this state, shall be subject to service of process, in the same manner as is now or hereafter provided for service of process on corporations: Provided, this paragraph shall only apply in actions concerning such certificates and/or policies of insurance.

5. Every nonresident individual who is engaged in business in this state and who conducts such business through an agent, employee, trustee, or other representative in this state, or who is a member of a partnership, firm, or unincorporated organization or association, or beneficiary or shareholder in a business trust doing business in this state, shall be subject to process in any action or proceeding in any court of competent jurisdiction in this state arising out of or connected with such business in this state, and such process may be served upon such agent, employee, trustee, or other representative or upon any person in this state receiving or collecting money with respect to such business, or upon any member of such partnership, firm, organization or association residing in this state or upon any person residing in this state who is authorized to act or contract for or collect or receive money on behalf of such partnership, firm, organization, association, or business trust with respect to its business in this state. Within five days after such service the plaintiff or petitioner or his attorney shall send by registered mail to said nonresident individual at his last address, if known, a copy of the summons and a copy of the complaint or petition with a statement calling attention to the provisions hereof and of the expiration of the time to answer or demur. Such service shall bind such individual as fully and effectually as if it had been made upon him personally.

6. Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this state by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this state upon whom all processes and precepts may be served, and certify to the clerk of the superior court of each county in which said association or organization does business in this state by performing any of the acts for which it was formed, shall, within thirty days from the ratification of this subsection, appoint an agent upon whom processes and precepts may be served, as provided in this subsection, and in the absence of such appointment, processes and precepts may be served upon the secretary of state, as provided in this subsection. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. (Rev. s. 440; Code, s. 217; C. C. P., s. 82; 1874-5, c. 168; 1899, c. 89; 1933, c. 24; 1941, c. 256; 1943, c. 478; C. S. 483.)

I. In General.

II. Service on Corporations.

A. Corporations Generally.

B. Foreign Corporations.

III. Service on Minor.

IV. Service on Insane Persons.

Cross References.

As to resident process agent and service through secretary of state, see §§ 55-38, 55-39. As to service of process on foreign insurance company, see § 58-153. As to infants, idiots, etc., of the 26th section, see § 6-155. As to privilege from service of process in certain civil actions of persons brought into state by extradition, see § 3-350.

I. IN GENERAL.

Editor's Note.—The 1933 amendment added subsection 4, the 1941 amendment added subsection 5 and the 1943 amendment added subsection 6.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 286.

Applicability to Criminal Actions. — This section though primarily intended as a regulation in the institution of a civil action, is equally appropriate in a criminal action, and its terms are sufficiently comprehensive to embrace both. State v. Western, etc., R. Co., 89 N. C. 584, 586.

Applicability in Justices' Court. — This section does not embrace a process returnable before a magistrate, Kirkland v. Rogers, 101 N. C. 144, nor do those provisions, in regard to the service of process upon corporations, apply to justices' courts. Katzenstein v. Raleigh, etc., R. Co., 78 N. C. 286, 297.

What Constitutes Delivery. — It would seem that the use of the word “delivery” in this section contemplates a delivery to the defendant in person, or his qualified agent or representative in this state, or who is authorized to act or contract for or receive money on behalf of such corporation in this state. R. v. Sutton, 185 N. C. 128, 197 S. E. 592. Delivery to any such person, whether resident or nonresident, is a valid delivery, and a separate copy of the summons must be served on and left with the agent in person, or his qualified agent or representative in this state. Atkinson v. Atkinson, 139 N. C. 1, 71 S. E. 630; Cox v. Cox, 221 N. C. 189, 15 S. E. (2d) 373.

II. SERVICE ON CORPORATIONS.

A. Corporations Generally.

Requirement Mandatory. — This requirement as to the mode of service on corporations must be strictly observed. Hatch v. Alamance R. Co., 183 N. C. 617, 621, 112 S. E. 529; Jones v. Vanstory, 200 N. C. 582, 157 S. E. 697.

The provisions of this section must be strictly followed, and a separate copy of the summons must be served on and left with the agent or corporate defendant. Hershey Corp. v. Atlantic Coast Line R. Co., 200 N. C. 184, 165 S. E. 550.

The provisions of this section as to service of summons on private corporations must be strictly observed. In such cases the officers, directors of a corporation, are served with process as trustees, it will not be effectual as service on the corporation, but only on the individuals named. Jones v. Vanstory, 200 N. C. 582, 157 S. E. 697.
Local Agent. — The term local pertains to place, and a local agent to receive and collect money, ex officiis, means an agent residing either permanently or temporarily for the purpose of his agency, and was not intended to embrace a mere transient agent. Moore v. Freeman’s Nat. Bank, 92 N. C. 590, 596.

But the authority to receive money is not the exclusive test of the statute, but this is not the controlling test of agency. Cape Fear Rys. v. Cobb, 190 N. C. 375, 377, 129 S. E. 828. A local agent receiving premiums or commissions for a bonding company doing business in this State with a local office or agency in this State was within the contemplation of this section. Pardue v. Absher, 174 N. C. 676, 94 S. E. 414.

...had not intended to limit the service to such a class of agents, but rather to extend the word "agent" to embrace a mere transient agent. Moore v. Freeman’s Nat. Bank, 92 N. C. 590, 596.

A local agent receiving premiums or commissions for a bonding company doing business in this State with a local office or agency in this State was within the contemplation of this section. Pardue v. Absher, 174 N. C. 676, 94 S. E. 414.

Service on Bank Director. — The service of process authorized to be made on a director of a corporation, under this section, as applied to a bank, means one of the eleven principal directors, annually elected by the stockholders, and not a director appointed by the authorities of the bank for its branches or agencies. Webb v. President and Directors, 50 N. C. 288.

Service on Receiver. — An action against the receivers of a corporation is in fact an action against the corporation, and not against a management agent found here. A reason follows the proviso as to who shall be considered local agents for the purpose of the section, and the last clause establishes certain conditions, restrictive in their nature, which are required to be present before the service of process can be made on foreign corporations. That is, service on the persons designated in the first clause, shall only be good as to foreign corporations: (1) when they have property in the State, (2) when the cause of action arose therein, (3) when the plaintiff resides in the State, and then a fourth method is established, (4) when service can be made within the State personally on the president, treasurer, or secretary thereof.

This construction has been held also in McDonald v. McArthur Bros. Co., 154 N. C. 122, 69 S. E. 382; Higgs & Co. v. Sperry, etc., 139 N. C. 259, 45 S. E. 219, following Higgs & Co. v. Sperry, etc., Co., 139 N. C. 299, 51 S. E. 1020, and holding also that the fact that such agent received money for the corporation on a single instance does not alter this result.

A local agency for a foreign corporation acting as its general agent, and collecting and receiving money in the State, is not a local agent upon whom service of summons for the foreign corporation can be served. Moore v. Freeman’s Nat. Bank, 92 N. C. 590.

Superintendent. — The agent of a foreign corporation with superintendent, and collecting and receiving money in the State, is not a “local agent” for the purpose of service of summons under this section. Clinard v. White, 129 N. C. 250, 39 S. E. 960.

President before Court in Individual Capacity. — Where a bill was amended so as to make a corporation a party, it was held to be proper to serve the president of the corporation with a copy of the bill, although he was already before the court in his individual capacity. McRae v. Guion, 58 N. C. 129.

Agent of Telephone Company as Agents of Telegraph Company. — In Brown v. Western Union Tel. Co., 169 N. C. 599, 86 S. E. 290, it was held that the fact that an agent of a telephone company received messages for a telegraph company, and used the same equipment, was sufficient to be submitted to the jury on the question of whether the agent of the telephone company was such an agent of the telegraph company as for the purpose of service of summons. See Blades Lbr. Co. v. Finance Co., 204 N. C. 285, 168 S. E. 219, following Higgins & Co. v. Sperry, etc., Co., 139 N. C. 299, 51 S. E. 1020, and holding also that the fact that such agent received money for the corporation on a single instance does not alter this result.

A local agency for a foreign corporation acting as its general agent, and collecting and receiving money in the State, is not a “local agent” for the purpose of service of summons under this section. Clinard v. White, 129 N. C. 250, 39 S. E. 960.

An attorney for a foreign corporation, who presents an account to the plaintiff and requested payment thereof, and then sent to himself, but presented the account without authority and received no money, is not a “local agent” (under this section) for the purpose of service of summons. Higgins & Co. v. Sperry, etc., Co., 139 N. C. 299, 51 S. E. 1020.

Superintendent. — The agent of a foreign corporation with superintendent, and collecting and receiving money in the State, is not a “local agent” for the purpose of service of summons under this section. Clinard v. White, 129 N. C. 250, 39 S. E. 960.

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place at which the cause of action arose are not material questions to be determined to maintain jurisdiction if the corporation can be found and served. Steel v. Western Union Telegraph Co., 132 N. C. 223, 17 S. E. 585.

When a foreign corporation has a place of business in this state and is here present transacting its corporate business through local agents, such corporation is amenable to service of summons under this section, depends upon the facts and the circumstances of this case. McDonald Service Co. v. People's Nat. Bank, 218 N. C. 533, 11 S. E. (2d) 556.

In the absence of any express authority, the question of whether a person or corporation residing in this state is the local agent of a foreign corporation for the purpose of service of summons under this section, depends upon the surrounding facts and the circumstances which the court may properly draw from them. Id.

An "agent" of a foreign corporation for the purpose of service of summons under this section is a person or corporation residing in this state properly or actually present for the purpose of the agency. McDonald Service Co. v. People's Nat. Bank, 218 N. C. 533, 11 S. E. (2d) 556.

The facts found by the court below upon the uncontested evidence appearing by affidavit and by stipulation of the parties, were to the effect that the bank, chartered by this state, upon which process was served, acted as a depository for the nonresident defendant bank, received money of the defendant for deposit, charged checks from the bank, and checked deposits by this state, upon which process was served, acted as a depository for the nonresident defendant bank, received money of the defendant for deposit, charged currency to defendant and when requested, and discounted notes of defendant's customers for defendant. Held: The depository bank was engaged in the discharge of the very functions for which it was organized, and it was conducting its own business and not that of the defendant, and the relation existing between the banks was that of creditor and debtor and not of agent and principal. Whether the depository bank was not the local agent of the nonresident bank for the purpose of service of summons under this section. Further, it would seem that the nonresident bank was not doing business in North Carolina, since the business transactions acted here was the business of the depository bank. Id.

A foreign express company, while a member of the Federal Government Control Act, a war measure, does not fall within the provisions of this section as to local process as required by this section, but for whom a guardian ad litem was appointed for the purpose of service of summons under this section, it being necessary only that the incompetent be given notice. Steele v. Western Union Telegraph Co., 117 N. C. 549, 55 S. E. 870.


A "local" agent of a foreign corporation for the purpose of service of summons under this section is a person or corporation residing in this state properly or actually present for the purpose of the agency. McDonald Service Co. v. People's Nat. Bank, 218 N. C. 533, 11 S. E. (2d) 556.

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A "local" agent of a foreign corporation for the purpose of service of summons under this section is a person or corporation residing in this state properly or actually present for the purpose of the agency. McDonald Service Co. v. People's Nat. Bank, 218 N. C. 533, 11 S. E. (2d) 556.

A "local" agent of a foreign corporation for the purpose of service of summons under this section is a person or corporation residing in this state properly or actually present for the purpose of the agency. McDonald Service Co. v. People's Nat. Bank, 218 N. C. 533, 11 S. E. (2d) 556.
§ 1-98. Service by publication.—Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases:

1. Where the defendant is a foreign corporation and has property, or the cause of action arose, in the state.

2. Where the defendant, a resident of this state, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of a summons.

3. Where he is not a resident, but has property in this state, and the court has jurisdiction of the subject of the action.

4. Where the subject of the action is real or personal property in this state, and the defendant has departed from or kept himself concealed, and the cause of action consists wholly or partly in excluding him from any actual or contingent lien or interest therein.

5. Where the action is for divorce.

6. Where the stockholders of a corporation are deemed to be necessary parties to an action and their names or residences are unknown; or where the names or residences of parties interested in real estate are unknown to the plaintiff, and his residence is a necessity party to an action and interested in the subject matter thereof is known, and he is a resident of the state, the court having jurisdiction may, upon affidavit that after due diligence the names or residences of such parties cannot be ascertained, authorize service by publication.

7. Where in actions for the foreclosure of mortgages on real estate, if any party having any interest in, or lien upon, such mortgaged premises, is unknown to the plaintiff, and his residence, with reasonable diligence, is ascertained, and such fact is made to appear by affidavit.

8. Where no officer or agent of a domestic corporation upon whom service can be made can, after due diligence, be found in the state, and such facts are made to appear by affidavit. This subsection also applies to all summonses, orders to show cause, orders and notices issued by any board of aldermen, board of town or county commissioners, or by individuals. (Rev., s. 442; Code, ss. 218, 221; 1885, c. 380; 1889, cc. 108, 263; 1895, c. 334; C. S. 494.)

I. In General.

II. Service by Publication on Foreign Corporations.

III. Service by Publication on Nonresident with Property within State.

IV. Service by Publication where Lien is Subject of Litigation.

V. Service by Publication in Actions for Divorce.

VI. Service by Publication on Domestic Corporation.

Cross References.

As to personal service on nonresident, see § 1-104. As to service of summons by publication in attachment, see § 1-444. As to service of summons by publication on parties to suit, or in proceeding to garnish, and in the case of an amended defense after judgment has been rendered by defendant served by publication, see § 1-108. As to publication of notice to nonresident parties of taking of deposition in action or proceeding, see § 1-443. As to service of summons on executors, without bond by publication, see § 28-179. As to manner of publication, see § 1-588. See note to § 1-104.

I. IN GENERAL.

Strictly Construed.—The service of the summons or notice, as an original process in the action, in the manner prescribed exists in any particular case before it grants the order of publication. Otherwise the publication will be unauthorized, irregular and fatally defective, unless in some way such irregularity shall be waived or cured.


Unless the provisions of this section are observed the service of a summons by publication in such cases will be ineffective. Martin v. Martin, 205 N. C. 157, 159, 170 S. E. 661.

Not only must it be shown that the defendant has property in this state; the cause of action must be stated with such clearness and comprehensiveness as may enable the court to determine its sufficiency. Id.

The Affidavit—By Whom Made.—The affidavit required by this section may be made by an agent or attorney. Wheeler v. Roberts, 84 N. C. 494.

Same—When Made.—It seems that the affidavit may be made after the order, provided the order remains in abeyance until the affidavit is filed. Bank v. Blossom, 92 N. C. 629.

Same—Allegations.—Everything necessary to dispense with personal service must appear by affidavit. Wheeler v. Cobb, 84 N. C. 494.

Same—Proper Party and Cause of Action Must Be Shown.—A brief summary of the facts constituting the cause of action, or of the facts showing that the parties are necessary to the action and the subject matter thereof is known, and he is a resident of the state, the court having jurisdiction may, upon affidavit that after due diligence the names or residences of such parties cannot be ascertained, authorize service by publication.

Where, upon the facts alleged, no judgment can be rendered affecting lands, it must follow that the defendant is a necessary party to the action. If, according to the statute, the defendant is not a necessary party, the party seeking to be made parties are necessary parties. It is the province and duty of the court to see the facts and determine that a cause of action exists, or that the parties are necessary for some appropriate purpose. The party demanding the order shall not be the judge to determine that a cause of action exists because a necessary party is not sought to be made parties are necessary parties. It is the province and duty of the court to see the facts and determine that a cause of action exists, or that the parties are necessary for some appropriate purpose. Where, upon the facts alleged, no judgment can be rendered affecting lands, it must follow that the defendant is a necessary party to an action to compel specific performance of a contract to convey land in a particular locality. The facts must be stated with sufficient fullness to develop the contract and the relation of the parties to it. Otherwise the party demanding the order shall not be the judge to determine that a cause of action exists, or that the parties are necessary for some appropriate purpose. The party demanding the order shall not be the judge to determine that a cause of action exists, or that the parties are necessary for some appropriate purpose. Where, upon the facts alleged, no judgment can be rendered affecting lands, it must follow that the defendant is a necessary party to an action to compel specific performance of a contract to convey land in a particular locality. 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Same—Necessity for Averment of Due Diligence.—The authorities seem to be decisive that, under this section as now framed, the allegation that a defendant cannot be found in the state after diligent search, is an essential averment to a service of original process by publication. Sawyer v. Camden Run Drainage Dist., 179 N. C. 182, 185, 102 S. E. 273; Wheeler v. Cobb, 75 N. C. 21; Faulk v. Smith, 84 N. C. 501; Grocery Co. v. Call Co., 142 N. C. 174, 55 S. E. 99; Denton v. Vassilides, 212 N. C. 513, 193 S. E. 737.

This allegation as to diligence is the very cornerstone to obtain jurisdiction by publication. Fowler v. Fowler, 190 N. C. 536, 540, 130 S. E. 315.
An averment, by affidavit or otherwise, that the defendant "cannot, after due diligence, be found in the state," is an essential requirement to obtain service of summons by publication, under section 493, and it must be made "in order to effectuate the purpose of the statute." Groce v. Groce, 214 N. C. 398, 399, 199 S. E. 388.

And the fact that the defendant is a nonresident, is not a sufficient averment of the affidavits. In order to show that after due diligence he cannot be found within the state, Davis v. Davis, 179 N. C. 185, 102 S. E. 270. A publication based upon the mere allegation that the defendant is an absconding defendant, is insufficient to confer jurisdiction under the section. Flint v. Coffin, 176 Fed. 872.

Same.—What Constitutes Due Diligence.—When the affidavit for publication sets out the reasons why the defendant cannot be found "after due search," this is tantamount to "due diligence." Rose v. Davis, 140 N. C. 266, 269, 52 S. E. 780.

But, as will be seen from a later paragraph, this section does not require the issuance and return of summons not served. The preceding paragraph is only an illustration of the diligence that will suffice. Ed. Note.

Same—Specific Allegation of Jurisdiction.—There is no requirement in this section that an allegation as to the court's jurisdiction shall be made specifically in the affidavit. If the jurisdiction of the court, as to the subject of the action, appears from the facts alleged in the affidavit, and that the defendant was beyond the limits of the state, which were ascertainable by the time the orders were made, this was sufficient. Page v. McDonald, 159 N. C. 38, 43, 74 S. E. 642; Bacon v. Johnson, 110 N. C. 114, 14 S. E. 598; Davis v. Davis, 179 N. C. 383, 102 S. E. 270.

County Sav. Bank v. Tolbert, 192 N. C. 126, 129, 133 S. E. 558.

Same—Other Allegations.—Specific allegations necessary to obtain the order under the particular subdivisions of this section will be found under the following analysis line of this note. Ed. Note.

Same—Amendment.—Where the affidavit for the publication of a summons was defective, it was proper for the judge to permit an amendment and grant an alias order of publication instead of dismissing the action. Mullen v. Norfolk, etc., Canal Co., 120 N. C. 109, 16 S. E. 551, cited in Proceedings to Foreclose Tax Certificate.—Where the summons in proceedings to foreclose a tax certificate of the sale of lands in the action against the listed owner of the lands has been returned the defendant 'not found,' it is not required as under the provisions of this section, that this fact be made to appear by affidavit to the satisfaction of the court in order for valid service. Orange County v. Jenkins, 200 N. C. 202, 203, 156 S. E. 774.

Process Must Name Parties Correctly.—In actions for foreclosure of mortgages on real estate, in the nature of which are tax foreclosure proceedings, under § 151-270, N. C. 1941, no notice is given to the mortgagee. If, upon, such mortgaged premises, is unknown to the plaintiff, and his residence cannot, with reasonable diligence, be ascertained, and such fact is made to appear by affidavit, "the court, in its discretion, may have made a publication of a notice of the action. But, in accordance with the rule that notice to a party defendant is required in order to give the court jurisdiction, the process, must correctly name the parties. This requirement is mandatory. Board of Com'rs v. Gaines, 221 N. C. 324, 328, 20 S. E. (2d) 377.

Issuance and Return of Summons Not a Prerequisite. — This section does not require the issuance and return of summons not served as the basis of or condition precedent to the publication. Groce Co. v. Collins Bag Co., 142 N. C. 77, 54 S. E. 50, overruling McClure v. Fellows, 131 N. C. 309, 42 S. E. 591, and reinstating Best v. British, etc., 131 N. C. 311, 33 S. E. 799.

Rights of Heirs May Be Determined Where Service Is by Publication.—A judgment entered in an action to determine the heirs at law of intestate for the purpose of disposing of the estate, in which the court was in the position of administrator and the funds in his hands, and some of the heirs appear in court and the other heirs are duly served by publication, is void, the judgment being entered without compliance with this section. Ferguson v. Price, 206 N. C. 202, 203, 156 S. E. 774.

Where the suit is merely in personam to determine the personal rights and obligations of the defendants, constructive service of process for attachment; Hinton v. Penn. Mut. Life Ins. Co., 126 N. C. 18, 35 S. E. 182.


II. SERVICE BY PUBLICATION ON FOREIGN CORPORATION.

Editor's Note.—Section 55-38, providing for service on a statutory agent of a foreign corporation, would seem to apply only to all the sections of the Act as prescribed by this subsection would occur. In view of the holding in Pardue v. Absher, 174 N. C. 676, 94 S. E. 414, it is probable that the two sections would be construed as creating no more than the privilege of the defendant to exercise an option as to the method of procedure.

Under this subsection, the unpaid balances due a foreign corporation on subscriptions to its stock by subscribers residing in this state are property of such corporation. Cooper v. Adel Security Co., 122 N. C. 463, 30 S. E. 348.

III. SERVICE BY PUBLICATION ON NONRESIDENT WITH PROPERTY WITHIN STATE.

In General.—A valid service by publication cannot be had on a nonresident defendant upon a cause of action arising out of a transaction made in this state. Everett v. Austin Bros., 169 N. C. 622, 86 S. E. 523, and it is necessary to set forth this fact in the affidavit. Bacon v. Johnson, 110 N. C. 114, 14 S. E. 598.


Where the summons has been duly returned "defendant not to be found in the state," at the time of its issuance it was alleged in a verified complaint and in supporting affidavits that the cause of action was for money had and received, and that the defendant was beyond the limits of the state, his domicile was unknown, and it was a state in which he was a resident, and in which the cause of action has been substantially complied with and the validity of the service is upheld. Bethell v. Lee, 200 N. C. 753, 158 S. E. 496.

Attachment Necessary. — In an action in personam, in which no attachment has been or can be issued, service by publication on a nonresident is ineffectual for any purpose. Winfrey v. Bagley, 102 N. C. 515, 9 S. E. 198. See also Price v. Cox, 83 N. C. 261; Wilson v. St. Louis Cook Mfg. Co., 88 N. C. 5.

Where an action is for the recovery of a debt and there is no attachment of the property to confer jurisdiction there can be no service by publication of the summons, or hence, actual service in another state "in lieu of publication" would be invalid. Long v. Home Ins. Co., 114 N. C. 465, 466, 19 S. E. 347; Bernhardt v. Brown, 118 N. C. 700, 701, 14 S. E. 347.

General Judgment Cannot Be Taken.—A plaintiff cannot take a general and personal judgment against a defendant, who is a nonresident, upon a service by publication and not even when an attachment has been levied on his property, the court having jurisdiction to adjudge against him only to the extent of the property seized. May v. Getty, 137 N. C. 583, 55 S. E. 774.

One who has left the State for an indefinite time, his return depending upon a doubtful contingency, is a nonresident for the purpose of service of summons by publication. In actions where service has been made without attachment, there may have retained his domicile in this state. And the cause of his absence from the state is immaterial if such absence prevents personal service for an indefinite period. Cooper v. Hanes, 194 N. C. 571, 140 S. E. 392. See note under § 1-41.

IV. SERVICE BY PUBLICATION WHERE LIEN IS SUBJECT OF LITIGATION.

In General.—In Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 655, it is said: "Such service (by publication) may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, where the property is public, to condemn and appropriate it for a public purpose." This is cited and approved in Winfrey v. Bagley, 102 N. C. 515, 516, 9 S. E. 198; and Long v. Home Ins. Co., 114 N. C. 465, 466, 19 S. E. 347; Bernhardt v. Brown, 118 N. C. 700, 701, 14 S. E. 347.

A judgment to enforce a mechanic's lien is a proceeding in rem, and service by publication is authorized by this subsection. Bernhardt v. Brown, 118 N. C. 700, 701, 14 S. E. 347.

V. SERVICE BY PUBLICATION IN ACTIONS FOR DIVORCE.

For article on "North Carolina and Jurisdiction for Divorce," mentioning this section, see 1 N. C. Law Rev. 95 et seq.

The Affidavit. — The requirements of this section are mandatory, and must be followed in good faith in actions of divorce to obtain an order of publication of service of summons, and where the plaintiff in divorce fails to make affi-
§ 1-99. Manner of publication. The order must direct the publication in one or two newspapers to be designated as *most likely to give notice to the person to be served*, and for such length of time as is deemed reasonable, not less than once a week for four successive weeks of a notice, giving the title and number of the action, the name of the defendant, the time appointed to appear, and answer, or demur to the complaint at a time and place therein mentioned; and no publication of the summons, or mailing of the summons and complaint, is necessary. The cost of publishing in a newspaper shall not exceed one dollar and fifty cents an inch of solid type, and shall in no case exceed six dollars for the notice. (Rev., s. 443; Code, s. 219; 1903, c. 134; C. C. P., s. 84; 1876-7, c. 241, s. 3; C. S. 485.)

Cross Reference.—As to cost of legal advertising, see § 1-104.

Sufficiency of Publication.—It is sufficient if the publication contains the substantial elements of the summons, and the fact that it is not a literal copy will not render the service insufficient. (Gulf County v. Georgia Co., 109 N. C. 316, 13 S. E. 861.)

Service of summons made by publication from 3 of August to 31 of August, the term of the court to which the process was returnable beginning on the latter day, is a sufficient publication of "once a week for four weeks," and a sufficient compliance with the statutes in that respect. Guilford County v. Georgia Co., 109 N. C. 310, 13 S. E. 861.

There being no specific requirement of statute that an order for the publication of summons state that the paper in which the publication is ordered to be printed is the one "most likely to give notice to the person to be served," a judgment that the clerk be restrained from ordering publication in a certain paper without such finding in the order is erroneous, and would seem to be discriminatory, and on appeal the judgment will be modified; an order for publication of summons being made by a court of record there is a presumption in favor of the correctness of its decree, and it will be presumed that the statutory findings and determination had been made, without specific adjudication in the order. Elmore v. Wooten, 198 N. C. 733, 153 S. E. 323.

Warrant of Attachment Insufficient.—The publication of the warrant of attachment does not serve the purpose of this section, as the section specifies that the publication of notices must be in a newspaper. Ditmore v. Goin, 128 N. C. 325, 327, 49 S. E. 61.

§ 1-100. When service by publication complete. —In the cases in which service by publication is allowed, the summons is deemed served at the expiration of the time prescribed by the order of publication, and the party is then in court; and the defendant shall have twenty days thereafter in which to answer or demur, or within ten days in special proceedings in which to answer. (Rev., s. 445; Code, s. 327; C. C. P., s. 88; 1939, c. 19, s. 1; C. S. 487.)

Editor's Note.—The 1939 amendment added the part of this section appearing after the semicolon.

For comment on the 1939 amendatory act, see 17 N. C. Law Rev. 345.

§ 1-101. Jurisdiction acquired from service.—From the time of service of the summons, in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. (Rev., s. 445; Code, s. 229; C. C. P., s. 90; C. S. 488.)

Cross Reference.—As to when action is commenced, see § 1-14.


§ 1-102. Proof of service.—Proof of the service of the summons or notice must be—

1. By the certificate of the sheriff or other proper officer.
2. In case of publication, the affidavit of the printer, or of his foreman or principal clerk, showing the same.
3. The written admission of the defendant. (Rev., s. 446; Code, s. 228; C. C. P., s. 89; C. S. 489.)

This section is exhaustive and proof of the service of a notice must be established as required by this section. Allen v. Strickland, 100 N. C. 225, 74 S. E. 795.

Necessity for Proof.—Where service of process on nonresidents was necessary it is error for the judge of probate (or clerk of the inferior court) to order or allow the sale of lands without adjudging by the proofs required by this section that the defendants had been regularly served with process by publication in the manner prescribed. Hyman v. Jarnigan, 65 N. C. 90.

Written Admission.—Where service is accepted in writing, it will be treated as "the written admission of" service as contemplated by this section. First Nat. Bank v. Wilson, 80 N. C. 489; Nichols, 10 N. C. 44. Godwin v. Monds, 106 N. C. 476, 10 S. E. 444.

It is manifest that no verbal admission of service or assent to the service as made will be a service within the provision appearing after the semicolon. First Nat. Bank v. Wilson, 80 N. C. 200, 202.

Personal service of a copy of the summons on a defendant, or his written admission thereof, is necessary to constitute a case in court. A copy left with defendant's wife is not a legal service, and proof of its delivery to him by her, or of
his recognition of or verbal assent thereto, will not make it sufficient. First Nat. Bank v. Wilson, 80 N. C. 200. 
§ 1-103. Voluntary appearance by defendant.—
A voluntary appearance of a defendant is equivalent to personal service of the summons upon him. (Rev., s. 447; Code, s. 229; C. C. P., s. 90; C. S. 490.)
"By making a general appearance and filing an answer upon the merits the defendant waived any defect in the service of the summons. The statute provides that the voluntary appearance of a defendant is equivalent to personal service of the summons."
An appearance for the purpose of filing a demurrer or answer to the complaint is a general appearance and waiving a proper service of summons. Reel v. Boyd, 195 N. C. 273, 141 S. E. 891; Abbitt v. Gregory, 195 N. C. 203, 141 S. E. 857.
The giving of a replevy bond is equivalent to a general appearance entered by a defendant in attachment, and is a waiver of the irregularities, if any, in the service of summons, or the necessity of such service, and estops the defendant from denying ownership of the property levied on, but it does not estop defendant from traversing the truth of the allegation on which the attachment is based. Bizell v. Mitchell, 195 N. C. 484, 143 S. E. 706.
What Constitutes a General Appearance.—A motion to dismiss for failure of plaintiff to file security for costs, pertains to a procedural question apart from the merits of the allegation on which the attachment is based. Mintz v. Frink, 217 N. C. 101, 6 S. E. (2d) 944.
§ 1-104. Personal service on nonresident.—When the place of residence of a person out of the state is known and the same is made to appear by affidavit, in lieu of publication in a newspaper it is sufficient to mail a copy of the summons, or other process, accompanied by a statement as to the nature of the action or proceeding, to the sheriff or other process officer of the county and state where the defendant resides, who shall serve same according to its tenor. The process officer who serves the paper shall, in making his return, use a form of certificate substantially as follows:
State of ........................................
County of ....................................
Affidavit of Service of Summons;
Clerk's Certificate
I, .......... [Sheriff or other process officer] of the county [or city] of ............., State of ............., being duly sworn, do certify that on the .... day of ...., 19 .... I served the summons and accompanying statement hereto attached by delivering a copy of the same to .......... the defendant(s) therein named.

I, .......... [Sheriff or other process officer]
Clerk of the Court of the County [or City] of .......... State of ............., do certify that said court is a court of record having the seal hereto attached; that ............ is well known to me as .......... [Sheriff or other process officer] of said county [or city] of ............., and that he has full power and authority to serve any and all legal processes issuing from courts of this state; that said .......... personally appeared before me this day and made and subscribed the above affidavit relative to service of summons on ............
This the .... day of ...., 19 ....
[L. S.] ........................................
Clerk of the ............. Court of the County [or City] of ............., State of .............

(Rev., s. 418; 1891, c. 120; 1943, c. 543; C. S. 491.)
Editor's Note.—The 1943 amendment inserted the form of affidavit of service of summons, and changed the form of civil process to serve as a general appearance.
When Service by Mail Permitted.—The service of summons and other process authorized by this section is in lieu of publication in a newspaper, and can only be made in those cases where publication could be made, to wit, in actions which are virtually suits in rem or quasi in rem, and in which the jurisdiction as to nonresidents only authorizes a judgment acting upon the property, and not upon the person of the defendant. Mintz v. Frink, 217 N. C. 101, 6 S. E. (2d) 944.
Cumulative Method.—The method of mailing the process is optional and not exclusive of service by publication in cases in which this last is proper. Mullen v. Norfolk, et al., 148 N. C. 106, 66 S. E. 263; 114 N. C. 518, 51 S. E. 316.
Jurisdiction Acquired.—The courts of this State have jurisdiction of the persons of nonresident defendants to the extent required in proceedings in rem or quasi in rem, when personal service is made by complying with the requirements of this section and the property is situated here. Vick v. Flournoy, 147 N. C. 209, 60 S. E. 978.
Omission to Clerk's Seal.—A summons issued without the seal of the clerk of the court is void as to nonresident defendants under this section, is an irregularity. Vick v. Flournoy, 147 N. C. 209, 60 S. E. 978.
This section permits service of process on the location of the defendant is determined and personal service has been made, an exception to the validity of the service on the ground that the place of residence of the defendant in another state was not made to appear by affidavit to the clerk prior to the mailing of the summons cannot be sustained, the provisions of this section having been substantially complied with. Fidelity, etc., Co. v. Green, 200 N. C. 535, 157 S. E. 797. But a different rule applies to § 1-98, relating to service by publication where the defendant's rights may be lost through lack of knowledge and lapse of time. In re Application to sell realty, 140 N. C. 203, 48 S. E. 170.
motor vehicle on the public highways of the state other than as so permitted or regulated, shall be deemed equivalent to the appointment by such non-resident of the Commissioner of Motor Vehicles, or of his successor in office, to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved by reason of the operation by him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State, and said acceptance or operation shall be a signification of his agreement that he shall be subject to the jurisdiction of the courts of this State, and be bound by the judgment of the court, and the commissioner of the revenue under the provisions of this section, and therefore service of process on the commissioner of revenue under the provisions of this section is valid. Bogen v. Bogen, 219 N. C. 51, 12 S. E. (2d) 649.

Findings by Trial Court That Defendant Was a Nonresident Is Conclusive on Appeal.—Upon motion to dismiss an action on the ground that the defendant was a nonresident of this state and was served with summonses under a statute authorizing service on nonresidents, the finding of the superior court judge that the defendant was a nonresident, based upon competent evidence, is conclusive on appeal. Bigham v. Poor, 201 N. C. 14, 158 S. E. 548.

This section makes no provision for service on the personal representative of a deceased automobile owner who was involved by reason of the operation of his automobile in this state. Lindsay v. Short, 210 N. C. 287, 186 S. E. 239.

Cited in Howard v. Queen City Coach Co., 213 N. C. 201, 193 S. E. 186.

§ 1-106. Record of such processes; delivery of return.—The Commissioner of Motor Vehicles shall keep a record of all such processes, which shall show the day and hour of service of the summonses or other lawful process, accompanied by his certificate that the summonses and complaint had been served on him, the sheriff or other process officer of the county and state where the defendant or defendants reside. This sheriff or other process officer, authorized to serve process in the state to which it is sent, shall serve the same according to its

[ 109 ]
§ 1-108. Defense after judgment on substituted service. — The defendant against whom publication is ordered, or who is served under the provisions of §§ 1-104 through 1-107, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for the foreclosure of county or municipal taxes, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as are just; and if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. No fiduciary officer or trustee who has made distribution of a fund under such judgment in good faith is personally liable if the judgment is changed by reason of such defense made after its rendition; nor in case the judgment was rendered for the partition of land, and the defendant who has sold the land in such partition shall be held for error for the clerk's failure to more specifically find the facts constituting such meritorious defense, and it is within the discretion of the judge of the Superior Court on appeal to enter an order allowing an extension of time for filing answer as provided by sections 1-112, 1-276. Vann v. Coleman, 206 N. C. 451, 174 S. E. 301.

§ 1-109. Vacations of judgment. — Under this section the defendant, where his affidavit fully justifies the findings of fact made by the court, and brings him within the terms of the section, has a legal right to have the judgment vacated. Such a right is absolute and not within the discretion of the presiding judge. Rhodes v. Rhodes, 125 N. C. 191, 37 S. E. 275; Savage v. Moore, 139 N. C. 38, 74 S. E. 452; Moore v. Rankin, 172 N. C. 599, 600, 90 S. E. 759.

The allegations of the complaint particularly describing the lands situate hereof of the nonresident husband sought to be subjected to the wife's claim for alimony in her suit for divorce, and the judgment therein directing it to be
or of conflicting facts that have been judicially found and of nearly five years, the defendant had actual knowledge. S. EB. 216, § 1-109 CH. 1.

ought not to be construed as limiting or modifying the right to defend, which is an absolute, legal right of the defendant. The right to defend an action, and the death of the wife has caused the following alimony to the wife pendente lite her action for divorce, or in a suit to declare him her trustee in taking title to lands bought with her money and without her consent, and the defendant's motion under this section, and in proceedings regular upon their face, when the motion has been made after a lapse of nearly five years, the defendant had actual knowledge of the occurrence of the events, and seven years after the same relative position, with reference to the subject-matter of the litigation, the defendant must either have known, or been required to answer the complaint, in accordance with the provisions of the statute or general rule of court, and thus to raise issues of fact to be tried by a jury, or issues of law to be tried by the court. Burton v. Smith, 191 N. C. 599, 132 S. E. 605. It ought not to be held that he has waived, or by publication, with respect to prop-

erty within its jurisdiction, or by such orders, designed to protect the plaintiff who had recovered the judgment, set aside and vacated upon the motion of the defendant, upon service of summons on the defendant as provided by the laws of this state, from loss which might result to him from the action of the court. Burton v. Smith, 191 N. C. 599, 132 S. E. 605. It ought not to be held that he

ers, etc., for a building erected on the lands of a nonresi-
dent owner, by service of summons by publication, may be set aside upon defendant's motion under this section, in the sum of two hundred dollars, with the con-
dition on such terms as may be just, with restitution, etc., to declare the defendant had notice, to pay the wife alimony which had been allowed her. White v. White, 179 N. C. 592, 103 S. E. 216. See note of this case under § 50-15. Exception as to Lands Sold in Divorce Proceedings. — The provisions of this section, as to setting aside judg-
ments against nonresident defendants served by publica-
tion, upon motion showing sufficient cause, made within a year after notice, and within five years after its rendi-
tion on such terms as may be just, with restitution, etc.,
does not apply where the lands have been regularly sold under an order of court in divorce proceedings, of which the defendant had notice, to pay the wife alimony which had been allowed her. White v. White, 179 N. C. 592, 103 S. E. 216. See note of this case under § 50-15.

Attachment of Lands — Alimony — Notice. — Attachment of the lands situated here of the nonresident husband, is not necessary to subject it to the payment of alimony pendente lite, for divorce, upon publication of summons, or to declare the husband her trustee in his purchase of lands with her sepa-
rate money, to which he had taken title in himself, with-
out the want of some additional notice, or by publication beyond publica-

The defense intended to be allowed, under this section, to put plaintiff and defendant, as near as may be, in the same relative position, with reference to the subject-matter of the litigation, the defendant must either have known, or been required to answer the complaint, in accordance with the provisions of the statute or general rule of court, and thus to raise issues of fact to be tried by a jury, or issues of law to be tried by the court. Burton v. Smith, 191 N. C. 599, 132 S. E. 605. It ought not to be held that he has waived, or by publication, with respect to prop-

erty within its jurisdiction, or by such orders, designed to protect the plaintiff who had recovered the judgment, set aside and vacated upon the motion of the defendant, upon service of summons on the defendant as provided by the laws of this state, from loss which might result to him from the action of the court. Burton v. Smith, 191 N. C. 599, 132 S. E. 605. It ought not to be held that he

Art. 9. Prosecution Bonds.

§ 1-109. Plaintiff's, for costs.—Before issuing the summons the clerk shall require the plaintiff to do one of the following:

1. Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.

2. Deposit two hundred dollars with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant a certificate to that effect.

3. File with him a written authority from a judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to cities and towns; provided, further, that cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (Rev., s. 450; Code, s. 209; R. C. c. 31, s. 40; C. C. P., s. 71; 1935, c. 398; C. S. 493.)

Cross References.—As to mortgage in lieu of bond, see § 1-130. As to bond allowed or guaranteed by surety company, see § 109-17. As to costs generally, see § 6-1 et seq.

Editor's Note.—The amendment of 1935 adds the two pro-
visions at the end of subsection (3), relating to cities and towns.

The object of the prosecution bond is not to secure the officers but to secure the defendant in the recovery of costs usually paid out. Waldo v. Wilson, 177 N. C. 461, 100 S. E. 182.

Who Can Take Bond. — The action of the Clerk in tak-
ing, proceeding under its provisions, or in refusing to do so, shall be ministerial. They may be taken by a deputy clerk, and are habitually taken by attorneys, who have authority from the clerks for that purpose, but are not their deputies. Shepherd v. Lee, 113 N. C. 585; 63 N. C. 591; Marsh & Co. v. Cohen, 68 N. C. 238, 283.

When Bond Not Given. — When the prosecution bond
§ 1-110. Suit as a pauper; counsel.—Any judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the preceding section. The court to which such summons is returnable may assign to the person suing as a pauper learned counsel, who shall prosecute his action. (Rev., ss. 451, 432; Code, ss. 210, 211; C. C. P., s. 72; 1868-9, c. 96, s. 2; C. S. 494.)

Local Modification.—Durham, Forsyth, Nash, Northampton: 1937, c. 381.

Cross References.—As to costs in suits in forma pauperis, see § 6-24. As to appeals in forma pauperis, see § 1-263.

Exemption Under Section.—This section is in the nature of an exception to the general rule in section 1-109. Dale v. Plessen, 119 N. C. 489, 492, 26 S. E. 27.

Undertaking Does Not Apply to Appeals.—The leave to sue as a pauper, under this section, is an exception in equity and does not extend in civil actions, beyond the trial in the superior court, his appeal being governed by section 1-288, which requires the sureties to give security for the costs of the appeal, but he may pay the fees as to the appeal due the officers of both courts for services rendered. Speller v. Speller, 119 N. C. 356, 26 S. E. 160. See Martin v. Chas-ter, 15 N. C. 96; Bailey v. Brown, 105 N. C. 127, 130, 10 S. E. 1054.

Court Has Discretion.—The right to sue as a pauper is a favor granted the plaintiff, and is in the discretion of the Court. Dale v. Plessen, 119 N. C. 489, 492, 26 S. E. 27.

§ 1-110. Suit as a pauper; counsel.—Any judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the preceding section. The court to which such summons is returnable may assign to the person suing as a pauper learned counsel, who shall prosecute his action. (Rev., ss. 451, 432; Code, ss. 210, 211; C. C. P., s. 72; 1868-9, c. 96, s. 2; C. S. 494.)

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a pauper does not raise the presumption that the at-
torney took the case for a contingent fee and was therefore
a party in interest. Allison v. Southern R. Co., 129 N. C.
230, 39 S. E. 91.

Where Plaintiff Assigns Interest Pending Action.—
Where a plaintiff, pending an action brought in forma
pauperis, assigns his interest in the land, which was the
subject of the action, the court will require the assignee
to give security, or it will withdraw the privilege given
to the assignor and dismiss the action. Davis v. Higgins,
91 N. C. 189, 51 S. E. 576; Allen v. winter, 121 N. C. 239, 50
S. E. 375. Cf. see § 1-211, paragraph 4.

Cited in Costello v. Parker, 194 N. C. 221, 139 S. E. 224.

§ 1-111. Defendant’s, for costs and damages
in actions for land.—In all actions for the recovery
or possession of real property, the defendant, be-
fore he is permitted to plead, must execute and file
in the office of the clerk of the superior court of
the county where the suit is pending, a bond in
advancing sufficient surety, in an amount fixed
by the court, not less than two hundred dollars,
to be void on condition that the defendant pays to
the plaintiff all costs and damages which the
latter recovers in the action, including damages
for the loss of rents and profits. (Rev. s. 453;
Code, s. 237; 1869-70, c. 193; C. S. 495.)

Cross References.—As to judgment by default final upon
failure of defendant to file undertaking or of his sureties
to justify, see § 1-211, paragraph 4.

§ 1-125. Relation to Other Sections of Code.—This section
and section 1-122 and the note thereto. Time in which to File Bond.—Where the complaint in an
action to recover the lands the defendant has also
pursued as vendee in possession. —Where a vendee is let into pos-
session of the lands the defendant has also
pursued as vendee in possession. Vendee in Possession.—Where a vendee is let into poss-
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property or its possession, upon the approval of the defendant's bond by the clerk of the Superior Court for continuing the suit without bond, the defendant must swear it is not necessary to file the bonds, before answer, required by this section, when he is in possession of and claiming title to land, the subject of the action, or to give the undertaking required, and his counsel certified that he was not worth the amount of the said undertaking, nor does section 350 [now § 109-29] authorize the party, of whom an undertaking may be required in any property whatsoever. (Rev., s. 454; Code, s. 257; 1869-70, c. 193; C. S. 496.)

Editor's Note. — This section appeared formerly as a part of section 323, already discussed. In reference to this proviso (now this section) the court said in Wilson v. Fowler, 110 N. C. 471, 10 S. E. 489: "The terms of the proviso are clear, explicit and exclusive. It declares 'that when it appears that the defendant was diligent in insisting upon his rights and has done nothing that could be regarded as a waiver thereof.'"

Art. 10. Joint and Several Debtors.

§ 1-113. Defendants jointly or severally liable.—Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recovers judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are not so joint, against the persons of the defendants served.

2. If the action is against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone.

4. If the name of one or more partners has, for any cause, been omitted in an action in which judgment has been rendered against the defendants named in the summons, and the omission was not pleaded in the action, the plaintiff, in case the judgment remains unsatisfied, may by court order require the partners served to give the certificate of counsel applies only to the action as then constituted, and not to any other possible action that might be brought by plaintiff for same or similar relief. Wilson v. Fowler, 110 N. C. 471, 10 S. E. 489.

Example of Sufficient Compliance.—In an action to recover land, this section was sufficiently complied with when the defendant made affidavit that he was not worth two hundred dollars in any property whatever, and was unable to give the undertaking required, and his counsel certified that he had examined his case and were of opinion he had a good defense to the action." Wilson v. Fowler, 110 N. C. 471, 10 S. E. 489.

Costs.—This section allowing a defendant in an action of ejectment to defend without giving bond, and section 1-288 allowing an appeal without bond, go no further than dispensing with the bond, and neither exempts the party from paying his own costs nor forbids his recovering costs. Speller v. Speller, 119 N. C. 356, 357, 26 S. E. 105; Justice v. Edgings, 72 N. C. 381; Lambert v. Kinney, 74 N. C. 348; Bailey v. Brown, 105 N. C. 127, 129, 10 S. E. 1054.

Art. 11. Actions to Enforce Rights of Parties.
all, upon a verdict in plaintiff's favor, a judgment is prop-
erly entered binding upon the partnership's joint property,
and upon the individual members served, but not individually
upon those not so served with process. Hancock v. South-
tract, 106 N. C. 278, 119 S. E. 364.

Same—Purpose of Section.—This section was intended to
prevent a partner, who was not served with the summons,
from benefiting under the judgment on the ground that
judgment had already been taken against his co-partner;
and so the cause of action was merged in the judgment, and
authorizes an action against him separately, provided the

§ 1-114. Summoned after judgment; defense.—
When a judgment is recovered against one or
more of several persons jointly indebted upon a
contract in accordance with the preceding section,
those who were not originally summoned to
answer the complaint may be summoned to show
cause why they should not be bound by the judg-
ment, in the same manner as if they had been
originally summoned. A party so summoned
may answer within the time specified denying the
judgment, or setting up any defense thereto
which has arisen subsequent to such judgment;
and may make any defense which he might have
made to the action if the summons had been
served on him originally. (Rev., ss. 456, 457;
Code, ss. 223, 224; C. C. P., ss. 318, 322; C. S. 498.)

Statute of Limitations May Bar Action.—Where an
action was begun against certain administrators and the
sureties on their bond, and one surety was not served with
summons and more than three years thereafter this latter
surety was served, it was held that a new action of limita-
tions was a bar to the action against the surety. Kocone v. Pelletier, 115 N. C. 233, 20 S. E. 391; See Rutsy v.
Claywell, etc., Co., 93 N. C. 301.

When Motion in Cause Proper.—Where a motion
is taken against two of three partners who are liable jointly
and severally, the proper method to enforce the liability of the
third partner is by an action against A. B. & Co., upon a bill of exchange, and C, who
was a secret partner in the firm, was not joined as defendant,
and the plaintiff afterwards, and more than three years after
the cause of action accrued, discovered that C was a partner
and instituted an action against him: Held, that the ac-
tion was barred by the statute of limitations. Navassa
Guano Co. v. Willard, 73 N. C. 521.

§ 1-115. Pleadings and proceedings same as in action.—The party issuing the summons may
demur or reply to the answer, and the party sum-
moned may demur to the reply. The answer and
reply must be verified in list cases and manner
and be subject to the same rules that apply in an
action, and the issues may be tried and judgment
given in the same manner as in action and en-
forced by execution if necessary. (Rev., ss. 458,
459; Code, ss. 225, 226; C. C. P., ss. 323, 324; C.
S. 499.)

Art. 11. Lis Pendens.

§ 1-116. Filing of notice of suit.—In action af-
fearing the title to real property, the plaintiff,
at or any time after the time of filing the com-
plain or when or any time after a warrant of at-
tachment is issued, or a defendant when he sets
up an affirmative cause of action in his answer
and demands substantive relief, at or any time
after the time of filing his answer, if it is in-
tended to affect real estate, may file with the
clerk of each county in which the property is sit-
uated a notice of the pendency of the action, con-
taining the names of the parties, the object of the
action, and the description of the property in that
county affected thereby. (Rev., s. 460; Code, s.
229; C. C. P., s. 90; 1917, c. 106; C. S. 500.)

Cross Reference.—As to execution, levy, and lien in at-
tachment, see § 1-449.

In General.—The general doctrine of lis pendens is famili-
ary and is firmly established. It may be stated to be that
When a person buys property pending an action of which
he has notice, actual or presumed, in which the title to it is
in issue, from one of the parties to the action, he is
bound by the judgment in the action, just as if he had
him whom he bought would have been. The rule is absolutely
necessary to give effect to the judgments of courts, be-
cause if it were not so held, a party could always defeat the
cause of action by bringing in an antecedent judgment of the
stranger, and the plaintiff would be compelled to commence
a new action against him, and so on indefinitely. Rollins v.
Henderson, 78 N. C. 42, 351.

The principle of lis pendens is that the specific property
must be so pointed out by the pleadings as to warn the
whole world that they meddle with it at their peril, and
the pendency of such suit duly prosecuted is notice to a
purchaser so as to bind his interest. Todd eto., Co. v. Out-
law, 79 N. C. 235, 239.

The established rule is that a lis pendens, duly prosecuted,
and not collateral, in the state courts, is a notice to the
purchaser so as to bind his interest by necessary to give
many instances very harsh in its operation; and one who
relies upon it to defeat a bona fide purchaser must under-
thand that his case is strictly just. Arrington v. Arring-
ton, 114 N. C. 153, 15 S. E. 678.

Section Similar to English and New York Statutes.—This
section is in substance a copy of 2 Victoria, which has re-
ceived a construction by the English courts. It is there
held that no right of attachment pending nisi prius shall
express notice, will now bind him unless it be duly reg-
istered. The provisions of the New York Code for the filing
of lis pendens, is similar to ours, and has received the
same construction as the English statute. Todd eto., Co.

Modifies Common Law Rule.—The common law rule,
was that the real estate to be affected by the judgment
or decree were situated in several counties, it would all be
bound by the lis pendens arising from the pendency of a
suit in the county in which only a part of it lies, since,"all persons be acquainted to a certain extent with the Courts of Justice"; whereas the plain purpose of this sec-
tion is to modify the rule so as to require notice in all
counties where there is any real estate. Collingwood v.
Brown, 105 N. C. 362, 368, 10 S. E. 668.

As to real property, there is but one rule of lis pendens in
North Carolina, and the provisions of this section are a
substitute for the common law. Collingwood v. Brown,
106 N. C. 362, 367, 10 S. E. 988.

Section Adequately Protects Rights of Trustor.—In a suit
attacking the validity of a foreclosure sale under a deed
of trust, a temporary order enjoining further transfer of
the property by the cestui que trust, the purchaser at the
sale, is properly dissolved, since plaintiff trustor has an
adequate remedy at law by filing notice of lis pendens in
accordance with this act and subsections 1 and 3 thereof.
Collingwood v. North Carolina Joint Stock Land Bank,
207 N. C. 229, 176 S. E. 745.

This section and § 1-449 are to be construed in pari ma-
teria, and where notice of levy of attachment on defen-
dant's land in a county has been given under the provi-
sions of § 1-449, by certification of the levy to the clerk
of the county, and publication of the notice in the pende-
ting the title to the property by the cestui que trust, the
attachment constitutes a lien superior to that of a judgment rendered in favor of an-
other, and a later judgment in the attachment proceed-
ings relates back to the filing and indexing of the at-
tachment, and where such notice under § 1-449 has been
given, the filing of lis pendens in the same county under
these provisions is unnecessary. Pierce v. mallard, 197 N. C. 679, 150 S. E. 342.

Jurisdiction of Court.—In order that the right to real
property and personal chattels may be affected by lis pendens, they must be within the jurisdiction of the court and subject to its power. Enfield v. Jordan, 119 U. S. 690, 6 S. Ct. 824, 29 L. Ed. 847.

Continuous Litigation.—In order for the doctrine of lis pendens to apply, there must be continuous litigation. Lee County v. Rogers, 132 N. C. 138, 19 S. E. 461.


Applies to Action in Another County.—Strangers to an action are not affected with constructive notice of an action involving the title to lands situate in a county other than that in which the action is pending. Unless the notice, lis pendens, is given under this section, Spencer v. Credle, 110 N. C. 68, 8 S. E. 910.

Action Not Affecting Title to Realty.—Where the mortgage is sold, and the action is to be had on the mortgage, the mortgagee may cure the mortgage and to set aside a deed of the mortgagee of lands brings an action to recover on the note securing the mortgage and to set aside a deed of the mortgagee. Enfield v. Jordan, 119 U. S. 225, 3 S. Ct. 197, 28 L. Ed. 220.

Registration as Notice of Pendency of Foreclosure Suit.—An action was instituted to foreclose a duly registered deed of trust in which the trustee and the cestuis and the owner of the equity of redemption by mesne conveyances, were made parties, and while the action was pending the owner of the equity sold the property. It was held that the duly registered deed of trust was constructive notice, not only of the lien, but also of the pendency of the foreclosure suit, since it would have been discovered by a prudent examiner, and therefore notice of the suit under this section was not required. Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438.

Cited in Pierce v. Mallard, 197 N. C. 679, 682, 190 S. E. 540.

§ 1-118. Effect on subsequent purchasers.—From the cross-indexing of the notice of lis pendens only in the pending action, the doctrine of lis pendens has no effect on a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice. (Rev., s. 462: Code, s. 229; C. C. P., s. 90; 1919, c. 31; C. S. 502.)

Editor's Note.—Previous to the adoption of section 1-117, regarding a cross index the filing of notice as provided in § 1-116 was all that was necessary for the protection of subsequent purchasers with notice. See Toms v. Warson, 66 N. C. 417, 419.

Judgment Requires Back to Beginning of Suit.—If a suit is pending against a person for certain property where cross-indexing is required in the judgment, that judgment relates to the commencement of the suit and binds subsequent purchasers. Briley v. Cherry, 13 N. C. 291, 8 S. E. 608; Martin v. Whitfield, 4 N. C. 266; Dancy v. Duncan, 56 N. C. 111, 116, 1 S. E. 455.

Fraudulent Purchaser of Lands.—Where the president of a corporation, a substantial owner of its shares of stock, has personally bought in the lands which the company is under a binding contract to convey, before suit brought to enforce the contract, and with full knowledge of the plaintiff's right, taken deed for same from his company, without notice of suit, and before complaint filed, he and his corporation are concluded from setting up the doctrine of lis pendens as a defense, and his purchase will be held ineffective and fraudulent as to the decree rendered and the rights established in the plaintiff's favor, for specific performance. Morris v. Basmight, 179 N. C. 256, 102 S. E. 389.

Purchase before Complaint Filed.—A purchaser of land after the filing of a lis pendens, but before the filing of the complaint in the action, is not charged with constructive notice of any defects in the title. Morgan v. Bostic, 132 N. C. 743, 751, 44 S. E. 639.

Filing or Service of Litigation.—The doctrine of lis pendens, as it ordinarily prevails, only affects third persons who may take title to lands after the nature of the claim and the property affected are pointed out with reasonable and sufficient description of the land to be affected to enable any person to locate said lands. The clerk shall be entitled to a fee of twenty-five cents for indexing said notice, to be paid as are other costs in the pending action. (Rev., s. 464; 1903, c. 472; 1919, c. 31; C. S. 501.)

Construed with Section 47-18.—Lis pendens and registration each have the purpose of giving constructive notice by the registration of the existence of a controversy in pari materia, and while the lis pendens statute do not affect the registration laws, the converse is not true. Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438.
takes it subject to the right of appeal and of the judgment which may be entered therein, and he is conclusively fixed with notice of the litigation. Rollins v. Henry, 76 N. C. 342; Dancy v. Duncan, 96 N. C. 111, 1 S. E. 455, Bird v. Gillis, 125 N. C. 76, 34 S. E. 136.


§ 1-119. Notice void unless action prosecuted.—The notice of lis pendens is of no avail unless it is followed by the first publication of notice of the summons or by an order therefor, or by the personal service on the defendant within sixty days after the cross-indexing. (Rev., s. 461; Code, s. 229; C. C. P., s. 90; 1919, c. 31; C. S. 503.)

Service Within 60 Days Required.—Where a party lives in a different county from the state, and claims as his bona fide purchaser, to affect him with notice of lis pendens the service of the summons or by an order therefor, or by the personal service on the defendant within sixty days after its filing. Powell v. Dail, 172 N. C. 261, 90 S. E. 194.

Cited in Pierce v. Mallard, 197 N. C. 679, 682, 150 S. E. 342.

§ 1-120. Cancellation of notice.—The court in which the said action was commenced may, at any time after it is settled, discontinued or abated, on application of any person aggrieved, on good cause shown, and on such notice as is directed or approved by the court, order the notice authorized by this article to be canceled of record, by the clerk of any county in whose office the same has been filed or recorded; and this cancellation must be made by an endorsement to that effect on the margin of the record, which shall refer to the order. (Rev., s. 463; Code, s. 229; C. C. P., s. 90; C. S. 504.)

Notice Continues Until Cancelled.—Where the suit has been prosecuted with proper diligence the lis pendens continues until the final judgment, or until it has been canceled under the directions of the court. Arrington v. Arrington, 114 N. C. 151, 159, 18 S. E. 351.

Loss or Destruction of Notice.—The mere loss or destruction of the notice will not affect its efficacy, if the statute has been fully complied with. Arrington v. Arrington, 114 N. C. 151, 159, 18 S. E. 351.

Same—When by Act of Party.—If the party, by any act of his own has, contrary to the usual course of the court, consented to the service of the summons on the defendant by giving up the defendant's copy of the notice of lis pendens, or by voluntarily leaving the defendant's copy of such notice of lis pendens in the hands of the clerk, it is the duty of the court to dismiss the action.

Cited in Threlkeld v. Macragnon Land Co., 198 N. C. 588, 589, 125 S. E. 266.

SUBCHAPTER VI. PLEADINGS.


§ 1-121. First pleading and its filing.—The first pleading on the part of the plaintiff is the complaint. It must be filed in the clerk's office at or before the time of the issuance of summons and a copy thereof delivered to the defendant, or defendants, at the time of the service of summons; provided, that the clerk may at the time of the issuance of summons on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, and a copy of such order shall be delivered to the defendant, or defendants, at the time of the service of summons in lieu of a copy of the complaint: Provided further, said application and order shall state the nature and purpose of the suit. The clerk shall not extend the time for filing complaint beyond the time specified in such order; except that when application is made to the court, under article forty-six of this chapter, for leave to examine the defendant prior to filing complaint and it is found that such examination of defendant is necessary to enable the plaintiff to file his complaint, and such examination is allowed, the clerk shall extend the time for filing complaint until twenty (20) days after the report of the examination is filed as required by § 1-571. When the complaint is not filed at the time of the issuance of the summons, the plaintiff shall, when he files complaint, likewise file at least one copy thereof for the use of the defendant and his attorney. When there are more than one defendant the clerk, may, by written notice to the plaintiff, require the filing of additional (not to exceed six) copies of the complaint within the time specified in such notice, not to exceed ten days. Such notice may be served by mailing to the plaintiff or his attorney of record. (Rev., ss. 465, 466; Code, ss. 206, 232, 238; C. C. P., s. 92; 1868-9, c. 76, s. 3; 1870-1, c. 42, s. 3; 1919, c. 304, s. 2; 1927, c. 66, s. 3; C. S. 505.)

Editor's Note. — By the amendment of 1919 a clause "otherwise the suit may, on motion, be dismissed" which originally appeared in the section was omitted, but subsequently was reinserted by the Consolidated Statutes. In changing other provisions of ch. 156 of the laws of 1919, this section in its original form was reenacted without change by the Extra Session of the Public Laws of 1929.


The act of 1927, ch. 66, not only materially enlarged the provisions of the statute but changed the time of the filing of the complaint. Prior to this amendment the complaint was to be filed on or before the return day of the summons, on pain of suit being dismissed at the cost of the plaintiff. After the change by the Extra Session of the Public Laws of 1929, prior to the amendment, the complaint was to be filed on or before the third day of the term to which the action was brought. See Hill v. Hotel Co., 188 N. C. 586, 588, 125 S. E. 266.

Similarity to Former Equity Practice. — The Code and the constitution authorize the granting or dening of a new complaint as to new defendant. Wilson v. Moore, 78 N. C. 558, 561; Staton v. Webb, 137 N. C. 35, 39, 49 S. E. 55. (Decided under the former law.) The summons no more precedes the complaint under the present law, save under the exceptional circumstances designated in the section as amended. Ed. Note.

New Complaint as to New Defendant. — A new or an amended complaint must be filed against a new defendant brought in subsequent to the filing of the original complaint. And a judgment by default for want of an answer where no such complaint is filed is irregular and void as being a nullity at law. Vass v. People's Bldg., etc., Ass'n. 91 N. C. 55, 56.

Extension of Time. — Prior to 1921, (the time when the Civil Code of procedure was restored) it was discretionary with the judge to allow the time for the service of summons to be extended beyond the time of filing for filing complaint; and the motion to extend the time of filing the complaint should be made before the judge, and not before the clerk. See Arrington v. Arrington, 125 N. C. 76, 34 S. E. 196. But this is no longer the rule. See Campbell v. Asheville, 184 N. C. 424, 114 S. E. 835.

Where the clerk of the court has extended the time for filing the complaint in accordance with this section, and the defendant has appealed to the Superior Court, it is within the sound legal discretion of the trial judge, given by § 1-152, to allow the complaint to be filed, and his sustaining
the clerk's order to that effect is an exercise of this dis-

I. IN GENERAL.

Logic and Precision of Common Law Not Discarded. —

As to a bill of particulars, see § 1-150. As to amendment

§ 1-122. Contents.—The complaint must con-

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary

The provisions of this section, in failing to state the title of the cause, the name of the county and parties, will not be considered as a verified complaint on the trial in the superior court, requiring the

Title of Cause. — A paper-writing introduced before a

For an eloquent expression on the abolition of the old

The plaintiff must state; and upon action with the same substantial certainty as was formerly required in a de-

Same Substantial Certainty as at Common Law a Requi-

same may go into the record and stand as a perpetual

The object of the Code was to abolish the different

Same — Motion to Dismiss Necessary to Prevent Exten-

motion requiring that the plaintiff shall state in a plain, strong

Cross Reference.

As to limitation of judgment to demand in complaint, see § 1-126. As to debt for duty on purchase of land, as noted, see § 1-156, subsection 5.

as to the pleading which are only

PARTIES.—A general designation of parties as the

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In O'Briant v. Bennett, 213 N. C. 400, 196 S. E. 326.


II. FORMAL PARTS OF COMPLAINT.

V. Statement of Consideration for the Purchase of Land.

III. STATEMENT OF FACTS CONSTITUTING THE CAUSE OF ACTION.

The rules of common law as to the pleading which are only the rules of logic, have not been modified by the Code.

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what are the proper issues, both as to form and to number. The principles of good pleading are retained in our present system. Hunt v. Eure, 189 N. C. 482, 127 S. E. 593, 603.

Defendant Must Not Be Left in Doubt.—The facts should be so stated as to leave the defendant in no doubt as to alleged cause of action against him, so that he may know what his defense must be. Hussey v. Norfolk, etc., R. Co., 98 N. C. 34, 3 S. E. 923.

Right to Demand Filing of Amended Complaint.—Several elements of damages may be alleged on one cause of action, or upon several causes of action, and the defendant must be required to file his answer. Jackson v. Bushue, 107 N. C. 599, 172 S. E. 196.

Sufficiency of the Facts.—If the facts stated in the complaint, together with those drawn into issue on the answer of the defendants, constitute a right to any relief whatever, the plaintiff is entitled to have it on the case as it was, without amendment. Jones v. Mial, 82 N. C. 252, 258.

Avemment of Willingness in Reciprocal Contract.—Where the plaintiff sues on a contract involving the performance of reciprocal acts between himself and the defendant, he must aver and show a readiness and willingness to perform on his part. Jones v. Mial, 79 N. C. 165.

Facts Warranted by the Evidence Should Be Alleged.—Under the new system, two causes of action are sought to be joined in the same complaint, the complaint must state such facts as would show that the two causes of action can be united under section 1-123. Allison v. Citizens' Bank Commissioners v. McPherson, 79 N. C. 524, 525; Citizens Bank v. Grady, 103 N. C. 106, 5 S. E. 196.

"A plain and concise statement of facts," within the meaning of this section, means a statement of all the facts necessary to enable the plaintiff to recover. By a "plain" statement of facts is meant a direct and positive averment of fact, which does not leave the existence of the fact to be inferred merely from the existence of some other fact. Commissioner v. McPherson, 79 N. C. 524, 525; Citizens Bank v. Grady, 103 N. C. 106, 5 S. E. 196.

Redundancy in pleading does not present quite the theoretical and technical problems posed by the subject of redundant evidence. Redundancy is that which is unnecessary to "a plain and concise statement of the facts constituting a cause of action," such as unnecessary repetition, and the detailed statement of evidential matters, however relevant the latter may be when presented upon the trial. Parrish v. Atlantic Coast Line R. Co., 221 N. C. 292, 298, 20 S. E. (2d) 299.

A party to an action is entitled as a matter of right to present the facts constituting his cause of action, and the facts constituting his cause of action, or defense, and nothing more. Patterson v. Southern Ry. Co., 214 N. C. 38, 42, 198 S. E. 364; Wadesboro v. Cox, 215 N. C. 708, 2 S. E. (2d) 876.

In any case where a party is entitled to present the material and essential facts constituting plaintiff's cause of action, as to so as to disclose the issuable facts determinative of plaintiff's right to relief, and should not contain collateral, irrelevant, redundant or evidential matter. Barron v. Cain, 216 N. C. 282, 4 S. E. (2d) 618.

Facts Must Be Stated, Not Conclusions or Evidence.—The code of civil procedure modifying the method of pleading, discards the old principle of pleading facts or circumstances constituting the cause of action must be pleaded and not the pleading's conclusion. The pleading must state every material fact as true as ever. With respect to the statement of these facts there has been no relaxation of the requisite in the new form, and no alteration from the old, except that the plaintiff need not aver in his pleading all the matter set forth in the complaint. Moore v. Hobbs, 79 N. C. 535, 537; Lasstler v. Roper, 114 N. C. 17, 19, 18 S. E. 946; Gossler v. Wood, 120 N. C. 69, 73, 27 S. E. 33.

A complaint which merely states a conclusion of law is demurrable both at common law and under the Code. Rountree v. Brinson, 98 N. C. 107, 3 S. E. 747.

Defenses Must Not Be Left in Doubt.—If it is alleged that the consideration for the debt or the note sued upon is value, and plaintiffs must not be left in doubt as to whether the consideration for the debt or the note sued upon is value. Jones v. Mial, 82 N. C. 252, 258; Lassiter v. Norfolk, etc., R. Co., 98 N. C. 34, 3 S. E. 923.

Relief Should Correspond to Proof.—Under this section a party is not restricted to the specific relief demanded by him, but may have any additional and different relief which the pleadings and facts proved show to be just and proper. Knight v. Houghtaling, 85 N. C. 17; McNeill v. Hodges, 105 N. C. 51, 11 S. E. 265; Randon v. North Carolina R. Co., 127 N. C. 110, 37 S. E. 155.

V. DEMAND FOR RELIEF.

Relief Prayed and Afforded.—It is the apparent purpose of the new system, while simplifying the method of procedure, to afford any relief to which the plaintiff may be entitled upon the facts set out in his complaint, although misconceived and not specially demanded in his prayer. Jones v. Mial, 82 N. C. 252, 258.

Relief Prayed Should Correspond to Proof.—The relief to be granted in an action does not depend upon that asked for in the complaint; but upon whether the matters alleged prove in fact, and are consistent with the petition, and not the prayer of the party. Knight v. Houghtaling, 85 N. C. 17; McNeill v. Hodges, 105 N. C. 51, 11 S. E. 265; Randon v. North Carolina R. Co., 127 N. C. 110, 37 S. E. 155.

What Determines the Measure of Relief.—Under the Code system the demand for relief is made wholly irrelevant, and that it is the case made by the pleadings and facts proved, and not the prayer of the party. The court must first determine the measure of relief to be administered, the only restriction being that the relief given must not be inconsistent with the procedure and facts proved. In other words, the court has adopted the old equity practice, when granting relief, the party to the relief granted, and this is so in the absence of any prayer for relief. Bryan v. Canady, 116 N. C. 579, 86 S. E. 584.

Party Not Limited to Specific Relief Prayed.—Under this section a party is not restricted to the specific relief demanded by him, but may have any additional and different relief which the pleadings and facts proved show to be just and proper. Knight v. Houghtaling, 85 N. C. 17; McNeill v. Hodges, 105 N. C. 51, 11 S. E. 265; Randon v. North Carolina R. Co., 127 N. C. 110, 37 S. E. 155.

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Alternative Relief.—The form of the prayer for judgment
§ 1-123

CH. 1. CIVIL PROCEDURE—PLEADINGS

is not material, and the plaintiff may unite two causes of action relating to the same transaction and obtain alternative relief. Herring v. Cumberland Lumber Co., 159 N. C. 382, 74 S. E. 1011.

V. STATEMENT OF CONSIDERATION FOR THE PURCHASE OF LAND.

See § 1-136 and clause 5 of § 1-313 and the notes thereto.

§ 1-123. What causes of action may be joined.—

The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—

1. The same transaction, or transaction connected with the same subject of action.
2. Contract, express or implied.
3. Injuries with or without force to person or property.
4. Injuries to character.
5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.
6. Claims to recover personal property, with or without damages for the withholding thereof; or, 7. Claims against a trustee, by virtue of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated.

In actions to foreclose mortgages, the court may adjudge and direct the payment by the mortgagor of any residue of the debt remaining unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor is personally liable for the debt secured; and if there is not enough to cover it, the court may adjudge payment of the residue of the debt remaining unsatisfied after a sale of the mortgaged premises, against the other person, and may enforce such judgment as in other cases. (Rev., s. 469; Code, s. 267; C. C. P., s. 126; C. S. 507.)

I. In General.
II. Causes of Action with Reference to Transaction, or Subject of Action.
III. Causes of Action in Contract.
IV. Causes of Action for Tort to Person or Property.
V. Must Affect All Parties and Have Same Venue.

Cross References.
As to parties generally, see § 5-57 et seq. As to who may be defendants, see § 1-69. As to improper joinder of causes of action as ground for demurrer, see § 1-127, subsection 5. As to section prohibiting deficiency judgments in foreclosures of purchase money mortgages, see § 45-36.

I. IN GENERAL.

See notes under §§ 1-69, 1-127.

The common law does not generally allow the joinder of causes of action of different natures because it leads to prolixity, the multiplication of issues and confusion. Gregory v. Hobbs, 93 N. C. 1, 4.

The purpose of this section is to extend the right of plaintiffs to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough so that a plaintiff may have against a defendant, so that the court may not be forced "to take two bites at a cherry," but may dispose of the whole subject of controversy and its incidents and corollaries in one action. Hamlin v. Tucker, 72 N. C. 502, 503; Livingston v. Tanner, 12 Barb. 486; Vandervoot v. Gould, 36 N. Y. 645; Gregory v. Hobbs, 93 N. C. 1, 3.

Joinder Not Mandatory but Permissive.—The provisions of this section are permissive. They are not mandatory to compel the joinder of separate causes of action arising out of the same transaction. Gregory v. Hobbs, 93 N. C. 1;
old system the lost or destroyed deed could only be estab-
lished in a court of equity, where a decree for title and
such other relief as might be proper could be made and
enforceable according to the principles of that court. Jennings
v. Reeves, 101 N. C. 474, 470, 7 S. E. 897.

Cited in Berger v. Stevens, 197 N. C. 234, 237, 148 S.
E. 244; Shuford v. Yarborough, 197 N. C. 150, 151, 147 S.
E. 892; Shemwell v. Lethco, 198 N. C. 346, 348, 151 S.
E. 729; Hodges v. Wilmington, etc., R. Co., 105 N.
C. 170, 171, 10 S. E. 917. For example in Hamlin v. Tucker, 72 N.
C. 502, it was held that a plaintiff may in the same complaint join as
separate causes of action: (1) the harboring and maintaining
of a wife; (2) the conversion of personal property belonging to
property, to which the plaintiff is entitled jure maritari; (3) induc-
ing the wife while harbored and maintained to execute
to defendant a deed for land, under which he had received
deeds, and (4) converting or selling certain mules, farming utensi-
ls, etc., set out in a marriage settle-
ment executed by the plaintiff and his wife. Hawk v. Pine
Builder Co., 141 N. C. 256, 63 S. E. 7.

Likewise in Young v. Young, 81 N. C. 92, the court held
that a complaint containing several causes of action, viz:
(1) to declare one defendant a trustee of land, (2) to re-
cover judgment of other defendants for purchase-value of
same, (3) and to recover possession of the land with
damages for withholding it, is not demurrable.

Stockholder’s Suit against Corporate Officers. — Where
the stockholders of a corporation have brought an action for
damages for their mismanagement and negligence in accept-
ing worthless paper, and inducing the plaintiffs to be-
come indorsers thereon to their loss and damage, and in
filing its answers they, as parties to the action, asked the
plaintiffs to dismiss their answer and to ask for a further
judgment to do so, the causes of action are properly joined,
one sounding in tort and the other being an
equitable right arising out of transactions connected
with the same subject-matter. Ayers v. Bailey, 105 N.
C. 209, 78 S. E. 66.

Suit against Defaulting Corporate Officer and Surety.—
A cause by the corporation and its surety for
suit against a defaulting officer and the surety or guarantor for his honesty
or fidelity is not objectionable as a misjoinder of parties and
causes of action, the alleged default of the principal having
occurred that created the surety’s liability within the terms
and conditions of its bond. Shuford v. Yarborough, 197
N. C. 150, 151 S. E. 834, distinguishing Clark v. Bonsol, 157
N. C. 270, 72 S. E. 954, and citing Carswell v. Talley, 192
N. C. 137, 133 S. E. 677. Shuford v. Yarborough, 197
N. C. 256, 125 S. E. 621; S. v. Bank, 193 N. C. 524, 137 S.
E. 933; Shuford v. Yarborough, 197 N. C. 150, 151, 147 S.
E. 584.

Actions on Insurance Policies. — In McGowan v. Life
Insurance Co., 141 N. C. 367, 54 S. E. 287, the complaint
alleged that the plaintiff had been induced to take fifteen
policies on her life from the corporation for the purpose of
providing for the support of her children by means of certain false and fraudulent
representations made to her by the defendant’s agents that
they were ten-year tontine policies; that after paying her
premiums and assessing the policies for ten years when she demanded
performance it was refused, and she discovered that the
policies did not mean what the defendant’s agents had represented to her.
It was held that the causes of action
properly joined were (1) a demand for judgment for the posses-
sion of the premiums paid for the policies, (2) a suit against the agents
of the defendant for damages arising out of a transaction connected with the
same subject of action. See also, Pretzelfelder & Co. v. Merchants
Inc., 116 N. C. 491, 54 S. E. 730, to Engrat Parol Trust on Land.—Where the
plaintiff in a suit to engraft a parol trust upon the title
unfavour of a husband and wife, alleges that they
had a mortgage on three tracts of land, the husband hav-
ing sold that in two of them and his wife in the other, and that
the husband for himself and as agent for his wife had
agreed with a third person that the latter should bid it in
at the sale and hold the title in trust for them upon
the following conditions: (1) that all the children of
of the alleged deceased trustee, the complaint was not de-
murtable upon the ground of a misjoinder of parties and
E. 734. In an action to recover land on the ground that the sale
under execution was void, it was held that all matter
of the title was in favor of a husband and wife, and
the cause of action was not joined with one founded on contract; but in
Hocutt v. Richmond Cedar Works, etc., R. Co., 105 N. C. 170, 10 S.
E. 917, this rule was stated and explained and so as to permit
such a joinder of action, provided they arose out of the same
transactions or subject of action. Hodgens v. Wakefield
Co., 135 N. C. 73, 47 S. E. 234; Richmond Cedar Works v. Roper
Co., 161 N. C. 603, 77 S. E. 770, 774. In an action on
all the cases of Logan v. Wallace, 76 N. C. 416, and
Doughty v. Atlantic, etc., R. Co., 197 N. C. 119, 110 S.
E. 916, it was broadened to state that a cause
of action founded on a tract of land could not be joined with one founded on contract; but in
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Co., 135 N. C. 73, 47 S. E. 234; Richmond Cedar Works v. Roper
Co., 161 N. C. 603, 77 S. E. 770, 774.
false arrest of the male plaintiff and abuse of process in
swearing out a peace warrant against him and his false
imprisonment, the defendant's demurrer on the ground of
misjoinder of parties and causes of action was properly
sustained and the case dismissed, the several causes of ac-
tion not affecting all the parties to the action as required
by this section and § 52-10, authorizing a married woman
to bring suit for personal injuries without the joinder of her husband. Sass v. Bullard, 199 N.
C. 562, 155 S. E. 248.

Scheme and Conspiracy to Defraud.—The complaint al-
lleged fraud and conspiracy on the part of defendants in-
cluding plaintiffs to sign a deed describing not only the property intended to be conveyed by plaintiffs, but also other property of such plaintiffs. The prayer was a motion for judgment for fraud and conspiracy to deprive plaintiffs of the purchase price of the property intended to be conveyed, which was to be paid in cash or secured by registered lien, defendant grantees exe-
cuted without notes, thereby defrauding and defendant attorney
wrongfully withheld one of the notes so executed, and prayed
for reformation of the deed and for judgment on the notes.
Held: Defendants' demurrer on the ground of
joinder of parties and causes of action was properly overruled, since
all the matters alleged arose out of the same transaction or
transactions connected with the same subject of action. Griggs v.

Warranties—Predecessors in Title.—A grantee of lands
against whom a recovery has been had for a part thereof
may sue his grantor for damages upon the covenant of
warranty in the deed. This is true not only of the express
warranty but of an implied warranty of quiet title. This
chain of title, separately or in the same action, the sub-
ject-matter being the same, our Code system not favoring
multiplicity of suits. Winders v. Southlander, 174 N.
C. 591, 159 S. E. 726.

Proceedings under § 59-16.—A complaint in proceedings by
the wife under § 50-16, for allowance for subsistence and
consul fees, with allegations that the husband had fraudu-
ently withheld his lands to his wife for a discharge of
her husband, to deprive the plaintiff of her marital rights, and
afterwards had grossly abused her and coerced her into ac-
cepting a deed of separation is good and a demurrer there-
to is improper. Where, however, the allegations are such
as to show that the trial court had jurisdiction in the action, the
plea of in forma pauperis does not prevent the issuance of

SPECIFIC PERFORMANCE AND ACTION FOR DAMAGES. — It is
well settled, a cause of action for specific performance may be
joined with one for damages resulting from a breach of the contract, or from a delayed performance, or from unauthorized performance, and the action for
injunction may be joined in one complaint. Bryan v. Stewart, 123
359, 55 S. E. 853.

A cause of action for a penalty for unreasonable delay in
delivery of goods may be joined with one for recovery of
the value of goods delivered. Doughty v. Atlantic,
etc., R. Co., 78 N. C. 22, 23; Hodges v. Wilmington etc.,
R. Co., 140 N. C. 604, 55 S. E. 191.

Claim for penalties against the same defendant may unite
several such causes of action in the same complaint.
Lykes v. Hughes, 116 N. C. 430, 437, 21 S. E. 971;
Carter v. Wilmington, etc., R. Co., 126 N. C. 437, 36 S.
E. 487.

IV. CAUSES OF ACTION FOR TORT TO PERSON
OR PROPERTY.

Injury to Person and Property May be United.—Causes
of action for personal injuries by assault and battery, or
property, or to either, may be united, and different
causes of action for such injuries may be united against
one or more defendants, provided that each of such causes
affects all the parties to the action. Howell v. Fuller, 151 N.
C. 315, 66 S. E. 131.

Trespass and Assault.—A count in trespass for forcibly
entering the plaintiff's close may be joined with a count
for assault and battery. Flynn v. Anderson, 31 N. C.
328.

Destroying Property and Trespass.—An action for
wrongfully destroying a building may be joined with a count
for trespass in entering the plaintiff's premises. Rip-
pee v. Miller, 46 N. C. 479.

Trespass Vi Et Armis and on the Case.—In an action
for false imprisonment, under the Code, the common-law
actions of trespass vi et armis and of trespass on the case
may be joined in one complaint. Bryan v. Stewart, 123
359, 55 S. E. 853.

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delivery of goods may be joined with one for recovery of
the value of goods delivered. Doughty v. Atlantic,
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the value of goods delivered. Doughty v. Atlantic,
etc., R. Co., 78 N. C. 22, 23; Hodges v. Wilmington etc.,
R. Co., 140 N. C. 604, 55 S. E. 191.
properly sustained, since one of the causes sounds in contract while the others sound in tort, and since the causes alleged do not affect all the parties to the action. Ellis v. Balk, 117 N. C. 567.

Injuries to Father and Son by the Same Negligence. — The joinder of a cause of action brought by a son, an employee, to recover of his employer damages for personal injury alleged to have been caused by the latter's negligence, with that of the father to recover for the loss of the son's services alleged to have been caused by the same negligence, is proper. A party may have two separate causes of action, one for a personal injury and the other for loss of services, and may sue either or both. Alford v. Atlantic, etc., R. Co., 160 N. C. 81, 181 S. E. 1.

Actions Against Different Insurance Companies. — Where a person was insured in several companies, and each policy limited the amount of his recovery thereunder to the portion of the loss which the policy should bear to the total insurance, it was proper, in an action to recover for a loss, to make each company a party defendant. Pretzfelder & Co. v. Merchants' Ins. Co., 116 N. C. 491, 21 S. E. 605.

Action against Partner. — A cause of action against one on a contract as a partner may be joined with a cause of action against such partner individually. Logan v. Wallis, 76 N. C. 415.

Actions upon Administrator's and Clerk's Bonds. — A complaint in which are joined two causes of action, one upon a clerk and one upon an executor, agrees irrevocably to have it tried in a place named. Thigpen v. Cot- 
tons Mills, 151 N. C. 97, 63 S. E. 750.

A appearing in the same cause of action is a full and sufficient defense to the action. Thigpen v. Cot-tons Mills, 151 N. C. 97, 63 S. E. 750.

Joinder of Contract and Tort Actions against Different Defendants. — A cause of action against one defendant, not being delivered, agrees irrevocably to have it tried in a place named. Thigpen v. Cot-tons Mills, 151 N. C. 97, 63 S. E. 750.

Action against Two Carriers. — Where a carrier has accepted a shipment beyond its own line, and upon notification of its loss a party to have it restored to the starting point, and delivery is made there in bad condition, a joinder of causes of action against the two de-fendants to recover damages to the shipment while in their possession is proper. Lyon v. Atlantic, etc., R. Co., 165 N. C. 143, 81 S. E. 1.

Joinder of Contract and Tort Actions against Different Parties. — A party may have one or more of several causes of action stated in the complaint, and answer to the residue. (Rev. C. S. 1907, ss. 470, 471; Code, ss. 238, 246; C. C. P., ss. 94, 103; C. S. 508.)

Cross Reference. — As to counterclaim in answer, see § 1-140.

Applies to Several Causes of Action Not to Several Allegations. — A party may have one cause of action not to be joined with another. See § 1-126, infra, as to the general rule. A party may, for example, assert that A wronged him, and also that B wronged him, and also that C wronged him, in the same cause of action. Such allegations are not joined. The joinder of two causes of action is proper. Thigpen v. Cot-tons Mills, 151 N. C. 97, 63 S. E. 750.


§ 1-125. When defendant appears and pleads; extension of time; clerk to mail answer to plain-tiff.— The defendant must appear and demur or answer within thirty (30) days after the service of summons upon him, or within thirty (30) days after the final determination of a motion to remove as a matter of right, or after the final determination of a motion to dismiss upon a special appearance, or after the final determination of any other motion required to be made prior to the filing of the answer, or after final judgment overruling demurrer, or after the final determination of a motion to set aside a judgment by default under § 1-220, or to set aside a judgment under § 1-142. If the director of a court of record overrules a demurrer to the complaint, then the defendant shall have thirty (30) days after the final day fixed by such extension in which to plead. The clerk shall not extend the time for filing answer or demurrer more than once nor for a period of time exceeding twenty days except by consent of parties. The defendant shall, when he files answer, likewise file at least one copy thereof for the use of the plaintiff, and his attorney; and the clerk shall not receive and file any answer until and unless such copy is filed therewith. The clerk shall forthwith mail the copy of answer filed to the plaintiff or his at-torney of record. This section shall also apply to all courts of record inferior to the superior court, where any defendant resides out of the county from which the summons is issued, and in such case the court of record inferior to the superior court shall fix such return date at least three (3) days. (Rev. 1937, ss. 473; Code, ss. 207; 1971, ch. 42, s. 4; 1919, c. 304, s. 3; Ex. Sess. 1921, c. 92, s. 1, par. 3; 1927, c. 66, s. 4; 1935, c. 267; C. S. 509.)

Cross Reference. — As to judgment by default final, see § 1-211. As to judgment by default and inquiry, see § 1-212. As to extension of time for filing of answer or by judge upon such conditions as the court may order, see § 1-126. As to provisions on summons, see sections 1-98 et seq. 1 N. C. L. Rev. p. 9 et seq.

For an analysis of summons in inferior courts, see § 1-126.

Editor's Note. — This section underwent material changes both in its phraseology and substance by every amendment since 1920, cited at the end thereof. As it originally stood in the Consolidated Statutes, it required that the defendant must appear and demur or answer within twenty days after the return day of the summons, and in case of extension of time for the filing of the complaint, twenty days from the filing of such complaint with an authority in the clerk to extend the time for filing the answer or demurrer for good cause shown; otherwise the defendant would be the judge of the case.

By the laws of 1921 (Ex. Sess. 1921, ch. 92, sec. 1, par. 3), these provisions were so framed, as to allow the filing of the answer or demurrer twenty days after service of complaint, or within twenty days after the final determina-tion of a motion to remove as a matter of right.

The same amendment inserted a provision to the effect that in case the complaint was not served, for good cause shown, the clerk may extend the time to a day certain; and a limitation upon the power of the clerk not to extend beyond twenty days after service of the complaint upon each of the defendants. (To this latter effect see, Battle v. Mercer, 187 N. C. 437, 122 S. E. 4; Lerch v. McKinne, 185 N. C. 244, 119 S. E. 189, where it was said that this limitation is a material part of the statute the object of which is to give the defendant twenty days after he is in-formed of the complaint.)

The amendment of 1927 changed the bases of the time within which the demurrer or the answer was to be filed. While formerly this was dependent upon the return day of the summons and the summons was served being time within which the defendant was required to file for the section as amended, the return day of the summons has no bearing upon the time for filing the answer or the demurrer, the basis of such time now being the service of the summons. As to changes wrought into section 1-125 fixing the time of filing the complaint, see section 1-89 relative to the service and return of process.

This amendment also increased (from twenty to thirty days)
the number of days within which the answer may be filed where the time is extended for the filing of the complaint. The time for filing an answer may be extended by the court, but such extension once is also new. So also is the requirement for filing a copy of the answer for the use of the plaintiff.

The Act of 1927, ch. 132, was to amend an amendatory act of 1925, ch. 150 (1925, c. 150, § 1-129) but did not affect any part of this section individually.

The amendment of 1935 added the last sentence of the section relating to courts to which it is applicable.

Note

1-120. Contrary to § 1-129. Construing the acts amendatory of this section and section 1-140 together there is no repugnancy between them so as to repeal by implication the provision of the latter, that an answer of defendant setting up a colorable defense, or a demurrer to any pleading, if of record, is served on the plaintiff or his attorney. Williams-Fulgren Lumber Co. v. Welch, 197 N. C. 249, 148 S. E. 250. Heffner v. Jefferson Standard Life Ins. Co., 214 N. C. 73, 195 S. E. 292.

Motion to Dismiss on Special Appearance.—Defendant mak- ing a special appearance and moving to dismiss is entitled to the right to extend the time for filing of plaintiff's motion for judgment by default. Bank of Fife- hurst v. Derby, 215 N. C. 669, 2 S. E. (2d) 875.

Extension of Time. — It has been held that the power of court to extend the time for filing of the complaint in which to answer under a misapprehension of the law or of any other act is neither affected nor curtailed by the provisions of this section. See McNair v. Yarbrough, 186 N. C. 111, 118 S. E. 913; Roberts v. Merritt, 189 N. C. 194, 126 S. E. 912; Edwards v. Harrell, 174 S. E. 919.


Same.—Consent of Defendant. — The clerk has authority, upon request of the defendant, to extend the time for filing the answer beyond the twenty days allowed by this section. Guedon v. Merrimon, 122 N. C. 731, 29 S. E. 321; United, etc., Baptist Church N. E. Conference v. Meeke, 122 N. C. 790, 796, 29 S. E. 781.

Same.—Beyond Time Requested. — Where a defendant has acted within the time allowed him by law to file his motion to dismiss, and the answer of the defendant, instead of extending the time for filing the answer, extends the time for filing of the complaint, though under a misapprehension as to the statutory time he has requested the clerk to allow him two weeks in which to file his answer, this assignment of error is not reversible. See Stevens Lumber Co. v. Arnold, 179 N. C. 269, 102 S. E. 409.

Same.—On Appeal. — The defendant against whom the judgment by default has been rendered, may on appeal apply to the judge for an extension of time. Brooks v. Weatherby, 105 N. C. 655, 11 S. E. 764.

Same.—Modification of Order at Subsequent Term. — An order extending time for defendant to plead, and providing that, in case he did not do so within the time limited, judgment by default should be entered, did not make such order conclusive as to affecting rights and interests of the parties. If not made so by defendant's consent to entry of such order, and hence it may be modified by another judge at a subsequent term. See Brooks v. Merrimon, 122 N. C. 731, 30 S. E. 321; United, etc., Baptist Church N. E. Conference v. United, etc., Baptist Church, N. W. Conference, 158 N. C. 564, 74 S. E. 14; Cook v. Bank, 131 N. C. 96, 42 S. E. 837.

Same.—Sufficient with Order. — If defendant prays time to answer and afterwards within the time he answers, denying combination and demurs for the residue, that is sufficient compliance with the order of deJohn v. Burton, 3 N. C. 127.

Plaintiff May Have Judgment by Default. — If the complaint is filed in compliance with section 1-123, and the defendant fails to appear and answer at the same term, plaintiff may have a judgment by default. Brown v. Rhinehart, 112 N. C. 772, 775, 16 S. E. 840.

§ 1-120. Contrary to § 1-129. Construing the acts amendatory of this section and section 1-140 together there is no repugnancy between them so as to repeal by implication the provision of the latter, that an answer of defendant setting up a colorable defense, or a demurrer to any pleading, if of record, is served on the plaintiff or his attorney. Williams-Fulgren Lumber Co. v. Welch, 197 N. C. 249, 148 S. E. 250. Heffner v. Jefferson Standard Life Ins. Co., 214 N. C. 73, 195 S. E. 292.

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Same.—Modification of Order at Subsequent Term. — An order extending time for defendant to plead, and providing that, in case he did not do so within the time limited, judgment by default should be entered, did not make such order conclusive as to affecting rights and interests of the parties. If not made so by defendant's consent to entry of such order, and hence it may be modified by another judge at a subsequent term. See Brooks v. Merrimon, 122 N. C. 731, 30 S. E. 321; United, etc., Baptist Church N. E. Conference v. United, etc., Baptist Church, N. W. Conference, 158 N. C. 564, 74 S. E. 14; Cook v. Bank, 131 N. C. 96, 42 S. E. 837.

Same.—Sufficient with Order. — If defendant prays time to answer and afterwards within the time he answers, denying combination and demurs for the residue, that is sufficient compliance with the order of deJohn v. Burton, 3 N. C. 127.

Plaintiff May Have Judgment by Default. — If the complaint is filed in compliance with section 1-123, and the defendant fails to appear and answer at the same term, plaintiff may have a judgment by default. Brown v. Rhinehart, 112 N. C. 772, 775, 16 S. E. 840.
Discretion of the trial judge to permit the defendant to answer after overruling a demurrer to the complaint, though the objection may not be taken advantage of by demurrer on appeal. — The refusal to hold a demurrer or answer frivolous and to render judgment thereon is not appealable (Walters v. Starnes, 118 N. C. 842, 24 S. E. 713; Abbott v. Hermann, 196 N. C. 585, 150 S. E. 271, where it was held that the defendant was entitled to an injunction); where the action of the judge of the Superior Court in passing upon the demurrer or answer to the court in refusing to strike out the defendant's answer as sham and frivolous, under this section, is upon a matter of law requiring exception thereto the defendant has a right of appeal to the Supreme Court. Wells v. Lassiter, 200 N. C. 470, 157 S. E. 434.

The Superior Court has the power and authority to determine on appeal the order of the clerk of the court in refusing to strike out the defendant's answer on the ground that it was sham and frivolous, under this section. Wells v. Lassiter, 200 N. C. 470, 157 S. E. 434.


§ 1-127. Grounds for.—The defendant may demur to the complaint when it appears upon the face thereof, either that:
1. The court has no jurisdiction of the person of the defendant, or of the subject of the action; or,
2. The plaintiff has not legal capacity to sue; or,
3. There is another action pending between the same parties for the same cause; or,
4. There is a defect of parties plaintiff or defendant; or,
5. Several causes of action have been improperly joined; or,
6. The complaint does not state facts sufficient to constitute a cause of action. (Rev., s. 474; Code, s. 239; C. C. P., s. 95; C. S. 511.)

I. In General.

II. Lack of Jurisdiction.

III. Lack of Legal Capacity.

IV. Pendency of Another Action.

V. Defect of Parties.

VI. Misjoinder or Merojoinder of Several Causes of Action.

VII. Failure to State Sufficient Facts.

Cross Reference.
As to objection by answer where grounds for demurrer do not appear on face of complaint, see § I-133.

IN GENERAL

All Demurrers Special.—Under our practice all demurrers are special, and serve only for the causes specified in this section. Shaffer v. Morris Bank, 201 N. C. 415, 417, 160 S. E. 481.

Demurrer Does Not Admit Conclusions of Law.—A demurrer challenges the sufficiency of the pleading, taking as true the facts alleged and the relevant inferences of facts deducible therefrom, but the demurrer does not admit inferences or conclusions of law. Cathey v. Southwestern Const. Co., 218 N. C. 525, 11 S. E. (2d) 571.

Defect Must Appear on Face of Complaint.—Demurrer to the jurisdiction on ground that summons was issued out of a recorder's court to another county in a action ex contractu involving less than $200,000, is bad as a pleading, since the defect does not appear on the face of the complaint. Four County Agricultural Credit Corp. v. Satterfield, 218 N. C. 296, 19 S. E. (2d) 914.

Enumeration of Grounds Exclusive.—The enumeration in this section of the grounds upon which a demurrer may be based is exclusive; the ground thus specified is the only ground which shall be considered when the demurrer is a plea to the jurisdiction of the court. Four County Agricultural Credit Corp. v. Satterfield, 218 N. C. 296, 19 S. E. (2d) 914.

Plea to the jurisdiction of the court is a plea to the cause of action set out in the complaint. Williams v. Cooper, 222 N. C. 589, 24 S. E. (2d) 844.

Motion Ore Tenus.—A motion which is demurrable on this ground may also be taken advantage of by a motion ore tenus. Tucker v. Baker, 86 N. C. 1, 3. See sec. 1-134. No demurrer to the jurisdiction of the court in an action ex contractu involving less than $200,000 is bad as a plea to the cause of action, since the demand is not by plea but by motion ore tenus. Dunn v. Barnes, 73 N. C. 273.

 objsions Waived.—All objections except those on the ground that the court has no jurisdiction of the person of the defendant or the subject matter of the action, and that the complaint does not state facts sufficient to constitute a cause of action, are waived unless they are taken by demurrer or answer. But the exceptions referred to may be taken advantage of by demurrer on appeal to the appellate court. Clements v. Rogers, 91 N. C. 63, 64; Raleigh v. Hatcher, 220 N. C. 613, 18 S. E. (2d) 207. See sec. 1-134 and notes thereto.

Same.—No Cause Stated.—The objection that the complaint states no cause of action or that the court has no jurisdiction to make the complaint more definite and certain, and not by demurrer. Jones v. Henderson, 147 N. C. 120, 60 S. E. 854; Allen v. Carolina Company of R. Co., 120 N. C. 548, 27 S. E. 76. See § 1-133, and notes thereto.


Alternative, Argumentative, or Hypothetical Allegations.—That a complaint is "argumentative, hypothetical, and in consistency of Causes.—A complaint is not always demurrable because two alleged causes of action are to some extent inconsistent. Worth v. Knickerbocker Trust Co., 132 N. C. 243, 67 S. E. 907.

Inconsistency of Causes.—A complaint is not always demurrable because two alleged causes of action are to some extent inconsistent. Worth v. Knickerbocker Trust Co., 132 N. C. 243, 67 S. E. 907.

Inability to Demand for Judgment.—Any inutility in the demand for judgment in a complaint is not ground for demurrer, and must be disregarded when the sum demanded, and how it is due, sufficiently appear from the allegations and complaint. Dunn v. Barnes, 73 N. C. 273.

By filing answer defendants waive right to demurrer except for want of jurisdiction or for failure to state the remedy of a defendant desiring a more definite statement of the alleged negligence is by motion to make the complaint more definite and certain, and not by demurrer. Jones v. Henderson, 147 N. C. 120, 60 S. E. 854; Allen v. Carolina Company of R. Co., 120 N. C. 548, 27 S. E. 76. See § 1-133, and notes thereto.

Motion to Make More Certain.—Where a pleading is indefinite and uncertain, it is not subject to demurrer, but the proper remedy is to make the pleading more certain. Seaboard Air Line R. Co. v. Main, 132 N. C. 445, 41 S. E. 930.

The same rule applies where the complaint does not fully state the terms of the contract sued on. Wood v. Kincare, 144 N. C. 393, 57 S. E. 4.

Where a complaint alleging negligence states a cause of action the remedy of a defendant desiring a more definite statement of the alleged negligence is by motion to make the complaint more definite and certain, and not by demurrer. Jones v. Henderson, 147 N. C. 120, 60 S. E. 854; Allen v. Carolina Company of R. Co., 120 N. C. 548, 27 S. E. 76. See § 1-133, and notes thereto.


III. Lack of Legal Capacity.

IV. Pendency of Another Action.

V. Defect of Parties.

VI. Misjoinder or Merojoinder of Several Causes of Action.

VII. Failure to State Sufficient Facts.

Cross Reference.
As to objection by answer where grounds for demurrer do not appear on face of complaint, see § I-133.

I. In General.

II. Lack of Jurisdiction.

III. Lack of Legal Capacity.

IV. Pendency of Another Action.

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I. In General.

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VII. Failure to State Sufficient Facts.

Cross Reference.
As to objection by answer where grounds for demurrer do not appear on face of complaint, see § I-133.

I. In General.
in this state, the plea to the jurisdiction should be overruled. Southerland v. Harrell, 204 N. C. 675, 169 S. E. 423.

Demurrer for Want of Proper Service of Summons.—When a defendant wishes to demur to the jurisdiction of the court for the want of proper service of summons on him, he must enter a special appearance for that purpose and confine his demur to that objection alone; and when this section the defendant may demur to the complaint when it appears upon its face, the court had no jurisdiction of the person of defendant, and the right to dismiss an action for want of jurisdiction by entering a special appearance for the purpose is included in the rule. Smith v. Haughton, 206 N. C. 587, 588, 174 S. E. 204.

III. LACK OF LEGAL CAPACITY.

In General.—Demurrer lies where a partnership does not show a right to sue, 13 O. S. 210; where it appears upon the face of the pleading that plaintiff suing as a corporation does not show a right to sue, 13 O. S. 210; where it appears upon the face of the pleading that plaintiff suing as an executor without showing authority to act as executor, 3 Abb Pr. 119; and where it appears upon the face of the pleading that plaintiff suing as a corporation does not show a complete title to sue as executor, 26, How. Pr. 15; and that incapacity to sue may arise from want of jurisdiction upon the same subject-matter, cases between the same parties, and that incapacity to sue may arise from want of jurisdiction over the subject-matter of the action. Dailey Motor Co. v. Reeves, 181 N. C. 260, 114 S. E. 175.

Under this section the defendant may demur to the complaint when it appears upon its face, the court had no jurisdiction of the person of defendant, and the right to dismiss an action for want of jurisdiction by entering a special appearance as to the merits, waiving the objection as to jurisdiction, and the defendant may demur to the complaint when it appears that the court has no jurisdiction of the subject-matter of the action. Dailey Motor Co. v. Reeves, 181 N. C. 260, 114 S. E. 175.

Must Appear on the Face of Complaint.—Unless the lack of legal capacity appears on the face of the complaint, a demurrer cannot be sustained based on that objection. Fisher v. Traders' Mut. Life Ins. Co., 126 N. C. 217, 219, 48 S. E. 667.

Action for Death by Wrongful Act.—Where an action for wrongful death is instituted by an administrative official appointed by the court of another state, the defect may be taken by demurrer, since such plaintiff does not have legal capacity to sue and the complaint does not state facts sufficient to constitute a cause of action. Menil v. Hazlewood, 218 N. C. 215, 10 S. E. (2d) 673.

IV. PENDENCY OF ANOTHER ACTION.

In General.—The character of the prior action is not material if all full relief could have been given therein, 16 Barb, 461; but if it was for relief, which could not be granted in the action demurred to, the demurrer will not be sustained. 5 N. Y. 35.

Pendency in This State Prerequisite.—Upon a demurrer on the ground of pendency of action, it must appear that the claim, or one of the causes of action, is pending in the courts of this state, and not elsewhere, or that the court is competent to render judgment on the claim. Co. v. Hanes, 162 N. C. 46, 47, 77 S. E. 1101; Ridley v. Seaboard, etc., R. Co., 118 N. C. 956, 24 S. E. 730; Sloan & Co. v. McDowell, 75 N. C. 164, 5 S. E. 2d, in another county.—A demurrer to a complaint, setting up the prior pendency in another county of an action upon the same subject-matter between the same parties, will be sustained, under this section, and when such action was not so pending in the pleading objection to the pendency of the second action may be taken by answer. Allen v. Salley, 179 N. C. 147, 171 S. E. 545.

Availed of by Demurrer or Answer.—If the pendency of the former action appear on the face of the complaint, it may be availed of by demurrer, or by answer. Allen v. Salley, 179 N. C. 147, 148, 101 S. E. 545; Curtis v. Piedmont Lumber, etc., Co., 109 N. C. 401, 13 S. E. 494; Reed v. Carolina Mtg. Co., 207 N. C. 27, 175 S. E. 515.

Conclusiveness of Prior Judgment.—Under this section the rights of the plaintiff are remitted to a prior judgment, and the right to dismiss an action for want of jurisdiction by entering a special appearance as to the merits, waiving the objection as to jurisdiction, and the defendant may demur to the complaint when it appears that the court has no jurisdiction of the subject-matter of the action. Dailey Motor Co. v. Reeves, 181 N. C. 260, 114 S. E. 175.

V. DEFECT OF PARTIES.

As to joinder of parties, see sec. 1-70 and notes.

Defect of Necessary Parties.—When a substituted trustee brings an equitable action to reform a deed of trust and certain mortgage notes which are negotiable and the holder of these notes is not parties plaintiff a demurrer may be sustained. First Nat. Bank v. Thomas, 204 N. C. 590, 169 S. E. 189.


The rule of the common law requiring the non-joinder of defendants actions ex contractu to be pleaded and maintained, has been changed, and the omission of a necessary party defendant may, under this section be taken advantage of by demurrer when the defect appears upon the face of the complaint. Merwin v. Cooper, 104 N. Y. 647, 50 N. Y. St. 669. A plea alleging want of jurisdiction is a sham plea. The objection must be raised by demurrer. Flack v. Dawson, 69 N. C. 49.

The non-joinder of parties plaintiff may not be taken advantage of under a general issue. It must be raised by demurrer. Lewis v. McNatt, 65 N. C. 63.

A motion to dismiss the action is an inappropriate method of raising the question of capacity to sue. This issue must be raised by a demurrer. Davidson v. Eims, 67 N. C. 222.

How Defect of Party Cured.—Where there is a defect of parties, the question may be raised by demurrer, and when so raised the defect may be cured by making the lacking party a party to the action. Graves v. Barrett, 126 N. C. 207, 27 S. E. 511.

Same—Correction of Misjoinder of Parties.—A misjoinder of parties plaintiff may upon demurrer or motion be corrected by taxing the plaintiff with such costs as are incurred by the misjoinder. Pritchard v. Mitchell, 139 N. C. 54, 56, 51 S. E. 783.


A motion to dismiss the action is an inappropriate method of raising the question of whether the plaintiff has no corporate capacity.—In a suit against a railroad company, it may be designated as a company by its corporate name, without an averment of its corporate capacity, and if this is disputed, it should be by answer and not by demurrer. Stanley v. Richmond, etc., R. Co., 89 N. C. 331.


VI. MISJOINDER OF SEVERAL CAUSES OF ACTION.

As to what causes may be joined, see sec. 1-123, and the notes thereto.

What Constitutes Misjoinder.—A complaint in an action which is not so prolix as to mislead or confuse the defendants or to conceal or obscure, by its elaboration or redundancy of the facts, the real character of the transaction, or the matter alleged is not held to be a misjoinder. Where matters alleged arise out of one and the same transaction, or series of transactions, forming one course of dealings, all tending to one end, narrating the transaction as a whole.
The cause stated is not objectionable as multifarious. Lee v. Thornton, 171 N. C. 209, 88 S. E. 232.

It does not lie on this ground when causes of action which may be stated in one pleading, but in no case separately stated, have been improperly mingled in one count, 46 N. Y. 173; the remedy is by motion, 14; 20 O. S. 144; 6 Kas. 547; nor where the petition (or complaint) contains more than one cause of action, 30 O. S. 308; 13 Kas. 351; nor where the petition (or complaint) states a single cause of action, 32 N. Y. 399, on the ground that it fails to state a cause of action, 199 N. C. 375, before the pleading in its entirety, it is sufficient in one or more of its parts that the demurrer is that the complaint sucd on was a wagering game, and no recovery could be had under § 16-3, and two causes of action are alleged. If one cause of action is good, the demurrer should be overruled. Meyer v. Fenner, 195 N. C. 476, 146 S. E. 82.

Same—Motion to Make More Certain.—Where the several causes of action are of such a nature that they can be prop- erly joined under section 1-123, but they are not put together in a very logical way, the proper method of taking advan- tage of the defect is not by demurrer but by a motion to make more certain and definite. State v. McCanless, 193 N. C. 200, 206, 136 S. E. 371.

Procedure—Pleas—Demurrer.—The purpose of this section seems to be to give an op- portunity to ask for an amendment when a defect admits of cure, or permits further costs to be avoided if the defect is incurable, since the party, upon the particulars being in- quired of, may become satisfied of the invalidity of his cause of action and discontinue further proceedings. Thompson v. Poovey, 65 N. C. 430, 433.

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Upon an appeal from a judgment overruling a demurrer to the complaint the merits of the controversy are not presented, and the court will determine only whether a cause of action has been sufficiently alleged. Star Furniture Co. v. Carolina Co., et al., 195 N. C. 636, 143 S. E. 242.

Strictness of the Requirement.—In Love v. Commissioners, 64 N. C. 706, the court said: "It is so easy to specify the ground of objection that the court is not disposed to relax the rule. There is no use in having a scribe unless you cut up your brief and boggle, 85 N. C. 203; Allford v. McCormick, 90 N. C. 159.

A demurrer that "the complaint states no cause of action whatever" against the defendant, will be disregarded. It must distinctly specify the grounds of objection to the complaint. Goss v. Walker, 90 N. C. 149.

A demurrer is also insufficient which states generally that "there is a defect of parties" or that plaintiff has no legal capacity to sue. 9 Misc. N. Y. 91.

Motion to Dismiss Must Also Specify Grounds.—A motion to dismiss an action because the complaint does not state facts sufficient to constitute a cause of action is a demurrer, and should be disregarded unless it states the particular defect of the alleged defect. Elam v. Barnes, 110 N. C. 73, 148 S. E. 621.

Demurring to Some Allegations and Replying to Others.—The latter sentence of this section clearly refers to a complaint containing several causes of action; or an answer taking two distinct grounds. Hence a party may not demur to some of the allegations supporting the same cause of action and reply to others. Ransom v. McClesky, 64 N. C. 706, the court said: "It is so easy to specify the grounds of objection to the complaint. Goss v. Walker, 90 N. C. 149."

§ 1-129. Amendment; hearing.—If a demurrer is filed the plaintiff may be allowed to amend. If plaintiff fail to amend within five days after notice, the parties may agree to a time and place of hearing the same before some judge of the superior court, and it shall be the duty of the clerk of the superior court forthwith to send the complaint and demurrer to the judge holding the courts of the district, or to the resident judge of the district, who shall hear and pass upon the demurrer: Provided, if there be no agreement between the parties as to the time and place of hearing the same before the judge of the superior court, then it shall be the duty of the clerk of the superior court to send the complaint and demurrer to the judge holding the courts of the district, or to the resident judge of the district, who shall hear and pass upon the demurrer at that term of the court. (1919, c. 304, s. 4; Ex. Sess. 1921, c. 92, s. 5; C. S. 513.)

Editor's Note.—Prior to the amendment of 1921 the plaintiff was allowed to amend within three days, and upon failure to amend within such time, and in the absence of agreement between the parties as to the time and place of hearing the demurrer, it was made the duty of the clerk to send the complaint and the demurrer to the judge holding the courts of the district or to the resident judge of the district who was required to fix the time and place of hearing the demurrer, when he shall hear and pass upon the demurrer. There was no provision made as to the procedure in case there was no agreement between the parties. Besides these substantial changes, the phraseology of the section was also materially affected.

As to the changes affected upon this and other sections, see article entitled "Changes in North Carolina Procedure," in C. S. 513.

Presumption on Appeal.—Where the plaintiff has not been asked to be permitted to file an amendment to his complaint upon a demurrer being interposed thereto on the ground that it is insufficient, and he has failed to file a demurrer, it will be considered on appeal that he has concluded to rely solely on the pleading he has filed. Ballinger v. Thomas, 195 N. C. 517, 142 S. E. 761.


§ 1-130. Appeals.—Upon the rendering of the decision upon the demurrer, if either party desires to appeal, notice shall be given and the appeal perfected as is now provided in case of appeals from decisions in term time. (1919, c. 304, s. 5; Ex. Sess. 1921, c. 92, s. 6; C. S. 514.)

Cross Reference.—As to appeal from judicial order or determination in superior court, see § 1-277.

Editor's Note.—The words "judgment" was substituted for the word "return" near the beginning of the section, and the words "from decisions" were inserted near the end of the section by the amendment of 1921.

Cited in Williams v. Cooper, 222 N. C. 589, 24 S. E. (2d) 484.

§ 1-131. Procedure after return of judgment.—Within ten days after the return of the judgment upon the demurrer, if there is no appeal, or within ten days after the receipt of the certificate from the superior court, there is an appeal, if the demurrer is overruled the plaintiff may move, upon three days notice, for leave to amend the complaint. If this is not granted, judgment shall be entered dismissing the action. If the demurrer is overruled the answer shall be filed within ten days after the receipt of the judgment, if there is no appeal, or within ten days after the receipt of the certificate of the supreme court, if there is an appeal. Otherwise the plaintiff shall be entitled to judgment by default final or by default and inquiry according to the course and practice of the court. (1919, c. 304, ss. 6, 7; Ex. Sess. 1921, c. 92, ss. 7, 8; C. S. 515.)

Cross Reference.—As to pleading over after demurrer interposed in good faith, see § 1-129.

Editor's Note.—By the amendment of 1921 the word "judgment" was substituted for the words "decision overruling the demurrer" in the sentence preceding the last. See Editor's Note by Commentator. The words "demurrer Overruled" should also be liberally construed and applied, to the end that actions may be tried on their merits and not dismissed because of defective pleadings. Morris v. Dent, 197 N. C. 253, 148 S. E. 253; Citizens Bank v. Gabagan, 210 N. C. 464, 188 S. E. 464.

Discretion of Court.—A demurrer to a complaint will be overruled upon the insufficiency of the complaint to state a cause of action, and where a judgment sustaining such demurrer has been appealed from and upheld by the Supreme Court, the trial court has the power under this section to reverse its former decision, to allow the plaintiff to amend the original complaint upon motion made within ten days after receipt by the clerk of the Supreme Court of the certificate from the supreme court that the judgment of the Superior Court had been affirmed. Morris v. Dent, 197 N. C. 253, 148 S. E. 253, affirmed in McKeel v. Latham, 202 N. C. 318, 162 S. E. 747; Hood v. Elder Motor Co., 209 N. C. 303, 183 S. E. 529.

A motion for leave to amend a complaint under this section is addressed to the sound discretion of the trial court, and his order denying the motion is not subject to review on appeal in the absence of gross abuse of this discretion. McKeel v. Latham, 203 N. C. 246, 185 S. E. 694.

Judgment Should Not Be Rendered at Same Time Demurrer Overruled.—The action of the court in overruling a demurrer is an expeditious administration of justice and should be liberally construed and applied, to the end that actions may be tried on their merits and not dismissed because of defective pleadings. Morris v. Dent, 197 N. C. 253, 148 S. E. 253, affirmed in McKeel v. Latham, 202 N. C. 318, 162 S. E. 747; Hood v. Elder Motor Co., 209 N. C. 303, 183 S. E. 529.

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Dismissal Unless Motion to Amend Is Made.—Where a motion to amend is not interposed in the Supreme Court it is sustained, questions of law presented by appellant's exception to the overruling of his written demurrers by the lower court need not be considered, and the case will be remanded with direction that it be dismissed, unless in apt time plaintiff moves for leave to amend as provided by this section. White v. Charlotte, 207 N. C. 721, 178 S. E. 219.

Amendment After Demurrer Sustained.—Under this section where the supreme court affirms the judgment of the inferior court below sustaining the demurrer of one of defendants, the decision is without prejudice to plaintiff's right to amend the complaint, if so advised. Byrd v. Waldrop, 210
cordance with this section is an inadvertence, and cannot
give him reasonable time for preparation. Cody v. Ho-
right to object that notice of the motion was not given him
be held to confine defendant to the procedure specified in
Within the ten-day period prescribed by this section even
Where the supreme court holds that plaintiff's demurrer to
Where it is determined on appeal that respondent's def-
to amend ''in accordance with the provision of C. S. 515,""§ 1-132 CH: i.
her to file amended complaint as a matter of right without
Where plaintiff, after notice of defendant's intention to
Where two causes of action are improperly joined, but one
where the defendant was already in court and had
where the defendant's demurrer, the opinion of the supreme
called the matter to the attention of the adverse party and to
where the defendant's demurrer, the opinion of the supreme
to amend under the provisions of this section, was still open to
the court having no right to require defendant to adopt an in-
under the provisions of this section not being appli-
the court, the statutory provisions are not applicable in
When the trial judge has allowed the plaintiff's
to the complaint, this must be done by an answer and not
where an action has been dismissed for
Where two causes of action are improperly joined, but
Misjoinder of Causes and Parties. — Where there is
ordinarily be dismissed upon demurrer; but the court may
Where the supreme court or any court has received
appeal otherwise will be dismissed as premature. Morris
$ 1-132. Division of actions when misjoinder.—If the
courts proceeding in different counties. Where causes of ac-
within the ten-day period prescribed by this section even
motion was untimely filed. Defendant's objection thereto on
sustaining a demurrer thereto, and the supreme
proceeding with an other action, shall be dismissed as to
Where the court has received a plea of not guilty by
Where it is determined on appeal that respondent's de-
This section not being applicable, the
in the complaint, this must be done by an answer and not
motion was not timely filed. Where defendant has re-
In reversing the judgment of the lower court overruling
counsel, the defendant was still allowed to appeal from the
court, or in the absence of such order, shall be dismissed as
courts proceeding in different counties. Where causes of ac-
the judgment of the lower court sustaining a demurrer to an
plaintiff to file amended complaint as a matter of right without
motion, is untenable, since parties are fixed with
objection to the procedure to which they are subjected under
proceeds with an other action, shall be dismissed as to
Where the clerk of the court rendered within the authority given
where the defendant demurrer to the complaint is a
Where the clerk of the court rendered within the authority given
motion was not timely filed. Where defendant has re-
of summons is necessary. Hodges v. Wilmington, etc., R.
Cited in Morris v. Cleve, 197 N. C. 253, 257, 148 S. E.
Where the court has received a plea of not guilty by
motion was not timely filed. Where defendant has re-
Due process of law is not violated by allowing
First motion appears to be the original motion, and the
Where the court has received a plea of not guilty by
motion was not timely filed. Where defendant has re-
Motion to Divorce. — In Dunn v. Aid Society, 151 N. C.
Appeal.—Where the trial judge has allowed the plaintiff's
motion was not timely filed. Where defendant has re-
Where two or more causes of action are
motion was not timely filed. Where defendant has re-
Motion to Divorce. — In Dunn v. Aid Society, 151 N. C.
Appeal.—Where the trial judge has allowed the plaintiff's
motion was not timely filed. Where defendant has re-
Where two or more causes of action are
motion was not timely filed. Where defendant has re-

§ 1-132. Division of actions when misjoinder.—If the demurrer is sustained for the reason that several causes of action have been improperly united, the judge shall, upon such terms as are just, order the action to be divided into as many actions as are necessary for the proper determination of the causes of the action therein mentioned. (Rev., s. 476; Code, s. 272; C. C. P., s. 141; C. S. 516.)

Provisions of Section Mandatory. — It is the duty of the judge on just and proper ground to divide the action into as many separate trials. Gattis v. Kilgo, 125 N. C. 133, 136, 34 S. E. 246.

With or Without Terms. — The judge may permit an amendment to divide the action, with or without terms. State v. Roberts, 108 N. C. 174, 177, 12 S. E. 890.

Different Venues. — Where causes of action have been improperly joined, the court may order the action to be divided undividedly by dismissal in different counties. Richmond Cedar Works v. Roper Lumber Co., 161 N. C. 601, 604, 77 S. E. 770.

Dismissal of One of Two Causes for Lack of Jurisdiction. — Where two causes of action are improperly joined, but one of them, because of the amount involved, is not within the jurisdiction of the court, it may be dismissable as to the one over with jurisdiction, and the other under jurisdiction. Taylor v. Postal Life Ins Co., 182 N. C. 120, 108 S. E. 502; Rose v. Freemont Warehouse, etc., Co., 182 N. C. 107, 109, 137 S. E. 389; Citizens Nat. Bank v. Angelo, 193 N. C. 576, 137 S. E. 705.

For example an action brought by the wife in which the husband has filed his answer contesting it, may be dismissed overcome the defendant the value of their services sepa-

§ 1-133. Grounds not appearing in complaint.—When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer. (Rev., s. 477; Code, s. 241; C. C. P., s. 98; C. S. 517.)

Cross Reference.—As to grounds for demurrer, see § 1-129.

Controverting Allegations of Complaint. — Where the defendant controverts the truth of the allegations contained in the complaint, this must be done in the answer, and not by a demurrer. Laney v. Hutton, 149 N. C. 264, 62 S. E. 1082.

§ 1-132. Division of actions when misjoinder.—If the demurrer is sustained for the reason that several causes of action have been improperly united, the judge shall, upon such terms as are just, order the action to be divided into as many actions as are necessary for the proper determination of the causes of the action therein mentioned. (Rev., s. 476; Code, s. 272; C. C. P., s. 141; C. S. 516.)

Provisions of Section Mandatory. — It is the duty of the judge on just and proper ground to divide the action into as many separate trials. Gattis v. Kilgo, 125 N. C. 133, 136, 34 S. E. 246.

With or Without Terms. — The judge may permit an amendment to divide the action, with or without terms. State v. Roberts, 108 N. C. 174, 177, 12 S. E. 890.

Different Venues. — Where causes of action have been improperly joined, the court may order the action to be divided undividedly by dismissal in different counties. Richmond Cedar Works v. Roper Lumber Co., 161 N. C. 601, 604, 77 S. E. 770.

Dismissal of One of Two Causes for Lack of Jurisdiction. — Where two causes of action are improperly joined, but one of them, because of the amount involved, is not within the jurisdiction of the court, it may be dismissable as to the one over with jurisdiction, and the other under jurisdiction. Taylor v. Postal Life Ins Co., 182 N. C. 120, 108 S. E. 502; Rose v. Freemont Warehouse, etc., Co., 182 N. C. 107, 109, 137 S. E. 389; Citizens Nat. Bank v. Angelo, 193 N. C. 576, 137 S. E. 705.

For example an action brought by the wife in which the husband has filed his answer contesting it, may be dismissed overcome the defendant the value of their services sepa-

§ 1-133. Grounds not appearing in complaint.—When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer. (Rev., s. 477; Code, s. 241; C. C. P., s. 98; C. S. 517.)

Cross Reference.—As to grounds for demurrer, see § 1-129.

Controverting Allegations of Complaint. — Where the defendant controverts the truth of the allegations contained in the complaint, this must be done in the answer, and not by a demurrer. Laney v. Hutton, 149 N. C. 264, 62 S. E. 1082.
Pendency of Another Suit. — Where another action is pending for the same cause and between the same parties, which fact does not appear on the face of the complaint, the objection may be taken by demurrer or motion to dismiss. Cook v. Gantt, 195 N. C. 535; Allen v. Salley, 179 N. C. 147, 101 S. E. 545. It is a ground of demurrer, if it appears on the complaint. See ante, section 1-127, clause 3, and annotations.

This rule was followed in State v. Gant, 201 N. C. 211, 229, 159 S. E. 427; Thompson v. Virginia, etc., So. R. Co., 216 N. C. 554, 5 S. E. (3d) 38; Johnson v. Smith, 215 N. C. 369, 11 S. E. (2d) 73; and see also, ante, sec. 1-157.

Defect of parties which does not appear on the face of the complaint must be taken advantage of by answer, otherwise it will be deemed as waived. Lunn v. Shermer, 92 N. C. 450, 55 S. E. (2d) 518.

But where the defect does appear on the face of the complaint, it is a ground of demurrer and cannot be taken advantage of in any other way. Burns v. Ashworth, 72 N. C. 496.

Stated in Cheshire v. First Presbyterian Church, 220 N. C. 393, 17 S. E. (2d) 344.


§ 1-134. Objection waived.—If objection is not taken either by demurrer or answer, the defendant waives the same, except the objection to jurisdiction of the court and that the complaint does not state facts sufficient to constitute a cause of action. Rev., s. 478; Code, s. 242; C. C. T., s. 90; C. S. 518.

See note under § 1-122.

The following section of the N. C. Code means that when objection is not taken by demurrer, when that mode is proper, or by answer in cases where that is the proper method, it is waived. Stated in Smoak v. Muller, 93 N. C. 252, 255; Gurganus v. McLawhorn, 217 N. C. 377, 193 S. E. 444; Raleigh v. Hatcher, 220 N. C. 613, 18 S. E. (2d) 207.

Same.—In the Supreme Court. — The want of jurisdiction and the failure of the complaint to state facts sufficient to constitute a cause of action may be waived and may be taken advantage of at any time even in the Supreme Court. Hunter v. Varrarough, 86 N. C. 472; Clement v. G. C. C., 91 N. C. 63, 64; Knowles v. Norfolk, etc., R. Co., 102 N. C. 59, 62, 9 S. E. 7; Raleigh v. Hatcher, 220 N. C. 613, 18 S. E. (2d) 207.

Defective Statement and Defective Cause Distinguished. —A defective statement of a good cause of action must be taken advantage of by demurrer, and will be deemed to constitute a cause of action, or in other words when it appears that the objection there can be no waiver, and objections may be made at any time. Johnson v. Finch, 93 N. C. 205, 208. Halstead v. Hunter v. Yarborough, 92 N. C. 68, 70; Tucker v. Baker, 63 N. C. 151, 49 S. E. 2d 49; McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219.

Defect of Parties.—The defect of nonjoinder of a plaintiff unless waived by d. murrer or by plea shall be deemed to have been waived. Lewis v. McNatt, 65 N. C. 63. The general rule is that defects of parties must be raised by demurrer or answer, Ussy v. Suit, 91 N. C. 465, 474; Godwin v. Jernigan, 174 N. C. 76, 93 S. E. 443; Knowles v. Norfolk, etc., R. Co., 102 N. C. 59, 62, 9 S. E. 7; Mizzell v. Ruffin, 118 N. C. 569, 71, 23 S. E. 927. See ante, section 1-127, cl. 4, and below and annotations thereto.

Arrest of Judgment for Defective Causes. — The provisions of this section as regards complaints which do not contain a statement of facts sufficient to constitute a cause of action are satisfied by arresting the judgment in cases where they apply. Love v. Commissioners, 64 N. C. 706.

Prosecution of a Motion against an Executor. — An action against an executor the objection that the action is prematurely commenced should be set up by the defendant in his answer. Clements v. Rogers, 91 N. C. 63, 64.

Demurrer after Answer. — A demurrer to the jurisdiction of the court or that the complaint does not state facts sufficient to constitute a cause of action, may be entered after answer filed, and the principle upon which it is ordinarily required that the answer be first withdrawn, or that the objection to the complaint, does not apply. Cherry v. Atlantic Coast Line R. Co., 185 N. C. 90, 116 S. E. 192.

Demurrer ore tenus does not lie where answer has been filed and the demurrer is based on the objection to the jurisdiction or that complaint does not state facts sufficient to constitute a cause of action. Roberts v. Grogan, 222 N. C. 30, 21 S. E. (2d) 829.


Art. 15. Answer.

§ 1-135. Contents.—The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A denunciation of the plaintiff, constituting a defense or counterclaim, in ordinary and concise language, without repetition. (Rev., s. 479; Code, s. 243; C. C. P., s. 100; C. S. 519.)
I. IN GENERAL

Any Defense Available under Old System, Available under the New.—Under the Code the defendant may avail himself of any defense that would have been available under the old mode of procedure, either legal or equitable. Clark v. Bourn, 227 N. C. 655, 660.

Must State Facts. — The answer, like the complaint, must state facts upon which the validity of the defense rests. An averment of a general principle of law will not discharge the defendant from the performance of the particular facts which they intended to controvert. To require the defendant to deny the truth of the allegations of the complaint, if he can, or, if he cannot, then to admit the truth of them, or to specifically admit the truth of them, so far as they are true, and to require of plaintiffs, by the facts; and he is further required to state such facts as he may have as to the allegations of the complaint and puts plaintiff to proof; while a general denial, that "no allegation of the complaint is true," is not a sufficient answer under this section, because such a plea may put in one issue several matters of fact, some of which are triable by the court, and others by the jury. Black v. Dawson, 69 N. C. 42; Brown v. Cooper, 89 N. C. 527.

Specific Denial. — An answer denying "the truth of the averments contained in the first, second, third, fourth, fifth and sixth paragraphs of the complaint" being the number contained in the complaint, is a specific denial of each allegation and a sufficient compliance with this section. Brown v. Cooper, 89 N. C. 237.

Effect of Failure to Deny. — If an allegation in the complaint is not denied in the answer, it is admitted, and the effect as if found by a jury. Bonham v. Craig, 80 N. C. 224.

Where the only controverted fact has no bearing on the rights of the parties, judgment may be rendered on the pleadings upon the facts admitted. Jeffreys v. Boston Ins. Co., 202 N. C. 168, 162 S. E. 761.

B. Denial of Information or Knowledge.

Denial of Both Knowledge and Information Necessary. — A denial of knowledge without a denial of information sufficient to form a belief is not sufficient to fulfill the requirements of this section. Truett v. Goolsby, 166 S. E. 555; Fagg v. Southern Bldg., etc., Ass'n, 113 N. C. 364, 366, 18 S. E. 632.

Defendant's Denial. — The only controverted fact to personal transaction may be denied on information and belief. Grimes v. Lexington, 216 N. C. 735, 6 S. E. (2d) 595.

Allegations of fraud may be denied on information and belief of a count of the complaint alleging a fraud or in a declaratory action to a personal transaction may be denied on information and belief. Woodcock v. Bostic, 128 N. C. 243, 18 S. E. 881; Fagg v. Southern Bldg., etc., Ass'n, 113 N. C. 364, 18 S. E. 632.

A denial of the allegations of the complaint, made in the form prescribed, i. e., of any knowledge or information thereof, sufficient to form a belief, being allowed by the Code of Civil Procedure, raises, when interposed, a sufficient issue; and such answer is not subject to the objection of being insufficient or frivolous. Farmers, etc., Bank v. Board, 75 N. C. 45.

However where a complaint alleges a matter to be within the personal knowledge of the defendant an answer "that defendant has no knowledge or information sufficient to form a belief" stated no defense and was an admission of the truth of the allegation of the complaint. Lay Gas Mach. Co. v. Falls, etc., Mfg. Co., 91 N. C. 74.

In an action on notes given for the price of land, denial on information and belief of a count of the complaint alleging that the notes were not paid is not sufficient to discharge the allegation was sufficient. Willis v. Williams, 174 N. C. 760, 94 S. E. 519.

In an action for specific performance of a lost bond for title, which denies that the bond embraces the land in controversy according to defendant's best recollection and belief, is sufficient and raises an issue of fact. Conder v. Stallings, 161 N. C. 270, 29 S. E. 283, 33.

III. NEW MATTER IN DEFENSE.

New Matter Equitable or Legal. — The answer may contain new matter in defense whether equitable or legal. Bean v. Western, etc., R. Co., 107 N. C. 731, 741, 12 S. E. 600.

Matters in Justification. — Under the old system of pleading, upon the general issue matter in justification could not be proved; it must be pleaded specially. Barker v. Johnson, 130 N. C. 366, on pages 356, and 371; Bush v. Parker, 1 Bing, N. C. 312; Brown v. Burnett, 5 Cowen, 181; Chitty on Pl., 501. Under the Code practice the prin-
ciple is not changed. A defense which can not be maintained by a denial of the allegations in the complaint, must be set up as new matter in the answer. Raynor v. Wilming- ton Searcoat R. Co., 129 N. C. 195, 57 S. E. 821.

§ 1-136. Debt for purchase money of land denied. — If the defendant shall deny in his answer that the obligation sued on was for the purchase money of the land described in the complaint, it shall be the duty of the court to submit the issue so joined to the jury. (Rev., s. 480; Code, s. 235; 1870, c. 217; 1921, c. 43; C. S. 520.)

Cross Reference.—See also, § 1-122, paragraph 4.

Editor's Note. — The amendment of 1921, substituted the word "shall deny" near the beginning of this section, for the word "denies." For a similar provision requiring the plaintiff to state that the consideration of debt was the purchase money of land, see section 1-122.

Defendant Entitled to Have Issue Determined by Jury. — In an action on a note alleged to have been given for the purchase money of land, the defendant, if he demands it in his answer and tenders an appropriate issue, has the right to have the question submitted to the jury as to whether or not the note was given for the purchase money of the land. (Rev., s. 226, 13 S. E. 735; Garrett v. Love, 89 N. C. 205, 207.)

Waiver of Right of Jury Trial. — Although the defendant is under this section, entitled to have the issue determined by the court in furtherance of this most desirable and beneficial principle is not changed. A defense which can not be main-

§ 1-137. Counterclaim.—The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. (Rev., s. 481; Code, s. 244; C. C. P., s. 101; C. S. 521.)

I. In General.
A. Editor's Note.
B. General Constructions.
II. Claims Arising out of Plaintiff's Demand.
A. General Rules and Instances.
B. Time of Existence.
III. Claims Arising out of Independent Contract.
A. General Rules and Instances.
B. Time of Existence.
IV. Pleading and Practice.
A. Rules of Pleading.
B. Non Suit.
C. Jurisdictional Amount.

Cross Reference.
As to duty of jury to render verdict and assess the amount of recovery by defendant in the event of successful counterclaim, see § 1-204.

See 13 N. C. Law Rev., 86, for annotation.

I. IN GENERAL.
A. Editor's Note.
Settlement of two independent disputes between the same parties in the action was beyond the conception of the common law system of pleading and practice. Claims in favor of defendant arising out of the same transaction as sued upon by the plaintiff, for example a breach of warranty for which the defendant is not responsible, could not be made the subject of an independent suit. But the inefficiency thus shown in this method of procedure and the injustices resulting therefrom lead to the enactment of the statute of set-off, under which liquidated claims arising out of different transactions could be availed of by the defendant against the plaintiff's demand in the same action. As in the case of recoupment, no recovery over the plaintiff's claim could be had. Another distinction of defenses available by way of set-off, and those by way of settlement was the in-
A. General Rules and Instances.

Counterclaim for Independent Tort Not Allowed.—Under this section a counterclaim is not permissible for a distinct independent tort, and applying the principle, in an action to recover a tract of land alleged to belong to the plaintiff, a counterclaim for a trespass by the plaintiff on a different tract of land belonging to defendant is not maintainable. See, e.g., Nichols v. Smith, 114 N. C. 534, 189 S. E. 2d 186.

Note.—A demurrer to a counterclaim sounding in tort not arising of the contract sued on, that the defendant had been damaged; Held, that the subject of the counterclaim was the trespass committed, and not the land, and hence the counterclaim was not connected with the cause of action and hence not maintainable. Bazemore v. Bridgers, 105 N. C. 191, 10 S. E. 888.

What Constitutes "Subject of the Action"—Example.—In an action for trespass for wrongful entry on land and cutting timber, the defendants filed a counterclaim, alleging that the plaintiffs had wrongfully raised a dam and caused water to back on defendant's land, which was part of the land described in the complaint as that on which the alleged trespass had been committed; Held, that the subject of the counterclaim was the trespass committed, and not the land, and hence the counterclaim was not connected with the cause of action and hence not maintainable. Bazemore v. Bridgers, 105 N. C. 191, 10 S. E. 888.

What Constitutes "Arising Out of the Same Transaction"—Example.—Where the cause of action alleged was an obstruction of the defendant's way by a building and the counterclaim attempted to be set up was that the plaintiff had placed an obstruction on the lower edge of his own land, it was held that these were two separate and distinct torts, and that the latter did not arise out of the transaction set forth in the complaint, nor was it "connected with the subject of the action." Street v. Andrews, 115 N. C. 417, 422, 20 S. E. 450.

An action for damages resulting from an automobile collision does not abate upon the death of the defendant, but may be continued upon the joinder of defendant's personal representative as a party defendant. And when action is brought for what would have been formerly denominated a tort, the defendant may set up a counterclaim for damages arising out of the same transaction or vice versa. Banning v. Thaxton, 72 N. C. 541; Walsh v. Hall, 66 N. C. 233. Smith v. Young Bros., 102 N. C. 224, 84 S. E. 2d 169.

 Payment and Counterclaim Compared.—A payment pursuant to a contract extinguishes the debt eo instanti and is itself thereby extinguished, so that neither remains any longer the subject of an action. On the contrary, a counterclaim which may not be claimed as a set-off or counterclaim the indebtedness of the State to him. Battle v. Thompson, 65 N. C. 406, 407.

Waiver of Exemption by United States.—Although direct suits cannot be maintained against the United States, yet, when the United States institutes a suit, they waive their exemption so far as to allow a presentation by the defendant of meritorious claims to the extent of the debt against the plaintiff; and if there is, then such cause of action is a counterclaim. Battle v. Thompson, 65 N. C. 406.

A few exceptions, growing out of public policy, the rules of law which apply to the government and individuals are the same. McKnight v. United States, 98 U. S. 179, 186, 25 L. Ed. 115.

Waiver of Exemption by United States.—Although direct suits cannot be maintained against the United States, yet, when the United States institutes a suit, they waive their exemption so far as to allow a presentation by the defendant of meritorious claims to the extent of the debt against the plaintiff; and if there is, then such cause of action is a counterclaim. Battle v. Thompson, 65 N. C. 406.

Counterclaim Where Lien upon Property Involved.—In an action upon a contract, though a lien upon property is involved, it is competent for the defendant to extinguish the debt, due to the plaintiff, by a proof of counterclaim. Poston v. Rose, 87 N. C. 279.


Equitable Counterclaim.—An equitable cause of action may be set up as a counterclaim against a legal cause of action. Diem v. Peerless, 189 N. C. 188.

Counterclaim Where Lien upon Property Involved.—In an action upon a contract, though a lien upon property is involved, it is competent for the defendant to extinguish the debt, due to the plaintiff, by a proof of counterclaim. Poston v. Rose, 87 N. C. 279.

 II. CLAIMS ARISING OUT OF PLAINTIFF'S DEMAND.

 A. General Rules and Instances.

Counterclaim for Independent Tort Not Allowed.—Under this section a counterclaim is not permissible for a distinct and independent tort, and applying the principle, in an action to recover a tract of land alleged to belong to the plaintiff, a counterclaim for a trespass by the plaintiff on a different tract of land belonging to defendant is not maintainable. See, e.g., Nichols v. Smith, 114 N. C. 534, 189 S. E. 2d 186.

Same.—But Permissible if it Grows Out of Same Transaction.—The contention that a tort can not under any circumstances constitute a counterclaim although "connected with the subject of the action" contained in the complaint is unfounded. The contrary is decided in Walsh v. Hall, 66 N. C. 233, and Bitting v. Thaxton, 72 N. C. 541; Lee v. Eure, 93 N. C. 120, 127.

Tort against Contract Claim.—If it arises out of the same transaction or is connected with the subject of the action, a tort claim may be pleaded as a counterclaim against a contract claim. McKinnon v. Morrison, 104 N. C. 354, 189 S. E. 2d 186. The same rule is applicable to tort actions. Branch v. Chappell, supra.

Damages for slander cannot be set up as a counterclaim to an action for debt. Merritt Milling Co. v. Finlay, 110 N. C. 411, 15 S. E. 4; Weiner v. Engel's Style Shop, 210 N. C. 705, 198 S. E. 331.


There is no reason to continue the plea in bar as the liability is not a tort liability, and the counterclaim, since this section gives full relief by admitting demands of the defendant on the counterclaim, is not permissible. The same result is reached in Merchants' National Bank v. Lane, 221 N. C. 199, 198, 19 S. E. 2d 849.

 Enumeration of Grounds Excluding.—A defendant cannot set up as a defense or counterclaim any and every cause of action. The subdivision of this section in which the counterclaim is sustained is whether the cause of action is connected with the plaintiff; and if there is, then such cause of action is a counterclaim. Byerly v. Humphrey, 95 N. C. 151.
Same—Counterclaim for Malicious Prosecution.—Where plaintiff instituted action alleging that defendant had formed a dummy corporation to which he had transferred all his assets, including chattels on which plaintiff had liens, was collecting from the corporation for services of minor children, and was wrongfully refusing to pay over to plaintiff, and was dissipating and jeopardizing the assets of the business, and defendant set up a counterclaim alleging want of good faith on the part of plaintiff in maintaining and prosecuting the action and the ancillary remedies and that such wrongful acts had damaged defendant in a large sum, it was held that the counterclaim did not arise out of the transaction set out in the complaint and was not a counterclaim. The subject of plaintiff's action within subsection 1, and therefore plaintiff's demurrer to the counterclaim was properly sustained. Manufacturers, etc., Finance Corp. v. Lane, 221 N. C. 189, 19 S. E. 2d 568.

B. Time of Existence.

See post, this note, "Time of Existence" III, B.

The counterclaims referred to in this clause must be existent and continue to exist between the same parties in the same right at the time they are offered and they must be due at the time the answer is filed, that is, not demands to become due in the future, but they need not be due at the time of commencement of the action. And they must state a cause of action, so that not only a counterclaim for the foundation of plaintiff's claim, or they must be connected with the subject of the action which is, generally speaking, the interest involved in the litigation, and very frequently this is the property itself. Smith v. French, 141 N. C. 1, 58 S. E. 435.

III. CLAIMS ARISING OUT OF INDEPENDENT CONTRACT.

A. General Rules and Instances.

Relation to Original Cause.—This section goes beyond the common-law pleading and practice, and under its provisions a defendant in an action on contract may file a counterclaim for a separate independent harm arising out of the same matter of controversy without or against the consent of the other. "A counterclaim is a defense to an action, and exists only in favor of the defendant against the plaintiff for the purpose of having his opposing claims must be adjudicated. The plaintiff then up his counterclaim, it becomes a cross-action, and both counters brought in issue, and naturally the defendant has the same right, and neither has the right to go out of court without or against the consent of the other." McCue v. Frohman, 207 N. C. 475, 180 S. E. 327.

Damages for Slander of Title in Action to Establish Title.—Where the plaintiffs' action is to establish their title to a 5-acre tract of land, and defendants set up as a counterclaim damages alleged to have been caused by the plaintiffs' slander of their title in 500-acre tract: Held, the cross-action alleged is for damages founded upon a tort, and not on contract, and does not fall within the equitable principle of a suit to quiet title, under the provisions of this section and §§ 1-135, 1-138, and a demurrer thereto is good. Thompson v. Buchanan, 195 N. C. 155, 141 S. E. 152.

An unpaid judgment in favor of a party to an action rendered previously to the commencement of the present action is in legal effect a contract upon which a counterclaim may be based and defendant set up a counterclaim alleging want of good faith on the part of plaintiff in maintaining and prosecuting the action and the ancillary remedies and that such wrongful acts had damaged defendant in a large sum, it was held that the counterclaim did not arise out of the transaction set out in the complaint and was not a counterclaim. The subject of plaintiff's action within subsection 1, and therefore plaintiff's demurrer to the counterclaim was properly sustained. Manufacturers, etc., Finance Corp. v. Lane, 221 N. C. 189, 19 S. E. 2d 568.

B. Time of Existence.

See paragraphs under preceding analysis line.

In General.—The requirement restricting a counterclaim to one that exists at the time the action was commenced is only stated in reference to the class of counterclaims described in this clause, and the very just and obvious reason that, when a plaintiff rightfully sues a defendant who owes him at the time the action is commenced, he shall not be put in the wrong and subjected to judgment rendered previously to the commencement of the action, if it existed at the commencement of the action, the defense of set-off has, by this section, been merged in that of accord and satisfaction, wherein the court may determine whether the amount due to defendant is greater for the purpose of having his opposing claims must be adjudicated. The plaintiff then up his counterclaim, it becomes a cross-action, and both counters brought in issue, and naturally the defendant has the same right, and neither has the right to go out of court without or against the consent of the other." McCue v. Frohman, 207 N. C. 475, 180 S. E. 327.

Collateral Demand against Assignee of Note.—The defense of set-off has, by this section, been merged in that of accord and satisfaction, wherein the court may determine whether the amount due to defendant is greater.
the assignment, unless such counterclaim had attached itself to the cause in note before the assignment. Haywood v. McNair, 19 N. C. 283; Wharton v. Hopkins, 33 N. C. 505; McNamogue v. Chambers, 64 N. C. 284, approved. Neal v. Lea, 64 N. C. 678.

In Neal v. Lea, 64 N. C. 678, it is held that by the proper construction of this section, no collateral demand against the assignor of a note can be set up against the assignee, and "that to make it available, the demand must have attached itself to the note in the hands of the assignor; for instance, a payment made to him not entered on the note, or a claim, which the assignor had agreed should be taken in satisfaction." The doctrine of Haywood v. McNair, 19 N. C. 283, was repudiated and that of Borough v. Moss, 10 B. & C. 558 adopted. Harris v. Burwell, 65 N. C. 584, 585.

A set-off at law must exist at the time the action is brought; in equity, every set-off or counterclaim must be shown before decree, and this is also the case under the Code. Hogan v. Kirkland, 64 N. C. 250, 253.

IV. PLEADING AND PRACTICE.

A. Rules of Pleading.

Allegation of Facts.—The counterclaim must disclose such a state of facts as would entitle the defendant to his action, as if he were plaintiff in the prosecution of his suit, and should contain the substance of a complaint, and not merely a plain and concise statement of the facts constituting a cause of action. There is no formula prescribed and in determining its effects, its allegations shall be liberally construed. The doctrine of Haywood v. McNair, 19 N. C. 283, was repudiated and that of Borough v. Moss, 10 B. & C. 558 adopted. Harris v. Burwell, 65 N. C. 584, 585. It is held in the United States Supreme Court that a counterclaim is unavailable unless set up by defendant in his pleading. McGowan v. American Express Co., Tan Bk Co., 121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027.

Same—Demand of Relief.—Strictly, a counterclaim is a cross-action against the plaintiff in which the defendant may have affirmative relief; but it must, like a complaint, state the cause of action and demand relief which to the defendant alleges he is entitled. Hurst, etc., Cov. E. 257; McLamb v. McPhail, 126 N. C. 218, 35 S. E. 426.

Particularity in Alleging.—A counterclaim is in substance a cross-action and it should be set out with the same particularity and accuracy required in stating a cause of action. In the complaint, State v. Scott, 84 N. C. 184, 187.

For instance a counterclaim which only alleges that the plaintiff is indebted to the defendant, without alleging further the nature, extent, and kind of indebtedness, and how it arose, is imperfectly pleaded, and should be disregarded. American Nat. Bank v. Northcutt, 169 N. C. 219, 85 S. E. 216.

Allegation as to Time of Existence.—An answer setting up a counterclaim, but which fails to show that the same subsisted between the parties when the action was begun, or that it arose out of, or was connected with the subject of the action, is demurrable. Reynolds v. Smathers, 121 N. C. 146, 28 S. E. 266.

Replication to Counterclaim.—Whenever a counterclaim is pleaded the plaintiff must make a replication, or else the defendant may have affirmative relief; but it must, like a complaint, contain the substance of a complaint, and contain the allegations as to the nature, extent, and kind of indebtedness existing at the commencement of the action, and as to the others except one to which the judge has been joined as defendants, the plaintiff may be permitted to take a nonsuit, or not pros. notwithstanding the fact that they have filed answers asserting counterclaims and asking for affirmative relief. Lee v. Eure, 93 N. C. 5.

Same—Against One of Several Defendants. — And where there are several defendants against whom the charge is joined, several, 87 N. C. 24, 25.

Same—As to Parties Not Necessary. — As to persons who are not necessary or proper parties, and who have been joined as defendants, the plaintiff may be permitted to take a nonsuit or not pros. at any time to enter to a nonsuit, or not pros. notwithstanding the fact that they have filed answers asserting counterclaims and asking for affirmative relief. Lee v. Eure, 93 N. C. 5.

Same—Against Several Defendants. — Where there are several defendants against whom the charge is joined, several, 87 N. C. 24, 25.

Law Rev. 224; and annotations to section 1-204.

Same—In Several Counterclaims.—Where several counter claims are pleaded in the same action, the aggregate sum will be taken as the jurisdictional amount. General Electric Co. v. Williams, 123 N. C. 51, 31 S. E. 288.

Jurisdictional Amount in Justice's Court. — The counterclaims must be on the same subject of action, and must therefore come within the jurisdiction of the court. It cannot exceed $200 in a justice's court. General Electric Co. v. Williams, 123 N. C. 51, 31 S. E. 288.

§ 1-138. Several defenses.—The defendant may set forth by answer as many defenses and counterclaims as he has, whether they are of a legal or equitable nature, or both. They must be separately stated and numbered, and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished. (Rev., s. 462; Code, s. 245; C. C. P., s. 102; C. S. 522.)

Same—Certainty of a Complaint Required. — The defenses in the answer must be as certain as the allegations of the complaint, so that the jury may separately determine the merits of each issue. See Gossler v. Wood, 120 N. C. 69, 57 S. E. 257; McLamb v. McPhail, 126 N. C. 218, 35 S. E. 426.

All matters equitable in their nature should be alleged in the pleadings with such reasonable fullness, and particularly as to the constituent facts which will enable the court to see clearly the character of the right or wrong of each party, and the purpose of the pleading and the issues raised. Bean v. Western, etc., R. Co., 107 N. C. 731, 741, 12 S. E. 600.

Contradictory Defenses.—Under this section every counterclaim and every answer in the plaintiff's action are demurrable. Where there is a subdivision of this section, he may, as a matter of right, in his answer, set up a counterclaim as allowed by this section, as to the cause of action arising on contract, existing at the commencement of the action, and not embraced within the first subdivision of this section, in the plaintiff's action, the defendant may have affirmative relief; but it must, like a complaint, contain the substance of a complaint, and contain the allegations as to the nature, extent, and kind of indebtedness existing at the commencement of the action, and as to the others except one to which the judge has been joined as defendants, the plaintiff may be permitted to take a nonsuit, or not pros. at any time to enter to a nonsuit, or not pros. notwithstanding the fact that they have filed answers asserting counterclaims and asking for affirmative relief. Lee v. Eure, 93 N. C. 5.

Same—As to Parties Not Necessary. — As to persons who are not necessary or proper parties, and who have been joined as defendants, the plaintiff may be permitted to take a nonsuit, or not pros. at any time to enter to a nonsuit, or not pros. notwithstanding the fact that they have filed answers asserting counterclaims and asking for affirmative relief. Lee v. Eure, 93 N. C. 5.

Same—Against One of Several Defendants. — And where there are several defendants against whom the charge is joined, several, 87 N. C. 24, 25.

Law Rev. 224; and annotations to section 1-204.

Same—In Several Counterclaims.—Where several counter claims are pleaded in the same action, the aggregate sum will be taken as the jurisdictional amount. General Electric Co. v. Williams, 123 N. C. 51, 31 S. E. 288.

Jurisdictional Amount in Justice's Court. — The counterclaims must be on the same subject of action, and must therefore come within the jurisdiction of the court. It cannot exceed $200 in a justice's court. General Electric Co. v. Williams, 123 N. C. 51, 31 S. E. 288.
I have, whether denominated legal or equitable, or both, and there was some doubt as to whether the fact of contributory to have such relief, affirmative or negative, as may be legally stated. McLamb v. McPhail, 126 N. C. 218, 35 S. E. 426.


But the cases are now uniform in holding that whatever doubt that may have existed upon the question, is removed of proving contributory negligence rests on the defendant; Moore defendant must properly plead the negligence of the pair no vested right. It was competent for the Legisla- Norfolk, etc., R. Co., 160 N. C. 196, 76 S. E. 212.

contributory negligence, even in the absence of a statute issue submitted to jury under this section. Murphy v. Western, etc., R. Co., 160 N. C. 49, 75 S. E. 860.


Assumption of Risk. — While there is a marked distinc- tion between the doctrines of assumption of risks and contribu- tory negligence, it is proper, in pertinent cases, to consider the application of the law relating to an assump- tion of risk under the issue of contributory negligence, pleads the issue of contributory negligence, with the burden on the plaintiff. Hence, where the answer denies the allegations of the complaint, the defendant is not en- titled to have the issue submitted to jury under this section. Miller v. Scott, 185 N. C. 93, 116 S. E. 86.

The general rule inculcated by this section is that the defendant must properly plead the negligence of the plaintiff as a defense, and he must also assume the burden of proving contributory negligence if the defendant wishes to take advantage of the doctrine of last clear chance, the burden is on him. 5 N. C. L. R. 63. Cox v. Norfolk, etc., Railroad, 122 N. C. 878, 55 S. E. 296.

Equitable Counterclaim. — Where Court Explains to the Jury the Testimony. — While it is better practice to submit an issue in regard to contributory negligence, when pleaded, and there is evidence to sustain the plea, the omission to submit the issue is not reversible error, where the court fully explained to the jury the several phases of the testimony referred to upon show contributory negligence and it was appre- hensive that the defendant had been given the benefit of such testimony with its application. Ruffin v. Norfolk, etc., 142 N. C. 120, 35 S. E. 484.

Contributory negligence pleaded and proved. — In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial. (Rev. s. 483; 1887, c. 33; C. S. 523.)

§ 1-139. Contributory negligence pleaded and proved. — This section brings within the sphere of the contributory negligence upon the defendant affects only the remedy and im- pairs no vested right. It was competent for the Legisla- ture to enact it. Wallace v. Western etc., R. Co., 104 N. C. 491, 29 S. E. 450.

The same — Where Complaint Negatives Contributory Negligence. — The defendant can avail himself of anything appearing in plaintiff's evidence which tends to disprove contributory negligence, but this does not change the burden of proving contributory negligence rests on the defendant; v. Chicago Bridge, etc., Works, 183 N. C. 438, 440, 111 S. E. 776.


Same — Burden of Proof in Supreme Court. — The Fed- eral Supreme Court has held repeatedly that the burden of negating contributory negligence rests on the defendant; hence, it is not to be negated or disproved by the plaintiff. Union Pacific R. Co. v. O'Brien, 161 U. S. 451, 456, 16 S. Ct. 618, 40 L. Ed. 766; Texas, etc., R. Co. v. Volk, 151 U. S. 73, 77, 14 St. Ct. 239, 38 L. Ed. 78.

The law presumes that a person found dead and killed by the alleged negligence of another has exercised due care and skill in his own behalf. Humphrey v. Wilmington, etc., R. Co., 123 N. C. 852, 44 S. E. 618.

How the Burden of Negligence Shifts. — The burden of proof is on the plaintiff to show that his injury was caused by the negligence of the defendant. Anderson v. Hoke, 121 N. C. 580, 26 S. E. 238, 35 S. E. 737.

Both Equitable and Legal Defenses — Affirmative Relief. — The defendant may set up as many defenses as he may have, whether denominated equitable or affirmative, or both, and he may rely upon any evidence or proof as may be necessary for the purpose of proving his defense authorized on the facts constituting his defense. Covington v. Ingram, 64 N. C. 123; Melvin v. Stephens, 82 N. C. 264, 288.

The inconsistent defenses, however, must be separately pleaded, since the enactment of this section, to submit only the burden of proof on the defendant pleading it. Pigford v. Norfolk, etc., R. Co., 160 N. C. 94, 75 S. E. 860.

Motion to Nonsuit — Scintilla of Evidence. — This section imposes the burden of proving contributory negligence upon the defendant. It therefore follows, that on a motion to nonsuit, the court can only consider the evidence relating to the negligence of the defendant, and if there is more than a mere scintilla of evidence tending to prove such negligence, the motion must be denied and the case submitted to the jury. Cox v. Norfolk & etc., Railroad, 122 N. C. 694, 55 S. E. 864.

Where there is evidence at the trial tending to sustain the allegations of the complaint, the defendant is not en- titled to a judgment as of nonsuit, unless all the evidence, considered in its light and in the light of the pleadings, sustains the defenses, e. g., contributory negligence, relied upon by the defendant in bar of plaintiff's recovery. Pittman Downing, 29 N. C. 219, 222, 183 S. E. 362.

Question for Jury. — The question whether the plaintiff was guilty of contributory negligence is to be determined by the jury upon proof offered at the trial pursuant to this section. Milne v. Scott, 185 N. C. 93, 116 S. E. 86.

Hence the trial judge cannot submit a verdict on a plea of contributory negligence, but must submit the issue to the jury. United States Leather Co. v. Howell, 151 Fed. 464.

It is not error, even when contributory negligence is pleaded, since the enactment of this section, to submit only the question whether the injury was caused by the de- fendant's negligence, and not the plaintiff's negligence, or the negative if they find that the plaintiff, by concurrent carelessness, contributed to cause the injury. McAadoo v. Richmond & etc., R. Co., 105 N. C. 140, 11 S. E. 316.

Satisfaction — What Cases in Court. — In Federal courts. — While it is better practice to submit an issue in regard to contributory negligence, when pleaded, and there is evidence to sustain the plea, the omission to submit the issue is not reversible error, where the court fully explained to the jury the several phases of the testimony referred to upon show contributory negligence and it was appre- hensive that the defendant had been given the benefit of such testimony with its application. Ruffin v. Norfo- l契, 142 N. C. 120, 55 S. E. 86.

A Specific Application. — The plea that an employee of the plaintiff was injured and negligent, rests on the de- fendant. It therefore follows that he has shown such negligence if the defendant wishes to plead contributory negligence as a defense, the burden is on him to show that the plaintiff was guilty of contributory neg- ligence. After the defendant has shown this, if the plaintiff is ever to take advantage of the doctrine of last clear chance, the burden is on him. 5 N. C. L. R. 63. Cox v. Norfolk, etc., Railroad, 122 N. C. 878, 55 S. E. 296.

What Law Governs — Federal or State. — The procedure for deciding a motion to nonsuit is as to whether the case has been defined and approved under numerous decisions construing the State statutes which control contributory negligence, as referred to in the Federal Statutes, and it has been de- clared that the State should be considered as the defense, coming within the terms of the local law, and to make the same available it must be set up in the answer and proved in the same proceeding. Murphy v. Norfolk, etc., R. Co., 160 N. C. 197, 76 S. E. 212.

As the Federal act makes no specific regulations as to
at the beginning of the section, requiring service of the counterclaim upon the party having the right to require its service thereto; and the provision prescribing the effect of failure to serve the counterclaim as required, was introduced by the amendment of 1924, see 3 N. C. Law Rev. 24.

Powers of Court under Section 1-132 Not Affected.—The restriction put upon the power of the clerk to extend the time of filing, does not affect the broad powers conferred upon the court by section 1-152. Roberts v. Merritt, 189 N. C. 194, 157 S. E. 250.

Failure to Serve Copy of Answer Setting up Counterclaim.—It is proper for the judge of the Superior Court to set aside a judgment by default on the defendant's counterclaim under this section when the plaintiff, or his attorney, is not served with a copy thereof, since the law denies the allegations of the counterclaim when such service is not made. Williams-Fulghum Lumber Co. v. Welch, 197 N. C. 269, 188 S. E. 250.

Where no service of answer is made upon plaintiffs they are under no compulsion to file a reply even though the answer sets up a counterclaim for them. Miller v. Grimsley, 220 N. C. 514, 17 S. E. (2d) 642.


§ 1-141. Content; demurrer to answer.—When the answer contains new matter constituting a counterclaim, the plaintiff may reply to the new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to the new matter in the answer. The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counterclaim or defense; and he may demur to one or more of such defenses or counterclaims, and reply to the residue. Such demurrer shall be heard and determined as provided for demurrers to the complaint. In other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may in its discretion, on the defendant's motion, requires a reply to such new matter, and such reply shall be subject to the same rules as a reply to a counterclaim. (Rev., s. 485; Code, s. 248; C. C. P., s. 105; 1919, c. 304; C. S. 525.)

Cross Reference.—As to demurrer, see § 1-127 et seq.

Matter in Defense Deemed as Denial without Replication.—If the new matter in the answer does not constitute a counterclaim or defense, the party who has no connection with the matter alleged in the answer, or to which there is no connection, such new matter is to be deemed controverted by the plaintiff as upon a direct denial. Wilson v. Brown, 134 N. C. 400, 407, 46 S. E. 760; Pittman v. Shelton, 95 N. C. 519; Williams v. Hutton, etc., Co., 164 N. C. 216, 80 S. E. 257; Smith v. Bruton, 137 N. C. 79, 49 S. E. 64.

For in such a case no replication is necessary, unless required by the court. Simon v. Masters, 192 N. C. 731, 115 S. E. 861; Flishbane v. Fidelity Co., 140 N. C. 589, 594, 53 S. E. 354; Jones v. Cohen, 82 N. C. 75, 80. It is only when a counterclaim is relied on that the plaintiff's failure to reply may afford ground for a judgment for the defendant, but not when the matter constitutes a defense to the action merely. Barnhardt v. Smith, 86 N. C. 473, 483.

The Court May Require Reply.—Though no counterclaim is included in the answer, the court may require the plaintiff to file any defence set up in the answer or may allow it to be filed as a matter of discretion. James v. Western, etc., R. Co., 121 N. C. 474, 51 S. E. 28.

May Contain New Matter.—The plaintiff may not only reply to a counterclaim, but may allege "new matter" which has no connection with the matter alleged in the counterclaim or the new matter alleged in the complaint, the requirement being that it shall not be inconsistent with the complaint. Boyett v. Vaughan, 79 N. C. 528, s. c. 85 N. C. 369.

Reply Only to New Matter in Answer.—A reply can be made only to new matter brought out in the answer. Olmstead v. Raleigh, 130 N. C. 243, 11 S. E. 292.

Must Not Be Radically Inconsistent.—A party will not be
allowed to maintain radically inconsistent positions, or to state one cause of action in the complaint and in the replication state another which is entirely inconsistent. Berry v. Hyde County Land, etc., Co., 133 N. C. 384, 386, 111 S. E. 704.

Plaintiffs may file a reply to a new matter appearing in the answer by way of counterclaim, but by express provisions of this section the allegations of the reply must not be entirely inconsistent with the complaint. Miller v. Grimsley, 220 N. C. 514, 17 S. E. (2d) 642.

Waiver by Failure to Demur.—Where an answer is defective in failing to allege that the plaintiff had knowledge of the fraud, a failure to demur thereto will have the effect of waiving such defect. Printing Co. v. McAden, 131 N. C. 178, 179, 42 S. E. 572.

Reply to Demurrer.—An answer having alleged a set-off, the replication thereto alleged that such answer is "une true and denied" and reiterated the cause of action stated in the complaint: Held, sufficient to put the plea of set-off in issue and require evidence in its support. Stubbs v. Motz, 113 N. C. 458, 18 S. E. 381.

An appeal will be from an order overruling a demurrer to the answer which admits the cause alleged and sets up an affirmative defense. Cody v. Hovey, 213 N. C. 391, 5 S. E. (2d) 165.

Amendment of Answer upon Demurrer Sustained.—The provisions of § 1-131, that plaintiff, after judgment sustaining a demurrer to the complaint must move to be allowed to amend within ten days after the return of the judgment or the demurrer, are applicable in the superior courts where summons to run out of state. Held, the certificate from the superior court, apply solely to amendment of the complaint after demurrer thereto is sustained, and the ten-day period prescribed by that section does not apply to an amendment of the defendant's answer, and demurrer sustaining the affirmative defense set up therein, the procedure regulating demurrer to an answer being provided by this section which contains no reference to § 1-131, and this conclusion is in accord with the rule of the ancient rules relating to civil procedure and with the principles that the adjective law will be liberally construed to promote justice and not to defeat or delay it by technical construction. Cody v. Hovey, 217 N. C. 407, 8 S. E. (2d) 479.

When a demurrer to the answer is sustained, defendant has the right to amend, if he so elects. Barber v. Edwards, 218 N. C. 731, 12 S. E. (2d) 234.


Cited in Herndon v. Massey, 217 N. C. 610, 8 S. E. (2d) 914.

§ 1-142. Demurrer to reply.—If a reply of the plaintiff to a defense set up by the answer of the defendant is insufficient, the defendant may demur thereto, and must state the grounds thereof. (Rev., s. 468; Code, s. 250; C. C. P., s. 107; C. S. 526.)

Amended Reply.—A judgment will not be reversed for error in sustaining a demurrer to the complaint when the plaintiff, on leave, files an amended reply, presenting, in addition to others, the same issues, and the same proceeds to trial and final judgment upon the issues thus presented. 22 Ohio St. Reports, construing a similar section of the Ohio Code.

Reply Set up New Matter.—In construing the Ohio statute it was held that where a reply, which sets up new matter sufficient to avoid the defense, is on demurrer erroneously held insufficient, and the case is finally disposed of by a finding against the plaintiff on issues of fact, under which the special matter in the reply is not available to the plaintiff, the error of the court in sustaining the demurrer constitutes a good ground for reversing the final judgment, and awarding a new trial, unless the record shows such error to have been otherwise waived. 18 Ohio State Reports 851.

If Reply Is a Departure.—If reply is a departure, demurrer must be sustained. 1 Cincinnati Superior Court Reporter 125. Construing the Ohio Code.

Failure to Demurr to Reply.—A failure to demur to a reply that does not contain matter sufficient to avoid a defense set up in the answer, is not a waiver of the right to object to the sufficiency of the reply, and will not affect the judgment to be rendered. 11 Ohio State Reporter 492, so held in construing the Ohio Code.

Art. 17. Pleadings, General Provisions.

§ 1-143. Forms of pleading.—The forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this chapter. (Rev., s. 487; Code, s. 231; C. C. P., s. 91; C. S. 527.)

Cross References.—As to abolition of differences between actions at law and suits in equity, see § 1-142. General Effect of New Form of Procedure.—The subtle science of pleading heretofore in use is not merely relaxed but abolished by the Code, so that the forms of pleading in civil actions, and the rules by which their sufficiency is to be determined, are those prescribed in this chapter. The new system inaugurated thereby is such that few, if any, of the ancient rules are now applicable. Moore v. Edmiston, 70 N. C. 516, 518.

In construing the Ohio Code, it was held that when the facts set out in the petition entitled the plaintiff to judgment, it is immaterial what the form of action would have been at law. 21 Ohio State Reporter 596, 603.

A replication has no reference to § 1-131, and this conclusion is reversed, on the ground that the meaning of the pleader must be fairly ascertained from the whole instrument without regard to technical rules. If legal or technical words are used they are to be taken in their recognized sense, unless the context shows another sense was intended. 42 Ohio State Reporter 565, 9 Circuit Court Reports 421.

§ 1-144. Subscription and verification of pleading.—Every pleading in a court of record must be subscribed by the party or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. (Rev., s. 488; Code, s. 257; C. C. P., s. 116; C. S. 528.)

When Verification Necessary.—The provisions of this section which are applicable also to special proceedings, do not require the verification of the petition (or any other pleading) be, at events, verified. It simply requires that when one pleading is verified every subsequent one, except a demurrer, be verified. Lindsay v. Beaman, 128 N. C. 189, 190, 38 S. E. 811.

Requirement One of Substance.—The requirement as to the verification of pleadings is one of substance, and not of form, and a defect therein is jurisdictional. Martin v. Martin, 270 N. C. 40, 115 S. E. 272; Anderton v. Holloman, 127 N. C. 15, 37 S. E. 68; Nichols v. Nichols, 128 N. C. 108, 38 S. E. 296.

The object of the verification is, that if the defendant does
§ 1-145 CH. 1.

not deny the allegations, the cause shall stand as if the jury had been empaneled, and the court, for the purpose of being to avoid the delay of trial upon uncontested points. Griffin v. Asheville Light Co., 111 N. C. 434, 16 S. E. 423.

In the absence of such a letter a convenient substitute for the old bill of discovery in equity, and to eliminate all issues of a fatal defect for which judgment will be arrested. Cowles v. Hartford, 65 N. C. 187. See Reynolds v. Cambridge, supra; Griffin v. McCormac, 90 N. C. 151, 152.

V. Effect of Non-Verification. — Where a pleading is not verified in compliance with this and the two succeeding sections, the other party is entitled to believe the facts stated therein. Griffin v. McCormac, 111 N. C. 434, 438, 16 S. E. 423.

Substantial Compliance. — The requirements of this section must be substantially complied with. Miller v. Curl, 162 N. C. 1, 77 E. 579.

§ 1-145. Form of verification. — The verification must be in substance that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by affidavit of the party, or if there are several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if the party is in the county where the attorney resides and is capable of making the affidavit. (Rev., s. 489; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7; C. S. 529.)

Cross Reference. — As to requirements of plaintiff's affidavit to be filed with complaint in divorce action, see § 59-3.

§ 1-146. Verification by agent or attorney. — The pleading of a non-resident may be verified by an affidavit of one or more residents of the state who can administer oaths. The one, or the other of these facts is essential to this section, requiring that verifications made by agents shall be under oath, and not to those ancillary remedies intended to be under oath, and not to those ancillary remedies intended to be administered by one authorized to administer oaths. Alford v. McCormac, 90 N. C. 151, 152.

Oath — By Whom Administered. — It is sufficient if the oath is administered by one authorized to administer oaths. Alford v. McCormac, 90 N. C. 151, 152.


§ 1-146. Verification by agent or attorney. — The affidavit may also be made by the agent or attorney, if the action or defense is founded upon a written instrument for the payment of money only and the instrument is in possession of the agent or attorney, or if all the material allegations of the pleadings are within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reasons why it is not made by the party. (Rev., s. 490; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7; C. S. 530.)

Editor's Note. — This section contemplates only two cases where the affidavit may be made by the attorney. The one, when the action is founded upon a written instrument for the payment of money only and the instrument is in possession of the agent or attorney; and the other, when the material allegations of the pleadings are within the personal knowledge of the attorney. The one or the other of these facts is essential to the validity of a verification and as to the other of the facts it is necessary to prove that the attorney possesses the knowledge that the party or attorney possesses.
edge, etc.—A verification to a complaint made by an officer of a corporation need not set forth "his knowledge or the grounds of his belief on the subject and the reason why the party himself did not make the verification. Miller v. Curl, 162 N. C. 293.

When a corporation is a party the verification may be made by any officer, or managing or local agent thereof upon whom summons might be served; and when the state or any officer thereof in its behalf is the party, the verification may be made by any person acquainted with the facts. (Rev. s. 491; Code, s. 258; 1001, c. 610; C. C. P., s. 117; 1868-9, c. 159, s. 7; C. S. 531.)

Cross Reference.—As to service of summons against corporation, see § 1-97, paragraph 1.

Editor's Note.—Formerly it was held that a verification by an officer, managing or local agent, and the agent of a corporation was inoperative, and that it must be made by a corporate officer. Bank v. Gay Mfg. Co., 120 N. C. 202, 12 S. E. 741; Piher v. Traveler's Ins. Co., 123 N. C. 465, 46, 31 S. E. 715. But now, this section in terms provides for verification by "managing or local agent." To this latter effect, see Godwin v. Carolina Tel., Co., 136 N. C. 258, 48, 8 S. E. 636. And see § 1-97 and notes thereto.


Knowledge or Ground of Belief of Corporate Agent.—See the following: Best v. Hutchison, 87 N. C. 22, in the annotations to the preceding section.

The city manager of a municipal corporation is its "managing or local agent" and is authorized to verify the municipal answer in an answer instituting an action against it. Grimes v. Lexington, 216 N. C. 735, 6 S. E. (2d) 505.

§ 1-148. Verification before what officer.—Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the superior court, notary public, in or out of the state, or justice of the peace, is competent to take affidavits for the verification of pleadings in any court or county in the state, and for general purposes. (Rev. s. 492; Code, s. 238; 1891, c. 140; C. C. P., s. 117; 1868-9, c. 159, s. 7; C. S. 533.)

Editor's Note.—Many decisions of the superior court had formerly declared that the notaries public authorized to take affidavits for the verification of the pleadings were those of the county where the other action was pending in the superior court, 76 N. C. 113; Hinton v. Life Ins. Co., 116 N. C. 22, 24, 21 S. E. 201. But this has now been changed by the express terms of this section which permit verification to be taken by notaries in as well as out of the state. See Hinton v. Life Ins. Co., supra.

And it seems that the phrase "in or out of the state" immediately succeeding the words "notary public," has reference not only to notaries, but to the other officers designated in the section. Thus in Hinton v. Life Ins. Co., 116 N. C. 22, 21 S. E. 201, the verification was made before the clerk of the Hustings Court of Richmond, Va., and it was held valid, the court announcing the general rule that courts take judicial notice of the seals of the courts of other states just as they do of the seals of foreign courts of admiralty and notaries public.

§ 1-149. When verification omitted; use in criminal prosecutions.—The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. No pleading can be used in a criminal prosecution against the party who made it, unless the party is alleged to have omitted it. (Rev. s. 493; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7; C. S. 533.)

In a prosecution for embezzlement the admission in evidence of defendant's objection of pleadings in civil actions against defendant, involving the funds he is alleged to have embezzled, is erroneous in view of this section. State v. Ray, 200 N. C. 736, 152 S. E. 109.

No Pleading Can Be Used in Criminal Prosecution.—It is error to permit the solicitor, while cross-examining defendant in a criminal prosecution to read certain allegations of fact in a complaint in a civil action relating to the same subject matter and to ask defendant if he had failed to deny them by answer. State v. Wilson, 217 N. C. 123, 7 S. E. (2d) 57.

Where defendant moved to set aside the verdict on ground that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted as evidence without objection, and typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, it was error to permit the jury to take such papers into the jury room and retain same while in its deliberations, and defendant's motion to set aside the verdict should have been allowed. State v. Stephenson, 219 N. C. 310, 15 S. E. (2d) 57.

§ 1-150. Items of account; bill of particulars.—It is not necessary for a party to set forth in a pleading the items of an account alleged in it; but he must deliver to the adverse party, within ten days after a demand therefor in writing, a copy of the items of account alleged in it. Every account alleged in a pleading, if it is clarified, must be verified by his own oath or that of his agent or attorney if within the personal knowledge of the agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court or judge may order a further account when the one delivered is defective, and may, in all cases, order a bill of particulars of the claim of either party to be furnished. (Rev. s. 494; Code, s. 259; C. C. P., s. 118; C. S. 534.)

Cross References.—For similar provision applicable to proceeding in court of justices of the peace, see § 7-149, rule 10. Cross references for provision applicable to the furnishing of a bill of particulars of the claim of either party to be furnished in a proceeding in court of justices of the peace, not to exceed fifty dollars, see § 8-56 et seq. See also, §§ 1-153, 15-143.

Purpose and Effect of Section.—This section, which, in case of a disregard of the demand, shuts out all proof of the items of the claim unless the claim is alleged in a pleading, is intended to close the mouth of the party making it, is intended to meet the case of a complaint that does not set out the particulars, and confines the evidence at the trial to such as are set out in the pleading. The object is to supply an omission to give them in the pleadings, and hence, when furnished, they become substantially and in legal effect as part of the complaint itself. Wiggins v. Guthrie, 101 N. C. 661, 675, 7 S. E. 761.

Indefinite Statement of Cause.—An uncertain or an indefinite statement of a cause of action may be corrected by an
§ 1-151. Pleadings construed liberally.—In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed to withstand justiciable
pushed to the extreme, and the rights of litigants were
determined not on the merits of the controversy but on sheer
technicalities such as using the verb "to have" in the past
tense, instead of in the present. These ideas have entirely
swapped the old English Practice of Civil Procedure,
wherever adopted. In England, after a series of improve-
ments, beginning in 1834, when the celebrated "Rules of
Term" were enacted, the English Practice of Civil Procedure
had been destroyed by fire, plaintiff is not precluded by his
failure to comply with the order from establishing the debt
In Criminal Proceedings.—For the procedure in ob-
taining a bill of particulars in criminal proceedings,
similarity to that in civil actions, see State v. Brady, 197 N. C. 437, 77 S. E. 627, 130 S. E. 53. Same rule applies to an answer. Pridgen v.
Hise, 192 N. C. 246, 134 S. E. 656; Elam v. Barnes, 110 N. C. 73, 14 S. E. 621.
A complaint cannot be overthrown by a demurrer un-
less it be wholly insufficient. If in any portion of it, or to
any extent, it presents facts sufficient to constitute a cause
of action, or if facts sufficient for that purpose can be fairly
gathered from it, the complaint is good, and the demurrer
shall be overruled. This rule, especially when it affects book records and other
In New Bern Banking, etc., Co. v. Duffy, 156 N. C. 83, 72 S. E. 96,
upon the inquiry as to whether the complaint states a
disposition of such accounts, is to apply for an
order to that effect before the trial, so as to have the
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question settled before the trial. Wiggins v. Guthrie, 191 N. C. 156, 185 S. E. 621.
Although under this section allegations of pleadings are to be construed liberally "with a view to substantial justice between the parties," § 1-122 makes it a necessary requirement of pleading that the party must state "a concise statement of the facts constituting a cause of action," which means that it shall contain a plain and concise statement of all the facts necessary to enable the plaintiff to recover. Chesapeake & Ohio Railroad Co. v. Citizens Bank v. Gahagan, 219 N. C. 464, 466, 187 S. E. 590.

The material allegations of the complaint are that at the foreclosure sale by the secretary of the corporate mortgagee, and that this official was "acting in said capacity at the time he purchased said land at the foreclosure sale,..." and was acting as the agent of said treasurer of said mortgagee, and that this official conveyed the land to the mortgagee, which thus indirectly purchased at its own sale. Held that the complaint is not so wholly insufficient that it cannot be overthrown by a demurrer. Comanche Joint Stock Land Bank, 211 N. C. 262, 265, 189 S. E. 777.

In spite of this section, a complaint must allege a cause of action under the liberal construction provided by this section, must allege all the material facts not essential to produce certainty of issues. Turner v. McKee, 137 N. C. 251, 259, 49 S. E. 330. See also Fairson v. Felton Beauty Supply Co., 222 N. C. 439, 23 S. E. (2d) 369.

Same—Judged from Whole Pleading. — When it is apparent from the whole pleading that the complaint alleges a good cause of action, it will be sustained under the rule of liberal construction. Muse v. Ford Motor Co., 175 N. C. 352, 55 S. E. 900; Dixon v. Green, 178 N. C. 205, 100 S. E. 263.

Extent of Liberal Construction Rule. — The rule of liberal construction does not mean that a pleading shall be considered as sufficient if it does not contain 'what is to be seen from its general scope that a party has a cause of action or defense he will not be deprived of its time merely because he has not stated it with technical accuracy. Chesapeake & Ohio Railroad Co. v. Citizens Bank v. Gahagan, 219 N. C. 464, 466, 187 S. E. 590. Nor is it intended thereby to repeal those rules of pleading which are essential to produce certainty of issues. Turner v. McKee, 137 N. C. 251, 259, 49 S. E. 330. See also Fairson v. Felton Beauty Supply Co., 222 N. C. 439, 23 S. E. (2d) 369.

Errors in Language and Use of Words. — A plea that a cause of action did not "arise" within the time prescribed by the statute for the commencement of an action, while not strictly accurate, will be construed under the liberal construction of pleading in force under this section, to mean that it did not "accrue" within that time. Stubbs v. Motz, 113 N. C. 458, 18 S. E. 387.

Answer Not Rejected Unless Fatally Defective. — Under the liberal principle provided by this section, an answer must be fatally defective before it will be rejected as insufficient and every reasonable intendment and presumption must be indulged in favor of the pleader. Commerce Ins. Co. v. McCraw, 215 N. C. 105, 108, 1 S. E. (2d) 369.

And an Amended Answer May Sufficiently State Cause of Action. — Where an amended answer is insufficient, and the amended answer, after the time limited for the filing of the amended answer, is interposed, overruling of the demurrer was proper, the amended answer being sufficient under a liberal construction to sustain the plain error, and the court will not interfere with the plea of the time. Dorsey v. Corbett, 190 N. C. 783, 130 S. E. 842.

Conflicts of Laws. — The rules of construction of the pleadings are governed by the lex fori, i. e. by the law of the state in which the cause is being litigated. McNinch v. American Trust Co., 183 N. C. 331, 110 S. E. 660.

Variances. — Under the liberal principle which this section inculcates, a variance between the pleadings and proof will not be regarded as material unless it misleads the court or prejudices the rights of either party, unless it misleads the court or prejudices the rights of either party, unless it misleads the court or prejudices the rights of either party. Turner v. McKee, 137 N. C. 251, 259, 49 S. E. 330.

Inherent Power to Extend Time. — Even independent of this section, and a fortiori under this section, the superior court possesses an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless by consent of the parties. Sheek v. Sain, 127 N. C. 633; Bynum v. Fidelity Bank, 219 N. C. 129, 47 S. E. 393; Hill v. Atlantic Coast Line R. Co., 222 N. C. 740, 24 S. E. (2d) 633; Belk's Department Store v. Guilford County, 222 N. C. 441, 23 S. E. (2d) 897 (dist. op.).

§ 1-152. Time for pleading enlarged. — The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order may enlarge the time.

Editor's Note. — It will be noticed that this section confers upon the judge two supplementary powers: (a) To allow an answer to be filed after the time limited for its filing; which presupposes that the power is to be exercised after the expiration of such time; (b) a power to extend the time of filing the answer or reply, which presupposes that the power is to be exercised before the expiration of the time limited for the filing of the answer or reply.

While it is true the line of cases cited under this section, refer more particularly to filing answer, no sound reason occurs why the same power does not exist for enlarging the time for filing complaint. Smith v. New York Life Ins. Co., 236 N. C. 99, 102, 179 S. E. 457.

Inherent Power to Extend Time. — Even independent of this section, and a fortiori under this section, the superior court possesses an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless by consent of the parties. Sheek v. Sain, 127 N. C. 633; Bynum v. Fidelity Bank, 219 N. C. 129, 47 S. E. 393; Hill v. Atlantic Coast Line R. Co., 222 N. C. 740, 24 S. E. (2d) 633; Belk's Department Store v. Guilford County, 222 N. C. 441, 23 S. E. (2d) 897 (dist. op.).

Review of Discretion. — It is generally held that whenever the judge is vested with a discretion, his doing or refusing to do the act in question is not reviewable upon appeal. United Am., etc., Baptist Church v. United Am., etc., Baptist Church, 138 N. C. 564, 74 S. E. 14; Wilington v. McDonald, 135 N. C. 548, 45 S. E. 864; Beck v. Bellamy, 93 N. C. 157; Board of Education v. Bryant, 102 N. C. 42 S. E. 456. This discretion however is not an arbitrary but a legal discretion. Hodgins v. White, 65 N. C. 393.

Power to Plead or Practice. — In Austin v. Clarke, 70 N. C. 458, 459, the court has held that this section invests the Court with ample powers, in all questions of practice and procedure, to be exercised at the discretion of the judge who is presumed to know best what orders and what indulgence will promote the ends of justice in each particular case. With the exercise of discretion we cannot interfere, and it is not the subject of appeal.

Extension Not to Be Encouraged. — After the defendant has failed to file a verified answer, the court may in its discretion extend the time for filing it, though such extension does not extend the time for pleading beyond the next term of court, unless by consent of the parties. G. C. 70, Ashevile Light Co., 111 N. C. 434, 438, 16 S. E. 423.

Extension beyond Next Term. — The trial court cannot extend the time for pleading beyond the next term of court, unless by consent of the parties. Sheek v. Sain, 127 N. C. 633, 74 S. E. 334.

Extension after Supreme Court's Decision. — The trial court cannot extend the time for pleading after the Supreme Court has decided that judgment should have been entered by default for the plaintiff. Cook v. American Exch. Bank, 130 N. C. 183, 41 S. E. 67.

Procedure Before Setting Aside Default. — The judge of the Superior Court where a civil action has been brought has the discretionary power to enlarge the time in which an answer may be filed to the complaint beyond that limited by the statute, and to order that an answer be filed after the time limited, in an order to that effect. Aldridge v. Greensboro Fire Ins. Co., 194 N. C. 683, 140 S. E. 706. See also Vann v. Coleman, 206 N. C. 431, 174 S. E. 306.

Setting Aside Default.—On an appeal from an order of the clerk of the superior court denying motion to set aside a default judgment the judge of such court has jurisdiction under this and § 1-276 to set aside the judgment [202]
enlarge the time for filing the defendant's answer.


Upon a proper finding of a meritorious defense and after hearing, the judge of the Superior Court, on appeal from the clerk, has authority under § 1-220 to set aside a judgment rendered by the clerk, against the defendant by default of pleadings, and to permit an answer to be filed under this section. Dunn v. Jones, 195 N. C. 354, 142 S. E. 320.

At the Time of Trial.—It is in the discretion of the court to allow filing of the answer or demurrer even where the case is reached for trial. Morgan v. Harris, 141 N. C. 358, 360, 54 S. E. 381.

Filing Answer after Five Years.—In Mallard v. Patterson, 108 N. C. 253, 13 S. E. 93, the defendant filed an unverified answer, the complaint in the action having been verified, and the defendant, after a lapse of five years, asked to be allowed to file an answer properly verified, and the court allowed him the leave, though he was not entitled to it as a matter of right. The Supreme Court approved of the order, and declared that the exercise of the discretion by the judge was not reviewable. Best v. British, etc., Mortg. Co., 131 N. C. 70, 42 S. E. 456.

Irrespective of Laches.—Even if the delay in filing the pleading was unreasonable, it is in the discretion of the presiding judge to permit it to be filed. McMillan v. Baxley, 112 N. C. 578, 583, 16 S. E. 845.

Delay in Motion for Judgment May Be Considered.—In proper case the court may in its discretion consider the delay of the plaintiff in moving for judgment. Horney v. Mills, 199 N. C. 724, 142 S. E. 111.

Answer to Amended Complaint.—The trial judge has the discretionary power conferred on him by this section to allow the defendant to file an answer to the amended complaint, which exception has not been reviewed on appeal when an abuse of this discretion has not been shown. Brown v. Hillboro, 185 N. C. 368, 117 S. E. 41.

Effect of Section 1-125.—Section 1-125 prohibits the clerk of the time of commencing a suit to make the averments more definite by amendment. Martin v. Goode, 111 N. C. 268, 16 S. E. 232; Allen v. Carolina Cent. R. Co., 120 N. C. 548, 550, 27 S. E. 76.

But it may direct the same upon the application of a defendant. Id. There was no error in the trial court's ordering it stricken out upon motion under this section, the test being whether the allegation is of a probative or of an ultimate fact. Revis v. Asheville, 207 N. C. 237, 176 S. E. 738.

Motions to confirm a foreclosure sale are properly stricken from the answer upon motion, under this section, since plaintiff, relying on a city carrying accident and liability insurance was an allegation of an evidential and probative fact and not of a material, essential, or ultimate fact, and there was no error in the trial court's ordering it stricken out under this section. Id.

Equitable matters in defense relevant only upon the motion to confirm a foreclosure sale are properly stricken from the record; an order seeking a legal remedy only and invoking no equitable jurisdiction of the court, and the foreclosure sale cannot be collaterally attacked in plaintiff's action to recover the deficiency.再, First-Stock Land Bank v. Stewart, 238 N. C. 139, 179 S. E. 463.

Power to Make Explicit Ex Mero Motu.—The court has a right ex mero motu to direct that pleadings shall be made more explicit. Martin v. Goode, 111 N. C. 268, 16 S. E. 232; Allen v. Carolina Cent. R. Co., 120 N. C. 548, 550, 27 S. E. 76. Or it may direct the same upon the application of a defendant. Id.

Motions to confirm a foreclosure sale are properly stricken from the answer upon motion, under this section, since plaintiff. Id. It may direct the same upon the application of a defendant. Id.

Manner of Correction May Not Be Directed.—While the trial judge is authorized in the exercise of his discretion to order that a pleading be made more definite under the provisions of this section, he may not direct the manner in which this may be done. Hensley v. McDowell Furniture Co., 164 N. C. 148, 80 S. E. 154.

Argumentative, Hypothetical or Alternative Pleadings.—The proper method of taking advantage of an argumentative, hypothetical or alternative pleading is an abortive motion not play off-murder but by a motion under this section to make more explicit. Daniels v. Baxter, 120 N. C. 14, 18, 26 S. E. 635.

Discretion of Court.—A motion to make a pleading more definite and certain is addressed to the discretion of the court. Womack v. Carter, 160 N. C. 286, 75 S. E. 1102. See also, Allen v. Carolina Cent. R. Co., 120 N. C. 548, 27 S. E. 76; Smith v. Summerfield, 158 N. C. 384, 12 S. E. 997; Conley v. Richmond, etc., R. Co., 109 N. C. 692, 14 S. E. 176. See also Temple v. Western Union Tel. Co., 205 N. C. 441, 171 S. E. 630; Tickle v. Hobgood, 212 N. C. 762, 194 S. E. 461.

If the pleader thinks that it is impossible to make the allegations of his pleading more definite, this fact must be addressed to the judge who has a large discretion in such matters, and if it appears to him that such was the case, he will disallow a motion to make such pleading more definite and certain. Bristol v. Carolina, etc., R. Co., 175 N. C. 359, 95 S. E. 850.

If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not manifest, the court may permit the pleading to be made definite and certain by amendment. (Rev., § 496; Code, s. 561; C. C. P., s. 120; C. S. 537.)

Cross-References.—As to bill of particulars in certain cases, see § 1-135. As to sham and irrelevant defenses, motion to strike, see § 1-125.

For note on use of the motion to strike, see 19 N. C. L. A. 193.

Editor's Note.—The true doctrine to be gathered from all the cases is that, if the substantial facts which constitute a cause of action are stated in the complaint, then the same has been done through reasonable intention, though the allegations are imperfect, incomplete and defective, and such insufficiency pertains rather to the form than to the substance, the proper mode of correction is not by demurrer nor by excluding evidence at the trial but by a motion, before the trial, to make the averments more definite by amendment. To this effect see, Moore v. Edmistion, 70 N. C. 510; Stokes v. Taylor, 104 N. C. 294, 297, 10 S. E. 565; Nye v. Williams, 141 N. C. 129, 45 S. E. 950; 109 N. C. 605, 13 S. E. 92; Blackmore v. Winders, 144 N. C. 212, 56 S. E. 874; Bristol v. Carolina, etc., R. Co., 175 N. C. 509, 95 S. E. 880; Leach v. Page, 211 N. C. 625, 191 S. E. 349.

Motion to Strike Under § 1-223, the superior court has power to strike out an answer whenever it appears to the satisfaction of the court that it is irrelevant or frivolous. Commissioners v. Fletcher, 72 N. C. 114, 11 S. E. 430.

The Test of Right to Have Allegation Stricken.—Whether evidence in support of an allegation would be competent evidence in the trial of the case does not determine whether it stricken out upon motion under this section, the test being whether the allegation is of a probative or of an ultimate fact. Revis v. Asheville, 207 N. C. 237, 176 S. E. 738.

If the court determines that an allegation is irrelevant or frivolous, a pleading containing such an allegation as an evidential and probative fact and not of a material, essential, or ultimate fact, and there was no error in the trial court's ordering it stricken out under this section. Id.
and certain. Sayles v. Loftis, 217 N. C. 674, 9 S. E. (2d) 243.

If defendant, in a negligent injury action, desires more specific and detailed allegations in the complaint as to the character of negligent act, the party requesting that the court require the pleading to be made more definite and certain or request a bill of particulars. Livingston v. Essex Inv. Co., 217 N. C. 109, 12 S. E. (2d) 896.

**Action to Establish Donatio Mortis Causa.**—In an action to establish a donatio mortis causa, allegations setting forth facts tending to show motive, the setting, the relationship between the parties, the intention of the donor, the state of his health and the circumstances surrounding his death, are proper, and defendant administrator's motion to strike such allegations from the complaint is properly denied. Bynum v. Fidelity Bank, 219 N. C. 109, 12 S. E. (2d) 898.

**Waiver or Cure of Defects in Absence of Motion.**—If the defect of uncertainty or indefiniteness is not raised by a motion to strike out certain portions of the pleadings, the court, in the presence of the jury, will be prejudicial if defendant, in a negligent injury action, desires more specific and detailed allegations in the complaint as to the character of negligent act, the party requesting that the court require the pleading to be made more definite and certain or request a bill of particulars. Livingston v. Essex Inv. Co., 217 N. C. 109, 12 S. E. (2d) 896.

When there is a defective cause of action, although in due form, the plaintiff cannot recover unless the court in its discretion, on reasonable terms, allows an amendment. With a good cause of action set out, but in due form, the court may require the pleadings to be made definite and certain by amendment. Bowling v. Fidelity Bank, 209 N. C. 463, 184 S. E. 13, citing Allen v. Carolina Cen. R. Co., 121 N. C. 506, 28 S. E. 265.

**Review of Refusal of Motion to Strike.**—The refusal of a motion to strike out certain portions of a bill of particulars as irrelevant and immaterial, under this section, will be affirmed where it appears that the lower court did not abuse its discretion by correct rulings on the admissibility of evidence offered in support of both alleged irrelevant and immaterial matter. Eggers v. Carolina Cent. R. Co., 205 N. C. 599, 172 S. E. 196; Scott v. Bryant, 210 N. C. 478, 187 S. E. 756.

An appeal will lie immediately from the denial of a motion to strike made under this section, if it clearly appears that the court, in striking out certain paragraphs from the complaint on the ground of irrelevancy and redundancy, has not made a proper motion to strike out the paragraphs on the ground of irrelevancy and redundancy. In re: Goldsboro Union Ins. Co., 211 N. C. 202, 19 S. E. (2d) 207.

On appeal from the denial of a motion to strike made under this section, the duty rests upon the supreme court to sustain the objections which relate to any allegation of scandalous and impertinent matter. Where a motion to strike is timely made and made on the eve of the trial, it should be denied for the reason that it is not made in apt time. But even though a motion to strike out is timely made, the court in striking out certain portions of the pleadings, the court, in the presence of the jury, will be prejudicial if defendant, in a negligent injury action, desires more specific and detailed allegations in the complaint as to the character of negligent act, the party requesting that the court require the pleading to be made more definite and certain or request a bill of particulars. Livingston v. Essex Inv. Co., 217 N. C. 109, 12 S. E. (2d) 896.

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In a negligent injury action, where the complaint was filed at October term, 1916, and the motion to strike out was not made until December term, 1917, the motion was correctly denied. But even though a motion to strike out is timely made, the court in striking out certain portions of the pleadings, the court, in the presence of the jury, will be prejudicial if defendant, in a negligent injury action, desires more specific and detailed allegations in the complaint as to the character of negligent act, the party requesting that the court require the pleading to be made more definite and certain or request a bill of particulars. Livingston v. Essex Inv. Co., 217 N. C. 109, 12 S. E. (2d) 896.

A motion to strike out alleged improper matter from a pleading must be taken in accordance with the rules of the court. Where a motion is made on the eve of the trial, it should be denied for the reason that it is not made in apt time. But even though a motion to strike out is timely made, the court in striking out certain portions of the pleadings, the court, in the presence of the jury, will be prejudicial if defendant, in a negligent injury action, desires more specific and detailed allegations in the complaint as to the character of negligent act, the party requesting that the court require the pleading to be made more definite and certain or request a bill of particulars. Livingston v. Essex Inv. Co., 217 N. C. 109, 12 S. E. (2d) 896.

A motion to strike out does not challenge sufficiency of the complaint as a whole to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made. If this allegation is controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction. (Rev., s. 497; Code, s. 262; C. C. P., s. 121; C. S. 538.)

**§ 1-155. Pleading judgments.**—In pleading a judgment or other determination of a court or of an officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made. If this allegation is controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction. (Rev., s. 497; Code, s. 262; C. C. P., s. 121; C. S. 538.)

**§ 1-156. How conditions precedent pleaded.**—In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing performance, but it may be stated generally that the party duly performed all the conditions on his part. If this allegation is controverted, the party pleading must establish, on the trial, the facts showing performance. (Rev., s. 198; Code, s. 263; C. C. P., s. 122; C. S. 539.)

In Actions upon Insurance Policy.—In Britt v. Mutual Ben. Life Ins. Co., 105 N. C. 175, 178, 10 S. E. 896, it was held under this section that, in an action upon an insurance policy, the truth of the representations alleged in the application as conditions precedent must be averred generally, stating that the party duly performed all the conditions on his part.

**§ 1-156. How instrument for payment of money pleaded.**—In an action or defense founded upon an instrument for the payment of money only, it is sufficient for the party pleading to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims. (Rev., s. 499; Code, s. 263; C. C. P., s. 122; C. S. 540.)

This section does not require that the entire writing be
made a part of the complaint, and, a demurrer ore tenus does not lie where answer has been filed and no objection taken by demurrer to the jurisdiction of the court or that the complaint did not state facts sufficient to constitute a cause of action. Roberts v. Grogan, 222 N. C. 30, 21 S. E. (3d) 829.


§ 1-157. How private statutes pleaded. — In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification, and the court shall thereafter, upon demand, take judicial notice thereof without the necessity of its being pleaded. Hancock v. Norfolk, etc., R. Co., 124 N. C. 222, 32 S. E. 679. And conversely, the fact that a private statute is made a part of the complaint, and, a demurrer ore tenus taken by demurrer to the jurisdiction of the court or that it does not contain such provisions it must be specifically pleaded. Hancock v. Norfolk, etc., R. Co., 124 N. C. 222, 32 S. E. 679.

Public Law Published in Private Laws, and Vice Versa.—Notwithstanding the fact that a public statute is erroneously published in the private laws, the court will take judicial notice thereof without the necessity of its being pleaded. See Code, s. 264; C. C. P., s. 123; C. S. 541.)

Private Statute with Public Provisions.—A private statute does not assume the character of a public statute by being published among the public statutes will not make it a public statute so as to do away with the necessity of pleading. Hancock v. Norfolk, etc., R. Co., 108 N. C. 399, 402, 12 S. E. 1040, 13 S. E. 1. A fortiori where it does not contain such provisions it must be specifically pleaded. Hancock v. Norfolk, etc., R. Co., 108 N. C. 399, 402, 12 S. E. 1040, 13 S. E. 1. A fortiori where it does not contain such provisions it must be specifically pleaded. Hancock v. Norfolk, etc., R. Co., 108 N. C. 399, 402, 12 S. E. 1040, 13 S. E. 1.

Nature of a Statute is a Question of Law. — Whether a statute is public or private is a question of law which the courts must determine in the absence of a statutory enactment declaring and settling its nature. Humphries v. Baxter, 28 N. C. 437; State v. Wallace, 94 N. C. 827.

Qualification of the Rule in Supreme Court.—While the court may not accept an ordinance or act, take judicial notice of a private statute or its terms and will require that it shall be specially pleaded in the manner required by this section, this rule will not be allowed to prevail when a private statute relating to and effectually settling the matter in controversy has, after due notice, been formally brought to the attention of the Supreme Court; for then only an ab abatement to be entered. Durham v. Richmond, etc., R. Co., 108 N. C. 399, 402, 12 S. E. 1040, 13 S. E. 1. A fortiori where it does not contain such provisions it must be specifically pleaded. Hancock v. Norfolk, etc., R. Co., 108 N. C. 399, 402, 12 S. E. 1040, 13 S. E. 1.

§ 1-158. Pleadings in libel and slander.—In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken.

The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances. (Rev., s. 501, 502; Code, ss. 265, 266; C. C. P., ss. 124, 125; C. S. 543.)

Cross Reference.—As to libel and slander generally, see § 99-1 et seq.

For an article entitled "Restrictions on a Free Press," wherein various phases of rights arising out of libel are discussed, see 4 N. C. Law Rev. 24.

Flea Prerequisite to Evidence of Mitigation.—A plea of justification or of mitigation is a prerequisite to the allowance of evidence of the truth of the charge. Without it such evidence is incompetent. Burris v. Bush, 170 N. C. 394, 87 S. E. 97; Upchurch v. Robertson, 127 N. C. 127, 128, 57 S. E. 127; Dickerson v. Dail, 159 N. C. 541, 75 S. E. 803; Bryant v. Reddy, 214 N. C. 748, 753, 200 S. E. 896.

Where the truth of words alleged to be slanderous is not specifically pleaded, evidence thereof was held properly referred to in the complaint that the slanderous words were spoken of the plaintiff, the facts which point to them and convey to the hearing the sense in which they are used are matters of proof before the jury. Wozelsk v. Hettrick, 93 N. C. 10.

Sufficient Publication.—Under this section where the complaint in an action for libel alleges that the defendant sent the plaintiff an open post card through the mails containing libelous matter, without an allegation that such matter was read by some third person, the allegation of publication is insufficient. McKeel v. Latham, 202 N. C. 318, 162 S. E. 747.

Evidence of Justification under General Issue.—When the defendant pleads the general issue, he may not introduce evidence of justification or mitigation. Upchurch v. Robertson, 127 N. C. 127, 37 S. E. 157.

Where defendants had not pleaded privilege, justification, etc., it was error to withhold case from the jury. Harris v. Goen, 274 N. C. 250, 162 S. E. 747.

In the absence of a plea of privilege, justification, or mitigating circumstances, the evidence was sufficient to be submitted to the jury on the question of whether the generation was defamatory, where the plaintiff had shown by evidence in uttering certain slanderous words in an action therefor against the corporation. Alley v. Long, 209 N. C. 245, 183 S. E. 294.

§ 1-159. Allegations not denied, deemed true. — Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case requires. (Rev., s. 503; Code, s. 268; C. C. P., s. 127; C. S. 543.)

Editor's Note.—The rule established by this section disposed of the necessity of submitting to the jury matters which the law deems as admitted in the absence of denial. New Matter Not Amounting to Counterclaim.—If the new matter in the answer does not amount to a counterclaim such matter will be deemed as denied by the operation of law. Wagon Co. v. Byrd, 119 N. C. 460, 26 S. E. 144; McQueen v. People's Nat. Bank, 111 N. C. 509, 513, 16 S. E. 270. Thus in an action for the purchase price of land sold, the allegation of defective title is a matter of defense, and will not be considered as a counterrequirement, even though not specifically denied by the operation of law. Bank v. Loughran, 122 N. C. 668, 674, 30 S. E. 17.

When such new matter does not raise issues of fact but presents only questions of law, the court may render judgment on the pleadings, there being no controverted issues of fact for the determination of the jury. Dunn v. Tew, 212 N. C. 286, 13 S. E. 246.

The allegations of the complaint, and every material allegation of new matter constituting a counterclaim in an answer, directly admitted or not denied, have the effect of changing the nature of the case, as the case requires. Bonhote v. W. N. C. 224; Heims v. Green, 105 N. C. 251, 263, 11 S. E. 470.

As a corollary to this general principle it follows that new matter in the answer not amounting to counterclaim disposed of the necessity of a replication. McLamb v. McPhail, 126 N. C. 218, 221, 35 S. E. 426; Wilson v. Brown, 134 N. C. 400, 408, 46 S. E. 763; Smith v. Bruten, 137 N. C. 79, 80, 49 S. E. 64; Askew v. Koonce, 118 N. C. 526, 24 S. E. 218.

Admission as Basis for Referee's Finding.—Allegations in
Pleading lost, copy used.—If an original pleading or paper is lost or withheld by any person, the court may authorize a copy to be filed and used instead of the original. (Rev., s. 504; Code, s. 600; C. C. P., s. 357; C. S. 541.)

Before Cause Argued in Supreme Court.—The lost pleading or paper should always be supplied by a copy, before the cause is argued in the supreme court. Blackmore v. Winders, 144 N. C. 212, 219, 56 S. E. 874.

Order of Substitution Not Reviewable. — Judgments of trial courts permitting lost pleadings to be substituted, are not reviewable. Bray v. Creekmore, 109 N. C. 49, 13 S. E. 723.

Art. 18. Amendments.

§ 1-161. Amendment as of course.—Any pleading may be once amended of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or it can be so amended at any time, unless it is made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is, or may be, docketed for trial; and if it appears to the court or judge that the amendment was made for that purpose, it may be stricken out, and such terms imposed as seem just to the court or judge. (Rev., s. 505; Code, s. 272; C. C. P., s. 131; C. S. 545.)

Cross References.—As to enlargement of time in discretion of judge, see § 1-152. As to amendment to make pleading more definite and certain, see § 1-153. As to amendment of pleadings, etc., to correct mistake, to insert material allegations, etc., in discretion of court, see § 1-163.

Editor's Note.—The resultant frustration of justice from the absurd technicalities of the common law system of procedure, as well as the absurdity of the act of 1872, it was discretionary with the judge to permit any amendment the provision being: the judge "may, in his discretion," etc. Matthews v. Copeland, 80 N. C. 30. But now the requirement is mandatory under proper circumstances. See Moore v. Hobbs, 77 N. C. 65, 66. A defendant demurs to a petition for divorce the court here must consider the demurrer as a concession, not only that the facts alleged are true, but that they can and will be proved. See § 1-163.

§ 1-160. Pleading lost, copy used.—If an original pleading or paper is lost or withheld by any person, the court may authorize a copy to be filed and used instead of the original. (Rev., s. 504; Code, s. 600; C. C. P., s. 357; C. S. 541.)

Application in Divorce Actions.—Divorces are granted only when the facts constituting a sufficient cause, under a properly made pleading, are proved by the evidence found by the jury. McQueen v. McQueen, 82 N. C. 471. The admissions of the parties are not competent evidence, as in other actions, of the truth of the material allegations of the pleadings. (Rev., s. 1-152; C. C. P., s. 357; C. S. 541.)

§ 1-162. Pleading over after demurrer.—After the decision on a demurrer, the judge shall, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just. (Rev., s. 506; Code, s. 272; C. C. P., s. 131; 1871-2, c. 173; C. S. 546.)

Cross References.—As to procedure after return of judgment upon demurrer, see § 1-151. As to motion for judgment on frivolous demurrer, see § 1-159. At the trial of a suit where the demurrer is interposed in good faith the judge shall allow the party to plead over, has no application to actions on contracts entered into.
§ 1-163 Amendments in discretion of court —

I. IN GENERAL.

See notes under §§ 1-129, 1-131.

Amplest Powers of Amendment — In civil actions, the amplest powers of amendment are given to the courts to amend any process, pleading or proceeding in such actions either in form or substance for the furtherance of justice, on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect; by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved.

When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto. (Rev., ss. 507, 512; Code, ss. 273, 274; C. C. P., ss. 132, 133; C. S. 547.)

II. amendments to the pleadings.

IV. Conforming Pleadings to Facts Found.

V. Amendments of Process.

VI. Amendments as to Parties.

VII. Amendments Before Justices of the Peace.

VIII. Specific Instances.

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To the same effect in Gilchrist v. Kitchen, 86 N. C. 20, the Court says: “But, independent of the Code, we hold that the right to amend pleadings in the cause and allow amendments of the pleadings ‘in furtherance of justice, and on such terms as shall be just, at any time before or after the judgment rendered therein.’ State v. Vaughan, 91 N. C. 532, 535.

Power to Amend Independent of Statute — Even independent of the Code the courts have power to allow amendments to pleadings or allow them to be filed at any time unless prohibited by some statute, or unless vested rights are interfered with, and a fortiori under the amplest powers of amendment given by the Code. Doss v. Herring, 127 N. C. 81, 53 S. E. 83.

Inherent Power of Amendment — The superior courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless prohibited by some statute, or unless vested rights are interfered with. Gilchrist v. Kitchen, 86 N. C. 20.

§ 1-163. Amendments in discretion of court —

The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect; by inserting other allegations material to the case; or when the amendment does not substantially change the claim or defense, by conforming the pleading or proceeding to the fact proved.

When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto. (Rev., ss. 507, 512; Code, ss. 273, 274; C. C. P., ss. 132, 133; C. S. 547.)

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When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto. (Rev., ss. 507, 512; Code, ss. 273, 274; C. C. P., ss. 132, 133; C. S. 547.)

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There is no force in the argument, that an amendment which removes the objections must be made before they are taken, and cannot be made afterwards, since it is precisely for such a purpose the power is conferred to be exercised in furtherance of the ends of justice, at the discretion of the judge, in order that such as are trivial, and do not affect the substantial and understood matters in controversy, may be removed.

Amendment after Judgment.—If necessary, the pleadings may be reformed even after judgment to conform to the facts proved. Hendon v. North Carolina R. Co., 127 N. C. 110, 12 S. E. 257.

Same.—The court may in its discretion even after judgment allow an answer to be amended to conform to the facts proved. Waters v. Waters, 125 N. C. 590, 593, 34 S. E. 548.

Amendment after Demurrer.—The trial court has the discretionary power to allow plaintiff to amend his complaint in furtherance of the ends of justice, at the discretion of the judge, so as to allege that the negligence complained of was the proximate cause of the injury. Bailey v. Roberts, 208 N. C. 532, 181 S. E. 278.

Amendment after Verdict.—The court has power to allow an amendment after verdict, so as to supply the omission of an averment in the pleading. Pearce v. Mason, 78 N. C. 375; Smith v. Bithell & N. C. 35; Roberson v. Hodges, 105 N. C. 49, 11 S. E. 263.

After Reversal.—Under this section upon the receipt of a certificate of reversal of judgment overruling a demurrer, the lower court has the discretionary authority to permit plaintiff to amend his complaint in accordance with the opinion. Commissioner of Banks v. Harvey, 202 N. C. 380, 162 S. E. 894.

Amendment after Order and Confirmation of Sale.—In State v. Smith, 178 N. C. 19, 198 S. E. 878, it was held that the trial court, when affirming the order of sale and confirmation of sale, had discretion to allow plaintiff to amend his complaint to include another tract of land not mentioned, and that the judge would have no power to amend the petition upon parole evidence that a tract of land had been omitted therefrom. The presumption of facts supporting amendment.—The trial judge will be presumed to have found the facts necessary to support a claim for judgment even when no facts are stated in the record. Patterson v. Champion Lumber Co., 175 N. C. 90, 94 S. E. 692.

Relation Back Doctrine.—An amendment when properly allowed will date back to the time of the institution of the suit. Leifer v. Lane & Co., 170 N. C. 181, 86 S. E. 1022.

An amended summons, under this section, relates back to the commencement of the action unless the amendment changes the relief or introduces a new party, in which event the amendment is effective only from the date it was granted. Lee v. Hoff, 221 N. C. 233, 237, 19 S. E. (2d) 230.

Jurisdiction.—In order to allow an amendment, the court must have jurisdiction of the cause. An amended summons, related back under the statute, gives jurisdiction to the court, whether he shall reinstate them. Grant v. Burgwyn, 88 N. C. 95.


Reinstatement of Nonsuited Causes.—Where plaintiff voluntarily amends his complaint by entering a nol pros as to nonsuited causes, and presents a new action in the court, whether he shall reinstate them. Grant v. Burgwyn, 88 N. C. 95.

Costs.—When the superior court has power to amend, the question of costs is entirely in its discretion. Robinson v. Willoughby, 67 N. C. 84.

III. INTRODUCING NEW CAUSE OF ACTION, DEFENSE OR RELIEF.

Permissible When It Introduces No New Cause.—Unless the plaintiff can add a new cause of action, based upon the subject-matter of the original action, no objection can be successfully urged where the amendment is germane to the original action, involving substantially the same transaction or event, and present a different demand by an amendment which is broad enough to warrant the action of the referee in allowing a partner to come in as party plaintiff and adopt complaint previously filed by copartner. Sheffield v. Alexander, 194 N. C. 744, 745, 140 S. E. 726. See note under § 1-163.

Instances of New Cause Not Introduced.—In an action to recover damages for a conspiracy to prevent the employment by others of a discharged employee, under §§ 14-355, 14-356, the cause of action alleged was not substantially changed by allowing an amendment to the effect that the plaintiff had been employed by the defendant prior to the time of the alleged conspiracy. Goins v. Sargent, 196 N. C. 478, 146 S. E. 131.

An amendment to a complaint in an action to set aside a conveyance of land for fraud is not substantially changed by an amendment allowing the plaintiff in the discretion of the court to allege that the conveyance was voidable as directly resulting therefrom. Parker v. Mecklenburg Realty, et al., Co., 195 N. C. 644, 143 S. E. 254.

Where the complaint in an action for nonpayment of draft alleged that defendant failed to pay when it was received, it was held not error to allow an amendment alleging that defendant had in fact accepted the draft by
entering it on its books and had held it for more than 24 hours thereafter during which time it failed and refused to return it accepted or nonaccepted. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253.

Second.—One may correct a summons. —Where one administratrix has renounced her right, and a second has been appointed, and the second administratrix has brought action and made its mark to the complaint, the action of the trial judge in correcting the summons and in changing the name of the first administratrix to that of the second does not change the cause of action, and does not constitute error. Hill v. Norfolk So. Ry. Co., 195 N. C. 695, 143 S. E. 129.

Consent Necessary when New Cause Introduced.—The court cannot, except by consent, allow an amendment which changes the cause of action and is not simply a correction, striking out “horse” and inserting “cow”, or else the jury must find the facts specially or the case must be submitted to the jury “on issues,” so that the pleading may be amended and be allowed to conform to the evidence established by the plaintiffs, and not merely to the terms as the judge may deeme proper, "unless the amendment affects the merits and substantially changes the claim or defense." Shelton v. Davis, 69 N. C. 324, 328.

The court has discretionary power to allow a pleading to be amended after the introduction of evidence so as to make the pleading conform to the evidence. Hicks v. Collier, 69 Mo. 176; Scoville v. Gasherm, 79 Mo. 490.

Defective Statement of a Good Cause. —A defective statement of a good cause of action, as distinguished from a failure to state a cause of action, is not of this nature, and may be allowed. Blalock v. Clark, 133 N. C. 306, 308, 45 S. E. 642. To the same effect see also, Fidelity, etc., Co. v. Jordan, 134 N. C. 236, 244, 46 S. E. 18.

Adding New Plea after Appeal Reached Supreme Court.—The power and duty of the judge in respect to amendments after the appeal has reached this court depend on these sections, and there is nothing in these sections requiring the judge to allow a new plea to be put in, though he may do so on payment of all costs up to that time. The Court of Appeals, in Ely v. Early, 94 N. C. 1, 253, 148 S. E. 253: "It would be in violation of one of the most important provisions of the Code and Constitution of the State, if a party to an action, upon the ground that the complaint is not as it should have been, from the facts established by the proofs in the case, to allow such an objection now to fail a party to a suit and be deprived of any evidence that the alteration shall not disturb or impair any intervenors of the process, particularly as to the signature and official origin, and of the purpose for which it was issued, and the broad discretion with which judges are clothed by this section may be freely exercised, subject only to the restriction that the alteration shall not disturb or impair any intervening rights of third parties. Cheatham v. Crews, 81 N. C. 341; Thomas v. Womack, 64 N. C. 657; Redmond v. Mullinen, 113 N. C. 505, 510, 18 S. E. 708.

A complaint which introduces a substantially new defence. Hinton v. Means, 75 N. C. 18, 20. This section is curable by amendment, even after verdict. Ely v. Early, 94 N. C. 1.

Amendment of Insufficient Affidavit.—The court has the power to allow the amendment of an affidavit upon which a warrant of attachment had issued, although the former affidavit is wholly insufficient. Brown, etc., Co. v. Hawkins, 84 N. C. 645.

IV. CONFORMING PLEADINGS TO FACTS FOUND. —See sections 1-165, 1-168.

Leave to Amend to Conform Pleadings to Facts. —Under this section and section 1-168, a plaintiff may sue for a horse and recover a cow; but in order to do this, when the variance appears, the plaintiff must be allowed to amend by striking out “horse” and inserting “cow”, or else the jury must find the facts specially or the case must be submitted to the jury "on issues," so that the pleading may be amended and be allowed to conform to the evidence established by the plaintiffs, and not merely to the terms as the judge may deem proper, "unless the amendment affects the merits and substantially changes the claim or defense." Shelton v. Davis, 69 N. C. 324, 328.

In Dickens v. Perkins, 134 N. C. 220, 223, 46 S. E. 490, the court said: "If the plaintiffs were unable to show by the proof that the contract was made as alleged, and by the evidence established a different agreement, they could have availed themselves of the latter and have enforced the same only by an amendment, provided the cause of action was not thereby substantially changed." Phipps v. York, 127 N. C. 325, 37 S. E. 435.

V. AMENDMENTS OF PROCESS. — Generally. —If the paper bear internal evidence of its official origin, and of the purpose for which it was issued, it comes within the definition of original process, and the broad discretion with which judges are clothed by this section may be freely exercised, subject only to the restriction that the alteration shall not disturb or impair any intervenors of the process, particularly as to the signature and official seal thereof, see Henderson v. Graham, 84 N. C. 496.

Not Permissable as to Prejudice Acquired Interest. —Amendments of original process are not permisssble as to prejudice acquired interest, and no process can be amended to prejudice acquired interests or take away any defense which could be made to an action begun at the time of the amendments. Phillips v. Holland, 78 N. C. 31; Henderson v. Graham, 84 N. C. 496, 498.

Defects Curable by General Appearance Amendable. —With reference to the amendment of a process, it is held that whether a summons should be amended is a discretion in the matter and not reviewable (Henderson v. Graham, 84 N. C. 496). From this is to be deduced the rule, in regard to the amendment of process, that any defect or omission of a formal character, which would be waived or disregarded by a trial tribunal and on which the merits, may be treated as a matter which can be remedied by amendment at the discretion of the court, when the rights of other persons are not affected and no prejudice will be to prejudice acquired interests or take away any defense which could be made to an action begun at the time of the amendments. Phillips v. Holland, 78 N. C. 31; Henderson v. Graham, 84 N. C. 496, 498.

Absence of Clerk's Signature.—Under this section the appeal of the clerk is not that whether a summons should be amended is a discretion in the matter and not reviewable (Henderson v. Graham, 84 N. C. 496). From this is to be deduced the rule, in regard to the amendment of process, that any defect or omission of a formal character, which would be waived or disregarded by a trial tribunal and on which the merits, may be treated as a matter which can be remedied by amendment at the discretion of the court, when the rights of other persons are not affected and no prejudice will be to prejudice acquired interests or take away any defense which could be made to an action begun at the time of the amendments. Phillips v. Holland, 78 N. C. 31; Henderson v. Graham, 84 N. C. 496, 498.

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Statute of Limitation. —Where a distinct cause of action is allowed to be inserted in a complaint, by amendment, it is tantamount to bringing a new action, and the statute of limitation runs to the time when the amendment is allowed; but where the cause of action is allowed by the amendment constitutes a part of the original cause of action, Ely v. Early, 94 N. C. 1, 253, 148 S. E. 253; once a suit is allowed, the court allowed the plaintiff to amend, so as to set up a new matter in an existing suit, in a deed, the statute only runs against the relief demanded by the amended complaint to the time when the action was commenced. Ely v. Early, 94 N. C. 1.
evidence of genuineness as to all process to be served in the county in which his court is held, yet, if he issue to the county a summons in the usual form, attested by his official seal, but not subscribed, and containing his name only as printed in the body of the paper, the court, having the power, after the defendant has entered an appearance, to amend by allowing the clerk to sign his name. Henderson v. Graham, 84 N. C. 496; Redmond v. Mullenaux, 113 N. C. 431.

On the other hand, when a summons is issued to an adjacent county, signed by the clerk of the superior court, but not proved, the court in the county in which the action was brought, having been returned by the officer who sold. Clark v. Hellen, 113 N. C. 431; Seawell v. Bank, 14 N. C. 79; Purcell v. McFarland, 23 N. C. 34. Redmond v. Mullenaux, 113 N. C. 431.

The seal, though not required, or the signature, though not imparting authenticity in the county to which the summons issues, is evidence of the fact that the clerk has approved the process, and the defendant waived the irregularity in the manner of service, and the face of the paper to give assurance that it had received the sanction of the court before it was delivered to the officer to serve. Clark v. Hellen, 23 N. C. 421; Seawell v. Bank, 14 N. C. 79; Purcell v. McFarland, 23 N. C. 34. Redmond v. Mullenaux, 113 N. C. 431.

Same.—Process Issued Out of County.—By amendment a process may be affixed to a process issued out of the county after its return. McArter v. Rhea, 122 N. C. 614, 89 S. E. 642.

Informalities Cured.—Informalities in the process may be cured by amendment, if allowed by the court. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

Amendment to Give Effectual Jurisdiction.—Where process is erroneously made returnable to the clerk, instead of to the term of the court, the court at term, having acquired jurisdiction, may make all necessary amendments of the process without the consent of any of the parties, in order to give the court jurisdiction, if no intervening and vested right is injuriously affected, and when the process is thus amended, it justifies the original service of any officer who previously served the original process. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

Amendment in Attachment Proceedings.—Amendment under this section may not be permitted where the rights of the parties are substantially affected by the failure to correct the officer's return to show the correct names of the defendants. Lee v. Hoff, 221 N. C. 233, 19 S. E. (2d) 893.

VI. AMENDMENTS AS TO PARTIES.

Allegations as to Value Supplied.—Where in an action of claim and delivery, personal injury,衡, or in an action to recover for damages caused by omission in the summons, the justice of the peace properly allowed a motion to amend by filling in the blank left for such allegation. Cox v. Grisham, 113 N. C. 279, 18 S. E. 705.

VI. AMENDMENTS AS TO PARTIES.

Generally.—The power to make additional parties to an action is settled, especially when the amendment did not change the cause of action, nor work any injustice to the opposing party. Mills v. Callahan, 126 N. C. 279, 41 S. E. 754; South Carolina Bank, etc., Co. v. Williams, 209 N. C. 866, 183 S. E. 18.

Limitation on Operation of Rule.—The rule has the power to make additional parties to a pending action or defendant. However, where a court permits parties to an action to institute a new action against the defendant as to the new party and the action as to him does not relate to the date of the institution of the original cause so as to deprive the defendants of the right to plead the statute of limitations in bar of recovery in such action. Home Real Estate, etc., Co. v. Locker, 214 N. C. 1, 2, 197 S. E. 555.

Discouraging and Not Reviewable.—It very rarely happens that a party is permitted to insert a new defendant, thereby impressing him with liabilities, and hence ordering such parties are discretionary with the trial court, and are not reviewable upon appeal. Tillery v. Candler, 118 N. C. 888, 899, 24 S. E. 709; Bernard v. Haney, 107 N. C. 59, 12 S. E. 551; Redmond v. Mullenax, 113 N. C. 431. See also 40 Am. Jur., Judgments, 708; 116 N. C. 430, 21 S. E. 971; State v. Arrington, 101 N. C. 197, 7 S. E. 652; Maggett v. Roberts, 108 N. C. 174, 12 S. E. 652. Washington v. Board of Education, 219 N. C. 197, 193 S. E. 763.

New Parties to a Pending Action.—By amendment proper new parties may be brought into a pending action. Dobson v. McPherson, 159 N. C. 38, 97 S. E. 642.

Making Parties after Judgment.—In a proper case additional parties can be made even after judgment. Bird v. Gilliam, 125 N. C. 76, 78, 34 S. E. 195.

Jointly-Paying Parties.—Statute of Limitation.—Where a note is made to the husband and his wife as joint payees, and the action thereon is brought by the husband alone, an amendment joining the wife as a party to the action, after the property is charged, the amendments is in effect the Instituting of a new action, which also will be barred. Fishall v. Evans, 193 N. C. 660, 137 S. E. 865.

Correction of Names as to the Parties Defendant.—Where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, buy the process and proceedings in order to give it effectual jurisdiction, the court had discretionary power to permit the officer to testify that in fact the summons was served on the proper party. Page v. McDonald, 159 N. C. 38, 97 S. E. 642.

Discharging Misjoinder Parties.—Where there has been a misjoinder of parties as well as causes of action, it is that the discretion of the court to allow an amendment to correct the verdict or adverse decision, to permit the withdrawal of one of the parties, the leaving the action to proceed singly as to the remaining cause and to allow a proper amendment of the pleadings as to the remaining cause. Fishall v. Evans, 193 N. C. 660, 137 S. E. 865. See "Introducing New Cause of Action, Defense or Relief."
As to the proper determination of the matters in controversy, the proceeding is conducted by consent into an administration suit, and petition is precluded by the agreement from objecting to an order requiring her to be made a party in her own right and, if she account for certain money paid to her individually or as the widow of the deceased, the agreement not constituting the proceeding a controversy without action in which the authority of the court is involved, is not limited. Ely v. Mathews, 218 N. C. 171, 10 S. E. 52 (2d) 619.

Making Trustee Party.—Where money is borrowed to pay off a prior mortgage and the lender takes another mortgage as security for that sum borrowed, the judgment is declared invalid for improper acknowledgment, and the lender brings action to foreclose unless the first mortgage is in the due course of proceedings after the deed is signed, the court may make a party by amendment if it should be necessary. Investment Securities Co. v. Gash, 203 N. C. 126, 154 S. E. 628.

Making New Parties upon Appeal to Superior Court.—A connecting line of carriers had been sued in a justice's court for the statutory penalty in failing to transport the shipment within a reasonable time, and appealed to the superior court from an adverse judgment. It was held proper for the court in its discretion to order them to be made a party therein, though the amount involved was less than $200, without the necessity of remanding the case to the inferior court. Sellar v. Florence Mills v. Southern R. Co., 174 N. C. 449, 93 S. E. 952.

Substitution of Plaintiff upon Appeal to Superior Court.—In a suit for a warrant to attach, the judgment as amended did not affect the substantial form, at any time before or after judgment in any action pending before him, either civil or criminal, either in form or in substance. Edney v. Mathews, 218 N. C. 279, 18 S. E. 212.

The summons by mistake or inadvertence, an amendment or drawn with technical accuracy, but are sufficient if they

ings in a justice's court need not be in any particular form

by the judgment rendered does not operate as an estoppel

When the statute of limitations has not run as to the latter, the amendment cannot be construed to have a different re

representations, it is within the sound discretion of the trial judge to permit an amendment alleging a warranty, in ad

increase the amount

The defendant false and

made a party by amendment if it should be necessary. In

nating between pleading and proof, see § 1-168.

Under this section the form of the prayer for judgment is not material. It is the facts alleged that determine the nature of the relief to be granted. Bolich v. Prudential Ins. Co., 206 N. C. 144, 150, 173 S. E. 320.

of Causes upon Their Merits.—It is manifest from this and other sections of the Code that the system, in its whole structure and scope, looks to a trial of a cause upon its merits, and discontinuances objections for defects which may be corrected and removed when made in apt time, and will not entertain them after trial and verdict. Halstead v. Mullen, 93 N. C. 232, 235.

The court or judge shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party; and no judgment may be reversed or affected by reason of such error or defect. (Rev., s. 509; Code, s. 576; R. C., c. 3, ss. 5, 6; C. C. P., s. 135; C. S. 549.)

Cross Reference.—As to variance, material and immaterial, between pleading and proof, see § 1-168.

Under this section the form of the prayer for judgment is not material. It is the facts alleged that determine the nature of the relief to be granted. Bolich v. Prudential Ins. Co., 206 N. C. 144, 150, 173 S. E. 320.

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VI. AMENDMENTS BEFORE JUSTICES OF THE PEACE.

Setting up Mistake in Deed.—In an action to recover land, the Court may be allowed even on the trial in the superior court, to make it appear that the justice's jurisdiction was not improperly exercised. Cox v. Grisham, 113 N. C. 279, 18 S. E. 212.

VIII. SPECIFIC INSTANCES.

Setting up Mistake in Deed.—In an action to recover land, the Court may be allowed even on the trial in the superior court, to make it appear that the justice's jurisdiction was not improperly exercised. Cox v. Grisham, 113 N. C. 279, 18 S. E. 212.
verified by a proper agent, though by apparent clerical error it was stated in its beginning to have been made by a member of the firm, the power of the trial judge to allow amendments being plenary under the provisions of this section. May Co. v. Menzies Shoe Co., 186 N. C. 144, 119 S. E. 272.

Defective Return of Process—Defect in Name.—A defective or informal return of process will be cured after judgment, Crawford v. Bank, 61 N. C. 185; it will also be a defect in the name of a defendant in the summons. Clawson v. Wolfe, 77 N. C. 100.

Mistake in Name.—Names are used to designate persons, and therefore the identity is certain a variance in the name is immaterial, and hence will be disregarded. Patterson v. Walton, 119 N. C. 500, 26 S. E. 43.

By the Supreme Court.—The Supreme Court will disregard proper defects in the pleadings or proceedings in the Superior Court, which are immaterial and where no substantial rights of the appellant will be injuriously affected thereby. Ricks v. Brooks, 127 N. C. 204, 125 S. E. 207.

The interpretation put upon a similar section in the courts of New York is that such defects as would be remediable by amendment that does not change substantially the claim or defense, will not sustain an application to dismiss the action. Loundsbury v. Purdy, 18 N. Y. S. 515. Halstead v. Mullen, 93 N. C. 252, 255.


§ 1-166. Supplemental pleadings.—The plaintiff or defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after, or of which the party was ignorant when his former pleading was filed. Either party may set up by a supplemental pleading, the judgment or decree of any court of competent jurisdiction, rendered since the commencement of an action, determining all or any part of the matter in issue between the parties and the affidavit of the party or his attorney certifying that the matters to him are ascertained, there seems to be no necessity for supplemental pleading. Hughes v. Hodges, 94 N. C. 56. When a nonsuit has been entered, it is too late to file a supplemental answer containing a counterclaim, Sybron Pump etc., Co. v. Rocky Mount Ice Co., 125 N. C. 83, 34 S. E. 198.

Defect of Title Raised by Plea Puis Darrein.—When a plaintiff cannot recover upon the title accruing after the commencement of an action to recover land, its title will be permitted by an amendment to his answer in the nature of a plea since last continuance to plead defects in the plaintiff's title, or matter validating his own, which accrued since the action began. Taylor v. Goob, 110 N. C. 397, 15 S. E. 2.

§ 1-167. Supplemental pleadings.—The plaintiff or defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after, or of which the party was ignorant when his former pleading was filed. Either party may set up by a supplemental pleading, the judgment or decree of any court of competent jurisdiction, rendered since the commencement of an action, determining all or any part of the matter in issue between the parties and the affidavit of the party or his attorney certifying that the matters to him are ascertained, there seems to be no necessity for supplemental pleading. Hughes v. Hodges, 94 N. C. 56. When a nonsuit has been entered, it is too late to file a supplemental answer containing a counterclaim, Sybron Pump etc., Co. v. Rocky Mount Ice Co., 125 N. C. 83, 34 S. E. 198.

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§ 1-168. Supplemental complaint or answer is required from new parties.—When a supplemental complaint or answer is required from new parties only when the previous record of the cause does not show how they are connected with the controversy or interested in its result; but where the death of the original party or his successor in interest occurs, the parties to him are ascertained, there seems to be no necessity for supplemental pleading. Hughes v. Hodges, 94 N. C. 56. When a nonsuit has been entered, it is too late to file a supplemental answer containing a counterclaim, Sybron Pump etc., Co. v. Rocky Mount Ice Co., 125 N. C. 83, 34 S. E. 198.

Defect of Title Raised by Plea Puis Darrein.—When a plaintiff cannot recover upon the title accruing after the commencement of an action to recover land, its title will be permitted by an amendment to his answer in the nature of a plea since last continuance to plead defects in the plaintiff's title, or matter validating his own, which accrued since the action began. Taylor v. Goob, 110 N. C. 397, 15 S. E. 2.

§ 1-166. Variance, material and immaterial.—1. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it is alleged that a party has been so misled, that fact and in what respect he has been
misled must be proved to the satisfaction of the court; and thereafter the judge may order the pleading to be amended upon such terms as shall be just.

2. Where the variance is not material as herein provided, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. (Rev., ss. 515, 516; Code, ss. 269, 270; C. C. P., ss. 128, 129; C. S. 552.)

Cross Reference.—As to error or defect in pleadings or proceedings which does not affect substantial rights, see § 1-169.

Editor's Note.—Under this section two situations may present themselves: (1) If the variance is not material, the court may direct the facts to be found according to the evidence; (2) If the variance is material and the adverse party has been taken by surprise or been misled, the court may allow an amendment upon such terms as may be just. Deligny v. Tate Furniture Co., 170 N. C. 189, 86 S. E. 980; Brown v. Morris, 83 N. C. 252, 256; Wills v. Branch, 94 N. C. 142, 146.


In construing the provision of the Ohio Code it is said: To constitute a variance between the allegations and the proof, the proof must wholly or partly fail to connect the facts drawn by the pleadings, 27 O. S. 159, 268.

Difference of the Old and New Rule on Variations.—The only observable difference between the old and the new rule is that a variance, so slight and unimportant that the adverse party cannot have been misled by it, is deemed immaterial. If an order is given to amend without terms, or will consider the pleading as if amended, and permit evidence to be given under it. And even in the case of a material variance, so substantial that the adverse party has been taken by surprise or been misled, the court, under the Code system does not avoid the necessity that the proof must correspond with the allegation, for proof without allegation is as unavailing as allegation without proof; and where the differences between the allegations and the proof are so slight, if the proofs have an apparent relation to and connection with the allegations, the court will allow an amendment, though upon terms. But where the proof establishes a case wholly different from the one alleged and inconsistent therewith, then no amendment is permitted, but the cause of action must fail. Carpenter v. Huffsteller, 87 N. C. 273, 278.

Uniformity of Allegata et Probata Not Wholly Dispersed.—The uniformity of pleadings under the Code system does not avoid the necessity that the proof must correspond with the allegation, for proof without allegation is as unavailing as allegation without proof; and where the differences between the allegations and the proof are so slight, if the proofs have an apparent relation to and connection with the allegations, the court will allow an amendment, though upon terms. But where the proof establishes a case wholly different from the one alleged and inconsistent therewith, then no amendment is permitted, but the cause of action must fail. Carpenter v. Huffsteller, 87 N. C. 273, 278.

The chief purpose of pleading is to enable the parties to litigate their rights intelligently and fairly and prevent shifts and undue advantage. It is a well-settled rule that there must be a variance of allegations. The rule that the court should not receive evidence that is not pertinent in some aspect of materiality is inapplicable, nor should the court hear evidence to prove a cause of action not alleged. McKee v. Lineberger, 69 N. C. 217; McLaurin v. Cronly, 90 N. C. 58; Brinton v. Daniels, 93 N. C. 781; Greer v. Herren, 93 N. C. 497; 6 S. E. 227; Faulk v. Thornton, 108 N. C. 314, 330, 12 S. E. 998.

Evidence Not Rejected unless Party Misled.—Even though there may have been a variance with the allegations and the evidence adduced, the evidence should not be rejected unless the variance will mislead the other party to his prejudice. Mode v. Penland, 93 N. C. 292, 293, 295; Moore v. Bailey, 93 N. C. 352, 355.

Accordingly it is held that where a railroad company is sued by a passenger for a wrongfully ejection from its train alleged to have been at a certain one of its stations, and upon the admission of the parties that a railroad company is not in the vicinity to a certain other of its stations, the variation will not be deemed material. Edwards v. Southern R. Co., 162 N. C. 146, 162 S. E. 219.

Leave to Amend in Case of Substantial Variance.—Where there is a substantial variance between the allegations of the pleading and the proof, the proper procedure is to ask leave to amend the pleading to conform to the proof, which will be allowed without cost and it cannot be maintained that the judge should disregard evidence contrary to the pleadings or neglect evidence contrary to the pleadings and evidence contrary to the pleadings and to variance according to the proof irrespective of the allegations of the pleading. Haughton v. Newberry, 69 N. C. 456, 459.

Cross Reference.—To render the pleading a variance where there is a variance between the allegations of the pleadings and the proof, when prejudicial and misleading, etc., should be taken in apt time. Patterson v. Champion Lumber Co., 175 N. C. 94 S. E. 149, 150.

Defendant Must Pursue Remedy Prescribed.—In the case of a variance between the allegations of the complaint and the proof upon the trial, the defendant must pursue the remedy prescribed in this section. In accord with the liberal practice of construction, will be deemed material. Simmons v. Roper Lumber Co., 174 N. C. 220, 221, 93 S. E. 726. See also, Whichard v. Lipe, 211 N. C. 51, 19 S. E. 720, 721, 129 A. L. 1147 (dis. opn.).

The adverse party must allege that he was misled, and must prove that fact "to the satisfaction of the court," and must prove that the variance was such as to mislead the other party. The sole object is that the case shall be tried and determined upon its merits. Wright v. Teutonia Ins. Co., 138 N. C. 488, 496, 51 S. E. 55.

Allegations of time and place are not in general material, and a variance thereof by proof is not such as to mislead the other party. Where the adverse party claims that the variance is such as to mislead the other party, the court will disregard the variance. Pegram v. Stolts, 67 N. C. 144, 147.

Examples of Immaterial Variances.—In an action against a railroad company for injuries sustained, the plaintiff alleged that at the time of the injury he was employed by the defendant to replace the derailed car on the track, and that he first connected the rod with the car and then with the rail, and he was permitted to enter the railroad tracks and the track was in a "near-by" point, and telephoned to A, by the defendant's agent there, and there is nothing to indicate that the defendant was misled, or was unprepared to meet the evidence introduced, or was thereby prejudiced. Held, the variance between the allegation and the proof was neither material nor fatal. Brown v. Western Union Tel. Co., 119 N. C. 593, 109 S. E. 509.

Where the answer averred a mutual understanding between the intestate and feme defendant, that an adequate compensation should be provided in the former's will, "to the amount of $50.00, less $20.00". By the intestate, held to be an immaterial one which should be disregarded. Lilly v. Baker, 89 N. C. 151, 522.

Where a plaintiff, in his complaint, alleged and set out a case in trover, and the proof showed that it should have been in the nature of an assumpsit for money had and received, it was held, that the plaintiff was entitled to recover, notwithstanding the variance. Oates, etc., Co. v. Krall, 67 N. C. 336.

In an action for the recovery of the possession of personal property where the proof revealed that the defendant did not have the possession of such property, though he had converted it, the complaint may be so amended as to change the relief sought from that for the possession of the property to that for the recovery of the value thereof, since the defendant will not be misled thereby. Anderson v. Newberry, 69 N. C. 456; Whichard v. Lipe, 211 N. C. 51.

§ 1-169. Total failure of proof.—Where the allegation of the cause of action or defense to which the proof is directed is improved, not in some particular or particulars only, but in its entire scope and meaning, it is not deemed a case of variance, but a failure of proof. (Rev., s. 517; Code, s. 397; C. C. P., s. 223; C. S. 553.)
No Amendment Where Proofs Wholly Different from Allegations.—No amendment of pleadings will be allowed where the cause of action proved is wholly different from that alleged. Grant v. Burgwyn, 88 N. C. 95.

Amendment of Pleadings.—A plaintiff may sue upon one contract and prove another essentially different contract. This is a failure of proof. 10 Barb. 321; 2 N. Y. 300.

No Issue Joined Where Proofs Wholly Different from Allegations.—No amendment of pleadings will be allowed where the cause of action proved is wholly different from that alleged. Grant v. Burgwyn, 88 N. C. 95.

Time of Filing Answer.—An answer is a variance only, but if there is total want of any allegation in the pleading of the subject matter as a cause of action or ground of defense, it is a failure of proof. 10 Barb. 321; 2 N. Y. 300.

Mere Variance Not Waiver of Jury Trial.—A variance is mere variance; it is a failure of proof. 10 Barb. 321; 2 N. Y. 300.

Issue Joined.—The evidence in support of the special relief sought is upon one contract and prove another essentially different contract. This is a more than a mere variance; it is a failure of proof. But if he sues for specific relief, to which he is not entitled, he may be adjudged to have that relief to which he is in law entitled. Wright v. Teutonia Ins. Co., 138 N. C. 488, 490, 50 S. E. 553.

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Cited in Whitchard v. Lipe, 221 N. C. 53, 57, 19 S. E. (2d) 14, 139 A. L. R. 1147 (dis. op.).

SUBCHAPTER VII. TRIAL AND ITS INCIDENTS.

Art. 19. Trial.

§ 1-170. Defined.—A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact. (Rev. s. 526; Code, s. 397; C. C. P., s. 223; C. S. 533.)

Summary Proceedings.—In construing the section of the Old Testament which mentions the trial of the controversy, the court says in Railway v. Thurstin, 44 O. S. 523, 528 says: "It seems clear that the issues here referred to are those which arise upon the pleadings and do not relate to controversies involved in summary proceedings like the one now under consideration, although the pendency of the action in which it is involved depends upon the disposition of it by the court."

Impaneling a Jury is embraced in a "trial" 42 Ohio State Reports.

Quoted in Dunn v. Tew, 219 N. C. 286, 13 S. E. (2d) 536.

§ 1-171. Joinder of issue and trial.—Pleadings shall be made up and issues joined before the clerk. After pleadings have been so made up and issues joined, the clerk shall forthwith transmit the original papers in the cause to the court at term for trial upon the issues, when the case shall be proceeded with according to the course and practice of the court, and on appeal with the same procedure as is now in force. (1919, c. 304, s. 8; Ex. Sess. 1921, c. 92, s. 13; C. S. 555.)

Editor's Note.—This section was re-enacted without change by the Public Laws of 1921, Extra Session.

§ 1-172. How issue tried.—An issue of law must be tried by the judge or court, unless it is referred. An issue of fact must be tried by the jury, unless a trial by jury is waived or a reference ordered. Every other issue is triable by the court, or judge, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it. (Rev. s. 527; Code, ss. 398, 399; C. C. P., ss. 224, 225; C. S. 556.)

Cross References.—As to reference: by consent of parties, see § 1-188; by direction of the court, see § 1-189. As to waiver of jury trial, see § 1-184 and the North Carolina Constitution, Article IV, section 13.

Plaintiff Entitled to Jury Trial.—In all actions under the C. C. P., where legal rights are involved and issues of fact are joined by the pleadings, the plaintiff is entitled to a trial by jury, and cannot be deprived of this right except by his consent. Andrews v. Pritchett, 66 N. C. 357; approving Hatchell v. Odom, 19 N. C. 302.

Methods of Waiving Jury Trial.—There are three modes of waiving a jury trial, but not the questions of fact which arise when, by consent of the parties, the judge is substituted for the jury. Lee v. Pearce, 68 N. C. 76, 89, overruling Goldbeck v. Cates, 67 N. C. 522.

What the evidence would have been had a jury been impaneled could not be anticipated by the court, and the court was without jurisdiction under this section to try the issues of fact which arose when the pleadings were filed. Hensley Corp. v. Atlantic Coast Line R. Co., 206 N. C. 122, 124, 176 S. E. 265.

Judge May Disregard Agreement to Waive Jury Trial.—The trial judge, in the exercise of a sound discretion, may disregard the agreement of the parties that a jury trial be held in the county from which it was issued; and those issues which are merely evidential, and not the questions of fact which arise when, by consent of the parties, the judge is substituted for the jury. Lee v. Pearce, 68 N. C. 76, 89, overruling Goldbeck v. Cates, 67 N. C. 522.

Equitable Element Cannot Defer Right to Jury Trial.—A party has no right to a trial to a jury, although the evidence and the facts are such as would support the case for a jury at the same trial, when the pleadings were filed. Hensley Corp. v. Atlantic Coast Line R. Co., 206 N. C. 122, 124, 176 S. E. 265.

Submission of Evidential Issues Error.—The only issues proper to be submitted to the jury are those raised by the constitutive facts alleged on the one side and denied on the other side, and not those issues which are merely evidential, and when found by the jury, only furnish facts which would be evidence to prove the main issue, should never be submitted. Fatton v. Western, etc., R. Co., 96 N. C. 455, 456, 1 S. E. 663.

Jury Impaneled but No Evidence Adduced.—On the trial of a civil action when the jury were sworn and impaneled and issues framed, but no evidence adduced on either side, and the jury were discharged without verdict it was held, (1) That the parties stood at issue on the pleadings just as they were before the jury were sworn. (2) That in such case the judge has no right to pass upon the issues, except in accordance with section 1-184. Chasten v. Odom, 19 N. C. 302.

Appeal.—Where the parties waive a jury trial and agree to trial by the court, the court's findings of fact from the evidence are binding and conclusive upon appeal. Berry v. Payne, 219 N. C. 171, 13 S. E. (2d) 247.


§ 1-173. Issues of fact.—Every issue of fact joined on the pleadings, and inquiry of damages ordered to be tried by a jury, must be tried at the term of the court next ensuing the joinder of issue or order for inquiry, if the issue was joined or
order made more than ten days before such term, but if not, they may be tried at the second term after the joiner or order. (Rev. s. 528; Code, s. 400; C. C. P., s. 228; 1923, c. 54; 1925, c. 5; C. S. 557.)

Editor's Note.—Prior to the passage of the Act of 1923 the time specified by this section was thirty days before the term. The same act substituted the word "may" for "must" in the next to the last line of the section.

Acts 1923, c. 5 did not affect the wording of the section but corrected an error in the amending act of 1923.

Power of Judge to Compel Party to Proceed.—The judge is without authority to compel a party to a action to proceed with the trial of a causa transferred to the civil issue docket when the issue has been joined within ten days from the commencement of the term. Calhoon v. Everett, 187 N. C. 369, 121 S. E. 612.

Amended Answer Raising Additional Issue.—Where, at trial term, an amended answer to an amended complaint raises additional issues of fact, the defendant is entitled to a continuance. Dobson v. Southern Ry. Co., 129 N. C. 289, 40 S. E. 42.

Issue of Insanity.—In an indictment for murder, there being no allegation that the prisoner was insane at the time of the trial, no issue as to insanity need be submitted. State v. Spivey, 132 N. C. 989, 43 S. E. 475.

Cited in Denmark v. Atlantic, etc., R. Co., 107 N. C. 182, 8 S. E. 742; Simms v. Sampson, 221 N. C. 379, 380, 20 S. E. (2d) 554.

§ 1-174. Issues of fact before the clerk.—All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term, and in case of such transfer neither party is required to give an undertaking for costs. (Rev., s. 529; C. S. 557.)

Denial of Good Faith in Condemnation Proceedings.—When in proceedings by a railroad company to condemn lands, the answer denies the intention of the petitioners in good faith to construct the proposed railroad, the pleadings, in substantial part, present an issue of fact to be transferred to and tried by the Superior Court in term, under the provisions of this section. Madison County R. Co. v. Gahagan, 161 N. C. 190, 76 S. E. 696.

Review of Clerk's Decisions.—The rulings or decisions of the clerks of the court must, as stated in this section, be transferred to trial for trial to the next succeeding term of the Superior Court, if determinative issues arise on the pleadings in any action or suit where litigants are present; and if there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge of the term to which the cause is transferred, and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence in order to enable it to determine the questions of fact presented. Mills v. McDaniel, 161 N. C. 112, 76 S. E. 551.

§ 1-175. Continuance before term; affidavit.—A party to an action may apply to the court in which it is pending, or to the judge thereof, by affidavit, thirty days before the trial term, and after three days notice in writing to the adverse party, to have the trial continued to a term subsequent to that in which it is regularly triable. The court or judge may continue the trial as asked for, on such terms as may be just, if satisfied—

1. That the applicant has used due diligence to have his case ready for trial.

2. That by reason of circumstances beyond his control, which he must set forth, he cannot have a fair trial at the regular trial term. If the application is made by reason of the expected absence of a witness, it must state the name and residence of the witness, the facts expected to be proved by him, the grounds for the expectation of his nonattendance, and that the applicant expects to procure his evidence at or before some named subsequent term. The applicant must in all cases pay the costs of the application. (Rev., s. 550; Code, 401; C. C. P., s. 227; C. S. 559.)

Continuance Lies in Discretion of Judge.—The matter of granting or refusing a continuance of a cause for trial rests in the discretion of the trial judge, and the exercise of such discretion is not reviewable on appeal, in the absence of gross abuse. Piedmont Wagon Company v. Bostic, 114 N. C. 758, 24 S. E. 525.

Continuance Not Favorable by Law.—Continuances are not favored by the law. The immortal provisions of the Magna Charta is that justice shall neither be delayed nor denied, and these are coupled together, for a delay of justice is often a denial of justice. Piedmont Wagon Company v. Bostic, 114 N. C. 759, 24 S. E. 525.

Who May Make Affidavit.—In the United States Supreme Court it has been held that an affidavit for a continuance must be made by one interested in the suit or action. See Hunter v. Kennedy, 1 Dall. 509, 1 L. Ed. 46.

§ 1-176. Continuance during term.—The judge at any time during the term at which an action is triable may continue the trial on the application of either party, and on such terms as shall be just, if satisfied—

1. That the applicant has used due diligence to be ready for trial.

2. That he cannot have a fair trial at that term, by reason of circumstances stated, and if the ground of application is the nonattendance of a witness, the affidavit must contain the particulars required by subdivision two of § 1-175. Unless the applicant also sets forth in his affidavit that the facts upon which his application is grounded occurred or came to his knowledge too late to allow him to apply as prescribed in § 1-175, and that his application is made as soon as it reasonably could be after the knowledge of those facts, the continuance shall not be granted, except on the payment of the costs of the continuance at the cost for the term for the application for the term. (Rev., s. 531; Code, s. 402; C. C. P., s. 228; R. C., c. 31, s. 57; C. S. 560.)


The court cannot lay down a general rule for the continuance of causes; but must, on the circumstances of the case, take care that injustice is not done, either by precipitate trials or wanton delays, and where there appears to be a fair ground for the postponement, the case will be continued. Symes v. Irvine, 2 Dall. 383, 384, 1 L. Ed. 425.

The absence of a party or witness must be accounted for before a cause will be continued on these grounds. Crites v. Lanier, 1 N. C. 109.

Attorney Son of Trial Judge.—The fact that an attorney in an action is the son of the trial judge is not a ground for continuance. Allison v. So. R. Co., 129 N. C. 336, 40 S. E. 91.

Sickness of members of a defendant's family may be a ground on which the judge, in his discretion, may grant a continuance. Skinner v. Byers, 75 S. C. 207.

Insanity of Defendant.—Where defendant becomes insane pending an action against him for divorce, the action should be continued if there is any hope of recovery. Stratfrod v. Strongford, 92 N. C. 418.

To Prove Bad Character of Witnesses.—Where defendant has asked for a continuance under this section without complying with the requirements and the purpose given for seeking the continuance, the second deposition as to the bad character of the State's witnesses when defendant has already been permitted to cross-examine the witnesses and the attorney has been allowed to procure evidence for criminal offenses, refusal of the trial judge to grant the continuance is no abuse of discretion. State v. Banks, 204 N. C. 233, 167 S. E. 558.

Amendment of Pleadings.—Refusal of a continuance on a defendant filing on the day of trial, an answer substantially
Like that of the other defendants, and raising no additional issues as an act of discretion. Slingluff v. Hall, 124 N. C. 397, 32 S. E. 729.

But where an amendment is such as to cause surprise, it is cause for continuance, Martin v. Bank, 131 N. C. 121, 43 S. E. 106. Thus, in McEvoy v. E. H. Johnson, etc., obop, 219 S. N. C. 709, 712, 715 (1927), by order of the court, the allowance of an amendment alleging fraud, if such as to take defendant by surprise, entitles him to a continuance. Dockery v. Fairbanks Morse Co., 172 N. C. 529, 90 S. E. 501. See also Bostic v. Southern Railway Co., 129 N. C. 289, 49 S. E. 42, under § 1-173. Likewise if an allegation of time, when placed on the civil issue docket, or, where there is a misjoinder of parties, the court in its discretion can do the same. Pretzfelder, etc. v. Merchants' Ins. Co., 116 N. C. 491, 496, 21 S. E. 525.

§ 1-177. Counter affidavits as to continuance.—It is competent in all civil cases only for the opposing side to controvert the allegations of fact in applications for continuance, and to offer counter affidavits to that end. The judge shall not allow the continuance unless satisfied, after thorough examination of the evidence aforesaid, that the ends of justice demand it. (Rev., s. 532; 1885, c. 394; C. S. 561.)

In General.—As the two preceding sections, in the judgment of the legislature, were not sufficient to protect against the delay of the party by issuance of a writ, this does not necessarily follow, nor compel the conclusion that the failure of the party, who, in his opinion, would be allowed by the court when, in its opinion, justice will thereby be promoted. (Rev., s. 535; Code, s. 413; C. C. P., s. 229; C. S. 562.)

§ 1-178. Order of business.—The criminal calendar must be first disposed of, unless, by consent of counsel, or for reasons satisfactory to the judge, particular criminal actions may be deferred. The issue on the civil calendar must be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court otherwise directs:

1. Issues of fact to be tried by a jury.
2. Issues of fact to be tried by the court.
3. Issues of law.

(Rev., s. 533; Code, s. 403; C. C. P., s. 229; C. S. 562.)

Cross Reference.—As to civil cases at criminal terms, see § 7-72.

Generally.—While placing a case on the civil issue docket usually indicates a trial by jury of issues of fact, this does not necessarily follow, nor compel the conclusion that the legislature so intended, as there may be, and frequently are, issues of law and questions of fact, triable by the judge, which properly find their way to this docket. State v. Williams, 289 N. C. 709, 217 S. E. (2d) 464.

§ 1-179. Separate trials.—A separate trial between a plaintiff and any of several defendants may be allowed by the court when, in its opinion, justice will thereby be promoted. (Rev., s. 534; Code, s. 407; C. C. P., s. 230; C. S. 563.)

Severance Not a Matter of Right.—It is within the sound discretion of the court, on motion of the defendants, or any of them, to allow severance and a separate trial as to each defendant if thereby justice will be promoted. However it was error for the court to hold that the defendants had a right to demand it, and a judgment rendered upon such demand will be reversed. Bryan v. Spivey, 106 N. C. 95, 11 S. E. 570.

Division Allowed in Case of Misjoinder.—Where there is a misjoinder of causes of action, the court may allow the action to be divided, or, where there is a misjoinder of parties, the court in its discretion can do the same. Bostic v. Piedmont Wagon Co., 118 N. C. 758, 759, 24 S. E. 525.

Result of Order of Severance.—An order of severance is equivalent to dividing the action into several suits, with all the usual provisions for costs, etc., incident thereto. Bryan v. Spivey, 106 N. C. 95, 11 S. E. 570.

§ 1-180. Judge to explain law, but give no opinion on facts.—No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon.
about the duty of the trial judge under our statute, and the
consequence of a violation of it, if, in proper form, it be shown
that the judge in his charge, or in any of his conduct, or in
the consequence of causes. The judge should be the embodiment of even
and exact justice. He should at all times be on the alert lest in an
incident or any other part of his conduct, or in the consequence of
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incident or any other part of his conduct, or in the consequence of
the hearing of the jury at any time during the trial, and
whether the objectionable comments may be towards the
jestor offered, the witness testifying, or the litigant
and the cause he is endeavoring to maintain."

An expression of an opinion by the judge as to an essential
fact involved in an issue is condemned by this section.
Abernathy v. State Planters’ Bank, etc., Co., 202 N. C. 46,
49, 161 S. E. 705.

The provisions of this section are mandatory. State v.
Evans v. Moore, 193 N. C. 489, 135 S. E. 468.

The Right of the Jury to Pronounce an Opinion.
The provisions of Equal Dignity.—This section
proscribes the judge in charging the jury from expressing
an opinion as to the weight and credibility of the evidence,
and this opinion as to the weight and credibility of the evidence,
and prescribes that he declare and explain the law arising
in the course of the trial. See the opinion in Wilson, 1909 N. C. 819, 130 S. E. 834; Ryals v. Carolina

A Substantial Right of Litigants.—This section gives
the parties to the action a substantial right. The jury has
the sole and exclusive function of finding the facts from the
evidence, and it is not its duty to pronounce an opinion on
the evidence. State v. Wiley, 199 N. C. 489, 100 S. E. 361; State v. Pugh, 183 N. C. 800, 111 S. E. 849.

Evidence Must Be Stated Impartially.—It has been ac-
cepted as the proper construction and meaning of the
act of 1899, that it is not the function of the
judge to express an opinion on the weight of

Where Law Gives Testimony Artificial Weight. It is
only in those cases where the law gives testimony an artificial
weight that the judge is at liberty to express an opinion upon its

Section Applies Throughout Trial.—This section
determines whether the party whose right to a fair trial has
been impaired is entitled to a new trial. State v. Bryant, 189 N. C. 112, 126 S. E. 107, 108; State v.
Oakley, 210 N. C. 206, 186 S. E. 344.

Section Applies Throughout Trial.—This section applies
to any expression of opinion by the judge in the hearing of
the jury at any time during the trial. State v. Cook,
162 N. C. 586, 77 S. E. 739; Thompson v. Angel, 214 N. C. 479,
195 S. E. 759.

It was considered so essential to protect the right of
trial by jury that this section was broadly worded and
was made applicable to any opinion or intimation
while it refers in terms to the charge, it has always been construed
as including the expression of any opinion, or
an even an intimation of the judge, at any time during the trial which
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of its instructions to the jury. Bailey v. Hayman, 220 N. C. 400,
17 S. E. (2d) 230.

Material and Immaterial.—The probable effect or
influence upon the jury, and not the motive of the judge,
determines whether the party whose right to a fair trial has
been impaired is entitled to a new trial. State v. Bryant,
189 N. C. 112, 126 S. E. 107, 108; State v. Oakley, 210 N. C. 206,
186 S. E. 344.

What Remarks Presumed Correct.—The remarks of
the trial judge in discharging a jury after verdict, or in
impressing upon jurors the public duty of jurors in their
future conduct, are not to be considered as
whether the objectionable comments may be towards the
jestor offered, the witness testifying, or the litigant
and the cause he is endeavoring to maintain."

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186 S. E. 344.

What Remarks Presumed Correct.—The remarks of
A Venire de NoVo for Violation. — Under this section the trial judge is restricted to stating plainly and correctly the evidence and declaring and explaining the law arising therefrom, and must be particular of opinion. If in any manner in presenting or arraying the evidence indicates his opinion upon the facts, or conclusion of facts, a venire de novo will be ordered. Withers v. Lane, 144 N. C. 184, 59 S. E. 557.

Exceptions after Verdict. — The fact that exception was not entered at the time a remark was uttered is immaterial. The statute is mandatory, and all expressions of opinion by the judge during the trial are prohibited, unless accompanied by the admission of evidence made incompetent by statute, may be excepted to after the verdict. State v. Bryant, 189 N. C. 120, 130 S. E. 107, 108 S. E. 393.

Record on Appeal Must Show Error. — If an appeal is taken on the ground that the judge, by his manner or emphasis intimated an opinion upon the facts, the record must show the occasion, its nature, and what was said. Davis v. Blevins, 125 N. C. 433, 34 S. E. 541. Citing State v. Wilson, 76 N. C. 120; State v. Jones, 67 N. C. 285.

An assignment of error to a charge shall state wherein the charge fails to comply with this section. Switzerland Co. v. North Carolina State Highway, etc., Comm., 216 N. C. 432, 100 S. E. 645; 33 S. E. 325.


Cited in Hunsinger v. Carolina, etc., Ry., 194 N. C. 679, 681, 140 S. E. 508; State v. Newsome, 195 N. C. 552, 143 S. E. 318; State v. Brown, 100 N. C. 519, 6 S. E. 568. In that case it was held that an objection made after verdict was too late.

In General. — This section has been interpreted to mean that no judge, in giving a charge to the jury, or at any time during the trial, shall intimate whether a fact is or is not true, or whether a fact is or is not of sufficient weight to affect the verdict. Sample v. Spencer, 222 N. C. 580, 24 S. E. (2d) 221.

What Constitutes an Opinion. — 1. A correct charge of the court upon the evidence in a case will not be held for error as containing an expression of opinion prohibited by this section, when nothing of this nature appears from a careful perusal of the charge. State v. Sawyer, 198 N. C. 459, 152 S. E. 153; Brown v. Postal Telegraph-Cable Co., 198 S. E. 309; Wilson v. Inter-Ocean Cas. Co., 210 N. C. 585, 188 S. E. 102; State v. Jones, 211 N. C. 462, 190 S. E. 720; State v. Johnson, 211 N. C. 462, 190 S. E. 720; State v. John-}

Possibility of Unfair Inference Insufficient. — It is not sufficient to show, that what the judge did or said might have had an unfair influence, or that his words, critically interpreted, would make it reasonably certain that it would have had an unfair influence, or that his words, critically interpreted, were such as to suggest the weight of evidence or to use language which, fairly interpreted, would make it reasonably certain that it would have had an unfair influence.

Direct Language Not Necessary to Constitute Error. — Where an intimation as to whether any fact is sufficiently proved is reasonably inferred from the manner of the judge in discussing or for language of the evidence, or in his presentation thereof or his form of expression, or by the tone or general tenor of the trial, giving advantage to the appellee thereby, such as to impair the credit which might otherwise have been accorded to the fact, and made essential to his case, there will be error. State v. Hart, 186 N. C. 582, 120 S. E. 345; State v. Rhinehart, 209 N. C. 150, 153, 183 S. E. 398.

Insufficient. — It is not sufficient to show, that what the judge did or said might have had an unfair influence, or that his words, critically interpreted, would make it reasonably certain that it would have had an unfair influence; but it must appear, with ordinary certainty, that his manner of arraying and presenting the evidence was unfair, and likely to be prejudicial, or that his language, when critically interpreted, was likely to convey to the jury his opinion on the weight of the evidence. State v. Jones, 67 N. C. 285.

Section Applies to Issues. — The facts on which this section restrains the judge from expressing an opinion to the jury are those respecting which the parties take issue in the cause, upon which the jury was called to find a verdict in the present instance, that is, those respecting which the evidence, as found by the jury, has had an unfair influence, or that his words, critically interpreted, would make it reasonably certain that it would have had an unfair influence. See Speed v. Perry, 167 N. C. 122, 83 S. E. 176; Sample v. Spencer, 222 N. C. 580, 24 S. E. (2d) 221.

Remarks Made in Mere Pleasantry. — Remarks made in mere pleasantry by the trial judge in the presence of the jury will not be held for error as containing an expression of opinion forbidden by statute, when it could not reasonably have had any appreciable effect upon the jury, and could only have been regarded by them in the manner in which it was uttered. State v. Jones, 181 N. C. 549, 154 S. E. 337.

Remarks That Fact Is "Sufficiently Proved."—The mortuary tables (see § 8-46), are but evidence of life expectancy, to be taken in connection with other evidence of health, constitution, and habits, and an instruction that intestate's life expectancy was so many years, based upon the tables, violates this rule and the rule against an expression of opinion by the court as to whether a fact is sufficiently proven. Chase v. Atlantic Greyhound Lines, 210 N. C. 93, 190 S. E. 330.

Charge Predicated on Jury Findings. — Where the trial judge, in charging the jury, predicated his instructions upon the facts, and the jury may find the facts to be, it is not an expression of opinion forbidden by this section. Ivie v. King, 167 N. C. 41, 43 S. E. 339.

Positive or Negative Testimony. — It is not error, as a general proposition, for a judge to say that positive testimony is entitled to more weight than negative. Henderson v. Crouse, 53 N. C. 633.

Assumption of Truth of Fact. — An instruction which assumes the truth of controverted facts is erroneous, as invading the province of the jury. Bradley v. Ohio River, etc., Co., 126 N. C. 735, 36 S. E. 181; Pigford v. Norfolk, etc., R. Co., 160 N. C. 87, 75 S. E. 860.

Assumption of Non-Existence of Facts. — A new trial will be awarded, where the charge of the court assumed the non-existence of controverted facts, and left the decision of such questions from the jury. Powell v. Wilmington, etc., R. Co., 68 N. C. 359.

Uncontroverted Facts. — An instruction is not erroneous in assuming the existence of uncontroverted facts. Crampton v. Ivie, 124 N. C. 391, 32 S. E. 968.

Uncontroverted Evidence. — Where the defense is based on the uncontroverted testimony of a witness, it is proper for the court to address the jury in such manner as to indicate that they believe such witness. Love v. Gregg, 117 N. C. 467, 21 S. E. 332; Purifoy v. Richmond, etc., R. Co., 108 N. C. 129, 11 S. E. 714; Chemical Co. v. Johnson, 101 N. C. 223, 7 S. E. 770, 775.

However, this principle does not apply where the evidence, if true, is susceptible of more than one deduction. Armour Packing Co. v. Matsuyama, 170 N. C. 206, 185 S. E. 568.
Instruction That There Is No Evidence.—If any testi-
mony that the state calls upon which the court may not intimate an opin-
on, the evidence for the State and for the defendant, is not
been in some way prejudiced by the remarks or conduct of
ordinary certainty that the rights of either party have
382, 43 S. E. 919; State v. Harris, 213 N. C. 648, 197 S. E.
Hypothetical Statements by Judge. — Merely hypotheti-
cal instructions are erroneous, and should not be indulged
in, as they proceed on an assumption of facts. State v.
Wilson v. Holley, 66 N. C. 408.

Remarks to Counsel. — Remarks of the judge, made, not
as distinctly to another and a different contract, it is not
error to charge that, if the jury find that plaintiff has
stated the contract correctly, they will find for him, but,
Barringer v. Burns, 108 N. C. 779, 30 S. E. 2; Newsome v.

Evidence Tends to Show. — It is not error, as comment-
ing on the weight of evidence, to use in instructions the
phrases, "the evidence tends to show," and "evidence tend-
in, as they proceed on an assumption of facts. State v.

Defendant Not Prejudiced by Remarks During Cross-Ex-
amination of State's Witness.—Remarks of the court in the

Credibility of Witnesses. — Where there is a disputed
fact depending upon the testimony of wit-
nesses, the credibility of the witnesses is always a ques-
tion for the jury, and this is so though the testimony may
be all on one side. In this case, the judge may charge the
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is not permitted to express an opinion as to whether a fact,
is sufficiently proved, in his charge to the jury. Williams

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Remark Complimentary to Witness. — A remark of the
trial judge complimentary to the character of one who was
in, as they proceed on an assumption of facts. State v.

Defendant Not Prejudiced by Remarks During Cross-Ex-
amination of State's Witness.—Remarks of the court in the

Remark That Prisoner Would Escape. — A remark of the
court that the prisoner "would escape if he had the opportunity" is not
error, as comment on the weight of evidence, to use in instructions the
phrases, "the evidence tends to show," and "evidence tend-
in, as they proceed on an assumption of facts. State v.

Remarks Made in Directing Nonsuit of One of Several
Defendants. — It is error for the judge in the presence of
the jury, to nonsuit one of several defendants upon the

Remarks Concerning a Party to the Trial.

Parties as Witnesses. — Where plaintiff and defendant are
the principal witnesses, and the former testifies distinctly
and without qualification, the jury may charge the

Defendant Not Prejudiced by Remarks During Cross-Ex-
amination of State's Witness.—Remarks of the court in the

Remark That Witness Has Fully Answered Question. — A
remark of the judge, made, not in his charge but to counsel during the
introduction of the evidence, are not a ground for a new trial, unless it reason-
able appears that a party is prejudiced in the minds of the
jury by such remarks. Williams v. Crosby Lumber
Co., 118 N. C. 928, 24 S. E. 800. 

Remarks Concerning the Plaintiff's Motions for New Trial. —
Where the judge, in giving the motion for new trial, stated that
the state has a number of witnesses and only defendant
was called, he had not understood the summons which was very
material, and that upon plaintiff's request the deficiency in the record
was supplied, it was held that the remarks of the court did
not constitute a reversible error, as opinion upon the deficiency
inferred by this section, but were within the court's sound
discretion in discharging its duty to see to it that each
side has a fair and impartial trial. Miller v. Greenwood,
218 N. C. 146, 197 S. E. (2d) 79S.

Remark Complimentary to Witness. — A remark of the
trial judge complimentary to the character of one who was
in, as they proceed on an assumption of facts. State v. Howard,
129 N. C. 584, 40 S. E. 71.

Amount of Recovery. — Mathematical computations in a
charge on the measure of damages are not error, as comment-
ing on the weight of evidence, to use in instructions the
phrases, "the evidence tends to show," and "evidence tend-
in, as they proceed on an assumption of facts. State v.

Remark Concerning Emotion of Witness. — On a trial

Remark Concerning the Plaintiff's Motions for New Trial. —
Where the judge, in giving the motion for new trial, stated that
the state has a number of witnesses and only defendant
was called, he had not understood the summons which was very
material, and that upon plaintiff's request the deficiency in the record
was supplied, it was held that the remarks of the court did
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Remark Concerning Emotion of Witness. — On a trial

Remark Concerning the Plaintiff's Motions for New Trial. —
Where the judge, in giving the motion for new trial, stated that
the state has a number of witnesses and only defendant
was called, he had not understood the summons which was very
material, and that upon plaintiff's request the deficiency in the record
was supplied, it was held that the remarks of the court did
not constitute a reversible error, as opinion upon the deficiency
inferred by this section, but were within the court's sound
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in, as they proceed on an assumption of facts. State v.

Remark Concerning Emotion of Witness. — On a trial

Remark Concerning the Plaintiff's Motions for New Trial. —
Where the judge, in giving the motion for new trial, stated that
the state has a number of witnesses and only defendant
was called, he had not understood the summons which was very
material, and that upon plaintiff's request the deficiency in the record
was supplied, it was held that the remarks of the court did
not constitute a reversible error, as opinion upon the deficiency
inferred by this section, but were within the court's sound
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Remark Concerning Emotion of Witness. — On a trial

Remark Concerning the Plaintiff's Motions for New Trial. —
Where the judge, in giving the motion for new trial, stated that
the state has a number of witnesses and only defendant
was called, he had not understood the summons which was very
material, and that upon plaintiff's request the deficiency in the record
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inferred by this section, but were within the court's sound
discretion in discharging its duty to see to it that each
side has a fair and impartial trial. Miller v. Greenwood,
218 N. C. 146, 197 S. E. (2d) 79S.
a question it is within the discretion of the trial judge to relieve the witness from answering substantially the same question; and his statement before the jury that the witness had already fully answered, is not an expression of his opinion as to the credibility of the witness. State v. Mansell, 192 N. C. 20, 133 S. E. 190.

Referring to Eyewitnesses.—Upon the trial under an indictment for assault and larceny, where some of the State's witnesses were eye-witnesses, and some were not, the court and the defendant had admitted he was present at the time, an instruction as to the first class "now that is the testing of their stories," followed by correct instructions as to the second class "a reasonable doubt," was held to be an expression of opinion by the trial judge forbidden by this section. State v. Boswell, 195 N. C. 496, 142 S. E. 583.

Statute Held Not Objectionable.—The statement that the evidence was too equivocal to corrobore witness, and failure to strike it out, was not expression of opinion on weight of evidence. State v. Starnes, 215 N. C. 539, 11 S. E. (2d) 553.

c. Remarks Concerning Weight and Credibility

Instruction Based on Law.—Where there is evidence of fraud and undue influence in the making of a will, and it appears that it was by a woman who derived the property from her first husband, of which marriage there was one child, and of the property by the children of her second marriage, an instruction to the jury to the effect that the court was evidently stating the contentions of the parties, and that the court was familiar with the handwriting of deceased, and had compared the handwriting of the purported will, and that they were familiar with the handwriting of deceased, and had compared the handwriting of the purported will, and had given it as their opinion that the paper writing and handwriting were not fraudulent, and that the handwriting of the purported will, which may be considered with the other evidence in the case as evidence upon the question of mental capacity and of undue influence, is not objectionable as an expression of opinion by the judge. In re Will of Hardie, 197 N. C. 383, 148 S. E. 660.

Statement That Phases of Case Were Admitted.—A trial judge in an action for damages who stated to the jury that there was no evidence apparently admitted by the defendant's counsel, and if not, to be passed upon by the jury, did not violate this section. Means v. Carolina Cent. R. Co., 126 N. C. 424, 35 S. E. 813.

Statement Concerning Admission.—It is not a violation of this section for the trial judge to tell the jury that the evidence that the defendant had admitted execution of a bond, if believed by the jury to be true, is entitled to more weight than the opinion of experts to the genuineness of the signature, and that such opinions should be received with caution. Buxly v. Buxton, 92 N. C. 479.

Reference to Testimony of One Witness.—Where the court was evidently stating the contentions of the parties as to the force of the evidence taken as a whole, his reference to the testimony of one witness is not improper as tending to restrict the consideration of the jury to it alone. Wheeler v. Cole, 164 N. C. 378, 80 S. E. 241.

Charge Based on Uncontradicted Testimony.—A charge by the court for the jury to return a verdict of guilt if they believed or found, as true the testimony of an uncontradicted witness, is not an expression of opinion on the weight and credibility of the evidence. State v. Moore, 192 N. C. 269, 137 S. E. 135.

Refusal on Evidence of Character of Defendant.—An instruction that "there was evidence tending to show that he (the defendant) is a man of bad character," said while stating the contentions of the state, cannot be held for an expression of opinion by the court on the weight or credibility of the testimony in violation of this section. State v. Sims, 213 N. C. 590, 197 S. E. 176.

Statement That Evidence Satisfies "Beyond Reasonable Doubt."—In a criminal case in which the court told the jury "the evidence tends to show a homicide committed in the perpetration of a robbery," and that the State has offered evidence "sufficient, beyond a reasonable doubt, and should satisfy you, gentlemen, beyond a reasonable doubt," etc.: Held, the charge will not be held for error on defendant's exception on the ground that it contained an expression of the opinion by the court on the weight of the evidence, appearing that the court, prior to this instruction, went into detail in citing cavators' testimony. In re Williams' Will, 215 N. C. 259, 1 S. E. (2d) 857.

d. Miscellaneous Remarks.

Where Defense Not Applicable to Issue.—Where the testimony of all the officers of a bank conversant with the facts that the bank was an indorsee for value and a holder in due course of the note sued on was not contradicted, and the other facts not solely dependent upon the inquiring note, the court properly charged that if the jury believed the evidence, the verdict should be for the bank. First Nat. Bank v. Griffin, 153 N. C. 72, 68 S. E. 919.

Statement Concerning Admission of Document and a Tip Book Are Same Under the Statute.—"That if you find this defendant guilty" will not be held for error as an expression of opinion on the evidence when the phrase is immediately followed by "if not, to be passed upon by the defendant's counsel, and did not convey an opinion of anything that the State offered in evidence that the defendant had admitted execution of a will, which may be considered with the other evidence in the case as evidence upon the question of mental capacity and of undue influence, is not objectionable as an expression of opinion by the judge. In re Williams' Will, 215 N. C. 259, 1 S. E. (2d) 857.

A reference in the charge to "these gambling devices" will not be held prejudicial as an expression of opinion on the evidence when it is apparent that the charge referred to the devices mentioned in the warrant and not to those about which evidence had been taken. Id.

Comment Upon Admission of Confession in Evidence.—The comment of the trial court upon the admission of defendant's confession in evidence that the court had held the confession competent because it appeared that it was taken without hope of reward or without extortion or fear, after it had been given only as an expression of opinion by the court, is no more than stating that the confession had been admitted in evidence and the reasons for admitting it, and will not be held for error as an expression of opinion by the court upon this section. State v. Webster, 218 N. C. 692, 12 S. E. (2d) 287.

Statement to Jury.—Where the jury has returned for a verdict, an instruction to the jury that, in the event of a breach of warranty, a suggestion by the judge, that a good test would be for each party to select a man and a woman, and swear to his summary that the prosecutrix had said that she did not know a certain woman, to which the judge said, "his summary that the prosecutrix had said that she did not know a certain woman," followed by correct instructions as to the second class "a reasonable doubt," etc.: Held, the charge will not be held for error on defendant's exception on the ground that it contained an expression of the opinion by the court on the weight of the evidence when it is apparent that the charge referred to the devices mentioned in the warrant and not to those about which evidence had been taken. Id.

Remark Concerning Recall of Witness.—A remark by a judge, when he permitted a witness to be recalled, and asked a question to impeach his credibility, that he if he had known the counsel intended to ask that question he would not have allowed the witness to be recalled, is not an expression of opinion about which evidence had been taken. Id.

Question to Counsel.—Where the judge asked defendant's counsel in the hearing of the jury, if he thought that an objection to certain proof in the case "would be fair," it was held that the remark of the judge was no violation of this section. State v. Pugh, 183 N. C. 800, 111 S. E. 849.

Remark Concerning Recall of Witness.—A remark by a judge, when he permitted a witness to be recalled, and asked a question to impeach his credibility, that he if he had known the counsel intended to ask that question he would not have allowed the witness to be recalled, is not an expression of opinion about which evidence had been taken. Id.

Response to Request of Counsel.—Where the prisoner's counsel called attention to the judge's failure to state in his summary that the prosecutrix had said that she did not know a certain woman, to which the judge said, "Yes, I believe that she did say that," it was held, that such remarks were a sufficient response to the request of the prisoner's counsel, and did not convey an opinion of anything that the State offered in evidence that the defendant had admitted execution of a will, which may be considered with the other evidence in the case as evidence upon the question of mental capacity and of undue influence, is not objectionable as an expression of opinion by the judge. In re Williams' Will, 215 N. C. 259, 1 S. E. (2d) 857.

Suggestion of Method of Settlement.—In an action for the purchase price of a horse, defended upon the ground of a breach of warranty, a suggestion by the judge, that a good test would be for each party to select a man and a woman.
drive the horse sufficiently to see what his condition was, as not an expression of opinion. Long v. Byrd, 169 N. C. 698, 87 S. E. 279.

Matters Subject to Mathematical Calculation.—Where the answers to the issues as to the amounts recoverable, in case the defendants were found liable to the plaintiffs, is a matter of mathematical calculation, peremptory instructions in regard thereto do not constitute prejudicial or reversible error under this section. State v. Morgan, 136 N. C. 628, 629, 48 S. E. 670.

2. Remarks Held Error.
a. Remarks Concerning a Party to the Trial.
Character of Accused. — It was held to be error for a judge to tell the jury that,"in plain case, a good character would not help the prisoner; but in a doubtful case, he would have all the benefit of the good character." Such an expression in the charge as to the defendant's character, unless it is shown by the evidence to be a bad character, is an expression of opinion by the trial judge upon the evidence that the defendant had a good character. Where the evidence is admissible in regard to the defendant's character, the expression of opinion by the trial judge upon the evidence that the defendant had a good character, amounts to an expression of an opinion upon the facts. Faulkner v. King, 159 S. E. 427.

Ordinary Care. — An instruction that, where the defendant was at fault in causing an injury, it was his duty to use such ordinary care as a reasonable man would have exercised under the circumstances, was error. Sanders v. Atlantic Commerce Co, 160 N. C. 526, 76 S. E. 553.

Comment on Absence of Defendants. — Where the trial judge recited the benefits conferred by corporate action against a telegraph company it is error for the court to instruct the jury that the evidence rebuts it and overrules the defendants' exceptive assignments of error thereto must be sustained. State v. Winckler, 210 N. C. 555, 187 S. E. 792.

Motive. — A charge, "While it is permissible to show a motive as a circumstance to be considered by the jury, it is not necessary. All the State has to do is to satisfy the jury beyond a reasonable doubt that the defendant did the act," was held to be error under this section. State v. Jenkins, 85 N. C. 544.

Identification of Defendant. — Where the only evidence connecting the defendant with operating a still was a coat found in the accused's room, but did not prove them to be the defendant's, the charge was held to be an expression of opinion forbidden by this section. Greene v. Newsome, 184 N. C. 77, 113 S. E. 569.

 Corporations. — An instruction, that a party, interested in getting one claim in return, and intimated that he would not permit the money to be used in any way which the judge computes error. State v. Sparks, 184 N. C. 745, 114 S. E. 755.

b. Remarks Concerning Witnesses.
Remarks Having Effect of Impeaching Witnesses. — Where questions propounded by the court have the effect of impeaching witnesses they are in violation of this section and defendants' exceptive assignments of error thereto must be sustained. State v. Winckler, 210 N. C. 555, 187 S. E. 792.

Remark That Witness was "Admirably Lucid." — The expression of the opinion of the court as to the "admirably lucid" testimony of a medical expert witness constitutes reversible error. State v. Horne, 171 N. C. 787, 88 S. E. 432.

Comments on Witnesses. — The expression, "This witness has the weakest voice or the shortest memory of any witness I ever saw"—is clearly susceptible of the construction that the testimony of the witness was at least qualified by the opinion of the court on his character and credit," was held to be error. State v. Bryant, 189 N. C. 112, 126 S. E. 107, 109.

Questioning Non-Resident As to Professional Ethics. — In an action to recover damages for personal injury, where a release from liability was set up, it is an inadmissible error for the judge, during the trial and in the presence and hearing of the jury, to stop the testimony of the defendant's witness, a nonresident attorney who had procured the release, and question her as to professional ethics involved and the standard in his own State, of such conduct; which reflected on the witness. Morris v. Kramer Bros Co, 183 N. C. 755, 161 S. E. 593.

Witness Included in Same Indictment. — Where there is a severance on the trial of defendants, and another party charged in the bill testifies in behalf of the accused, it is an indication of the opinion of the court on the facts that the evidence of that witness should be considered by the jury to charge that the very fact that the witness is included in the same indictment will impair his testimony, and that the same should not be placed on the same plane or footing with that of a witness of undoubted character who is disinterested. State v. Jenkins, 85 N. C. 544.

Interest of Witness.—It is error to charge the jury that they are bound to believe a witness whose story is impeached in his pocket by the evidence of the state was circumstantial. State v. Jenkins, 85 N. C. 544.

Matters Subject to Mathematical Calculation—Where the testimony of two witnesses contradicted each other, the court erred in instructing the jury that they are bound to believe a witness who is unimpeached and uncontradicted. "Though he tells a credible story, his connection with the parties may shake the jury's confidence." Bonner v. Hodges, 111 N. C. 66, 15 S. E. 881.

Identification of Witness. — Where the evidence be uncontradicted and even though the fact of guilt may be inferred from defendant's own testimony, it is an error for the court to refer in its charge to the "proverbial slowness of the messenger boy." Meadows v. Western Union Tel. Co., 182, N. C. 187, 109 S. E. 381.

Remark That Circumstance Was a "Strong Badge of Fraud." — Where the evidence was uncontradicted and even though the fact of fraud may be inferred from defendant's own testimony, the inference that there was fraud is sufficient ground for a new trial. Sneed v. Creath, 8 N. C. 309.

c. Remarks Concerning Weight and Credibility of Testimony.
Remarks That Circumstances Was a "Strong Badge of Fraud." — Where a creditor postponed taking judgment because the debtor alleged that he was making arrangements to borrow the money, but before the expiration of the extended time the defendant made an assignment, pre- ferre other creditors, an instruction that the circumstance was a strong badge of fraud was held to be error. Bonner v. Hodges, 111 N. C. 66, 15 S. E. 881.

Instruction As to Former Marriage. — In an indictment for bigamy an instruction that the weight of the evidence was that there had been no first marriage, is a violation of this section. State v. Parker, 106 N. C. 711, 11 S. E. 517.

Determination of Preponderance. — A request in a civil action that, "when the minds of the court are in doubt, they must find for the defendant," is error. Willis v. Atlantic, etc., R. Co., 122 N. C. 905, 29 S. E. 941.

Instruction That Evidence Rebuts a Prima Facie Case. — When the plaintiff makes out a prima facie case, then to instruct the jury that the evidence rebuts it and overcomes it, is to invade the province of the jury and violates this section. Sherrill v. Western Union Tel. Co, 116 N. C. 655, 657, 21 S. E. 231.

Instruction That Guilt Is Established. —This section prohibits the court in its charge to the jury from expressing any opinion as to the weight and credibility of the evidence, and, defendants' exceptive assignments of error for the court to charge the jury in effect that the fact of guilt is established by the evidence, even though the evidence be contradicted and even though the guilt may be inferred from defendant's own testimony, since the credibility of the evidence is in the exclusive prov-
in the judge to designate a single witness who is contradicted by other witnesses, and to instruct the jury that if they believe the testimony of such witness, then the prisoner is guilty. State v. Rogers, 93 N. C. 532.

50. — Contradictory Evidence. — Where evidence was conflicting, an instruction, "if the jury believe the evidence, the answer to the first issue should be no," was a misstatement of this section. Rickett v. Southern R. Co., 133 N. C. 565, 69 S. E. 497; Leak v. Covington, 99 N. C. 559, 6 S. E. 241.

Where the case is tried upon special issues, an instruction that plaintiffs are not entitled to recover if the jury believe the evidence is improper. Jones v. Railway, 144 N. C. 61, 69 S. E. 827; Baker v. Brem, 103 N. C. 72, 9 S. E. 659. See Cauley v. Dunn, 167 N. C. 32, 83 S. E. 16.

Degree of Crime. — Although the defendant in a trial for murder introduced no evidence, and all the evidence for the State tended to show only murder in the first degree, it was error to instruct the jury that if they believed the evidence they should find the defendant guilty of murder in the first degree. State v. Gaddbery, 117 N. C. 811, 23 S. E. 479.

When No Presumption at Law. — A trial judge cannot say to the jury that any fact proved or admitted, that does not in law raise a presumption of the truth of the allegation of fraud, is a strong circumstance tending to prove it. National Bank v. Glimer, 116 N. C. 694, 703, 22 S. E. 2.

Arguing Law to Jury. — For the judge to argue that a case cited by counsel for plaintiff, and relied on to establish his position, was an authority directly against that position, and that counsel for defendant had admitted that the case was to be held to be error. Perry v. Perry, 144 N. C. 328, 57 S. E. 1063.

Trial for Attempted Rape. — On a trial of an indictment for an assault with intent to commit rape, where there was evidence that the defendant had been found on the six year old child, while on her back with her clothes up, it was held to be error for the court in its charge to the jury to remark with emphasis, "Why was she on her back, and why was he on her?" State v. Dancy, 78 N. C. 437.

Insurance. — A requested charge that, if insured was twelve years of age at the time of the accident, and the association was not liable on the policy, "as the same was procured under a misrepresentation of the age" of the insured, was properly refused as an expression of opinion not authorized. Hargrove v. Royal Ben. Soc., 165 N. C. 263, 30 S. E. 1068.

Regarding Duty of Railroad to Build Culvert. — It was held error in a trial judge's instruction to the jury that it was the duty of a railroad company to build a culvert over a certain ravine, and it was also held error to express the opinion that the said branch, regarding which there was conflicting evidence, was not a natural water-course. Fleming v. Wilmington, etc., R. Co., 115 N. C. 676, 20 S. E. 714.

Effect of Easement on Adjoining Land. — In a proceeding to condemn the easement for a telephone line, the respondent's land for a high voltage transmission line, where the court in ruling upon the admissibility of evidence stated that the steel towers on the land and the power lines running over the land did not affect the value of the land, the court on the side of the easement, it was held that the remarks of the court constituted a determination, as a matter of law, of an issue of fact within the province of the jury in violation of this section. National Flyway, etc., Co. v. Carriger, 220 N. C. 57, 16 S. E. (2d) 453.

Validity of Lien. — In an action involving the validity of a lien on certain crops, an instruction that the lien was void because, while the crops resided in another, involves an expression of opinion as to the facts of the case. Weisenfield v. McLean, 96 N. C. 248, 24 S. E. 56.

Bill and Notes. — In an action on a note, where defendant testified that he signed as surety, with the knowledge of the payee, and the payee testified to the contrary, it was error to instruct the jury that if they believed the
evidence they should find that defendant knew that defend- 

ant signed as a surety. Harris v. Carrington, 115 N. C. 

157, 20 S. E. 78.

II. Admissibility of Evidence. — In an action for damages plaintiff testified that the property destroyed was worth a specified sum, and defendant introduced as a witness the tax lister who testified that plaintiff stated that a much lower valu-

ation was the property destroyed. McMillan v. Street, 119 N. C. 332, and modified the rule laid down in State v. 

Boyle, 104 N. C. 800, 10 S. E. 696, in a series of adjudi-

cations that followed it, it was not intended that the 

jury that the court had the uncontroverted evidence of plaintiff as to the value of the property de-

stroyed rendered Emry v. Raleigh, etc., R. Co., 109 N. C. 589, 14 S. 

ruled.}

Inconsistent or Contradictory Instructions. — An incon-

sidered charge by the trial court may be the result of

errors as to the law applicable to their findings upon an issue is 


Blanton Grocery Co. v. Taylor, 162 N. C. 307, 78 S. E. 276; 


Erroneous Instruction Not Cured by Correct Instruction. 

— An error in giving an erroneous instruction is not cured 

by subsequently correctly stating the law. State v. 

McDowell, 129 N. C. 523, 39 S. E. 961.

The use of the words “you want to find” in charging the 

jury to the elements of the offense charged, construing 

the charge as a whole, merely placed the burden on the 

jury to prove the charge, and not the burden of an 

expression of opinion or a direction or intimation that the 

jury should so find. State v. Smith, 221 N. C. 400, 30 S. 

E. (2d) 500.

The use of the words “the state has offered evidence 

which tends to show” in a charge to the jury does not 

constitute an expression of opinion in violation of this sec-


Weight of Defendant’s Testimony. — The testimony of 

defendant if accepted as true, by the jury, is given the same 

credibility as that of a disinterested witness, and a charge 

to the effect, after instructing the jury to consider 

the evidence submitted by either party. Hunt v. Eure, 189 N. 

C. 160, 77 S. E. 706.

When Charge Contains a “Powerful Summing up.” — In 

the trial judge in his general charge gives "every 

reasonable conclusion that may be drawn from the 

facts of the case. Blackwell v. Lynchburg, etc., Railroad, 

111 N. C. 151, 16 S. E. 13, 17 L. R. A. 729, 32 Am. St. Rep: 

1657.

Where Charge Favorable to Appellant. — The failure of 

the court to comply with this section will not be sufficient 

ground for reversal, where no prejudice is shown and it 

appears the jury could not have been misled thereby. Evans 

v. Howell, 84 N. C. 461.

§ 1-180 GENERAL CONSIDERATIONS OF THE CHARGE. — The chief object 

contemplated in the charge of the judge is to explain the law of 

the case, to point out the essentials to be proved on the 

theory that the jury has a right to find as true all the 

facts of the case. Blackwell v. Lynchburg, etc., Railroad, 

111 N. C. 151, 16 S. E. 13, 17 L. R. A. 729, 32 Am. St. Rep: 

1657.

Defendants can not complain that the court embodied in 

the charge, as an abstract proposition, what is known as 

the “rule of the prudent man” in response to its requests, 

where, in specific instructions, the court correctly applies 

the law of negligence to the particular facts of the case. 

Blackwell v. Lynchburg, etc., Railroad, 111 N. C. 151, 16 S. 


Where Charge Favorable to Appellant. — The failure of 

the court to comply with this section will not be sufficient 

ground for a new trial, where the case on appeal shows that 

the charge of the court presents the case in the most 

favorable light for the defendant. State v. Frittsch, 106 N. 

C. 607, 668, 11 S. E. 357.

Requests for Instructions Must Be Timely. — A party 

desiring more specific instructions than those given in 

the general charge must make his request in a timely 

manner, or his failure to do so will be taken as acquiescence in 

the charge, made after verdict, is too late. Simmons v. Davenport, 140 N. C. 407, 53 S. E. 225. See also 

State v. Brady, 115 N. C. 822, 12 S. E. 738.

Exemption Must Be Specific. — An exception to the charge 

on the ground that it failed to explain and apply the law 

to the evidence as required by this section may be disregarded

[223]
as a broadside exception. State v. Webster, 218 N. C. 692, 12 S. E. (2d) 272.

An exception to the charge on the ground that it did not explain the evidence and did not declare and explain the law arising from the evidence as required by the indictment for the reasons given by the defendant, is too general and cannot be sustained. Jackson v. Ayden Lumber Co., 158 N. C. 377, 74 S. E. 350.

**Rule Stated.** — It is held under the requirements of this section, to be the duty of the judge in charging the jury, to segregate the material facts of the case, array the facts on both sides, and apply the principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. State v. Rogers, 84 N. C. 511; citing State v. Dunlop, 63 N. C. 417; State v. Jones, 87 N. C. 547; Guy v. Council, 213 N. C. 654, 197 S. E. 121.

He is required to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to decide, and to give them the law applicable to the facts as the jury might find them from the evidence, and is not a simple or self-explanatory principle of law, but every state of the facts which upon the evidence they may reasonably find to be a true one. State v. Matthews, 78 N. C. 533, 537.

And in criminal cases this section requires the court to give to the jury such instructions as will enable them to understand the nature of the crime and properly determine each material fact upon which may depend the guilt or innocence of the accused. State v. Fulford, 124 N. C. 798, 891, 32 S. E. 377.

An instruction meets the requirements of this section when it clearly applies the law to the evidence introduced upon the trial and gives to the jury the law applicable to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. State v. Graham, 194 N. C. 459, 140 S. E. 35.

The duty of the court in its charge to the jury explains the law applicable and gives the contentions of the parties, but fails to instruct the jury as to the application of the law to the substantial features of the case, the charge is insufficient to meet the requirements of this section and a new trial will be awarded. Com'r of Banks v. Florence Mills, 202 N. C. 509, 163 S. E. 598.

In both criminal and civil causes under this section, a judgment may be obtained by the party who shall have secured every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. He should state clearly and distinctly the particular issues arising on the evidence in such a way as to make plain to the jury what law is to be applied, and explain the law arising thereon, and a failure to do so, when properly presented, shall be held for error. Mebane Contracting Co. v. Alamance County, 211 N. C. 213, 226, 189 S. E. 873, citing State v. Merrick, 171 N. C. 788, 135 S. E. 658.

Where evidence is in the record defendant is entitled to judgment except where the evidence is insufficient to meet the requirements of this section and a new trial will be awarded. State v. Anderson, 222 N. C. 148, 151, 22 S. E. (2d) 272.

Where the charge of the court fails to point out the distinction between the counts in the indictment, and leaves the jury with the impression that both counts are valid when there is only one question to be answered constitutes reversible error under this section. State v. Ray, 237 N. C. 642, 178 S. E. 224.

**Scope of Instruction.** — The court should instruct the jury on all the issues presented by the pleadings and the evidence. Patterson v. North Carolina Lumber Co., 145 N. C. 42, 58 S. E. 437.

Where the effect of a charge of the court to the jury is to eliminate from the case an instruction upon a principle of law, and the charge was taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts. State v. Wilcox, 213 N. C. 654, 140 S. E. 26.

Same—Failure to Call Judge's Attention to Error. — Where there are several contentions or claims for damages, and the charge was correctly given by the court to the former, and for the reasons given by the defendant, it is too general and cannot be sustained. Jackson v. Ayden Lumber Co., 158 N. C. 377, 74 S. E. 350.

Where the judge in his charge to the jury should present every substantive feature of the case, and as to subordinate features, the prisoner should have aptly tendered prayers for instructions to that effect. He should have the law arising thereon explained and applied by the judge in his charge to the jury should present every substantive feature of the case, and as to subordinate features, the prisoner should have aptly tendered prayers for instructions. State v. Reynolds, 87 N. C. 544; State v. Grady, 83 N. C. 643.

**Instructions to the jury should be addressed to specific issues, but, where the issues are simple, and they do not carry the jury with the impression that both counts are valid when there is only one question to be answered constitutes reversible error.** Craig v. Stewart, 163 N. C. 531, 79 S. E. 1100. See State v. Cox, 128 S. E. 471: Parker v. Thomas, 192 N. C. 798, 803, 136 S. E. 118. See Fowler v. Champion Fibre Co., 191 N. C. 42, 141 S. E. 390.

**Duty of Judge in Civil and Criminal Cases.—In civil cases this section requires the court to state the contentions of the parties to the jury, and the practice has grown up in our courts as a helpful and accepted procedure, and a failure to do so, where the issues are simple, and they do not carry the jury with the impression that both counts are valid when there is only one question to be answered constitutes reversible error.** Duckworth v. Orr, 126 N. C. 674, 677, 59 S. E. 1048; for error upon exception. Rocky Mount Sav., etc., Co. v. Aetna Life Ins. Co., 204 N. C. 282, 167 S. E. 854.

An objection to the charge on the ground that the court did not call the attention of the jury to the contentions of the state, amounting to an expression of opinion on the facts, held untenable, since the charge construed as a whole stated only contentions legitimately arising on the evidence, and the court properly instructed thereon. State v. Wilcox, 213 N. C. 665, 197 S. E. 156.

**Explanation of Subordinate Features of Case.—** The charge of the court may not fail to comply with the provisions of this section if it sufficiently pointed out and explained the substantive features of the case, and as to subordinate features the prisoner should have aptly tendered prayers for instructions. State v. Ellis, 230 N. C. 963, 167 S. E. 67.

In the absence of a special request for instructions, the failure of the court to declare and explain the law as to a subordinate feature of the case will not be held for error. State v. Puckett, 211 N. C. 66, 189 S. E. 183.

**Duty Cannot Be Omitted.** — The duty of the court to call the attention of the respective prisoners to the issues arising on the evidence, and to explain the law as to those issues, but, where the issues are simple, and they do not carry the jury with the impression that both counts are valid when there is only one question to be answered constitutes reversible error. Robinson v. Standard Transp. Co., 214 N. C. 489, 199 S. E. 725.

The trial judge in an action against a corporate and an individual defendant the trial court charged the jury as though the corporate defendant was the sole party sued, it was held that the individual defendant is entitled to a new trial for failure of the charge to declare and explain the law arising upon the evidence as it related individually to him and involving his contentions.

The trial judge should instruct the jury "that if the jury find from the evidence" and not "if they believe the evidence." State v. Green, 134 N. C. 660, 65 S. E. 761; State v. Seaboard Airline R., 145 N. C. 570, 58 S. E. 264.

But where instructions consisting of several clauses contain at the beginning the words, "If the jury find from the evidence," it is not necessary to repeat such words in subsequent clauses. Williams v. Parker, 121 N. C. 373, 37 S. E. 234. Rehearing in 128 N. C. 113, 38 S. E. 289.

**2. Statement of Evidence.**

In General. — All that is required of a charge by this sec-

224
tion is that the essential evidence offered at the trial shall be stated in a plain and correct manner, together with an explanation of the law arising thereon. State v. Fleming, 202 N. C. 512, 514, 163 S. E. 453; In re Beale, 202 N. C. 618, 163 S. E. 549.

By virtue of this section where the charge of a trial court fails to state the evidence of a party relative to a material point and which directly bears on the amount recoverable, a new trial will be awarded. Myers v. Foreman, 202 N. C. 246, 162 S. E. 549.

Slight inaccuracies in the statement of the evidence in the instructions to the jury will not be held reversible error when not called to the attention of the judge at the time and the charge substantially complies with this section. State v. Sterling, 200 N. C. 18, 19, 156 S. E. 96.

Restricting Evidence Inadmissible.—This is performed by simply repeating the testimony in the order in which it was delivered, or in a general statement of the principles of law applicable to the case; but it requires the judge to clearly and distinctly the particular issues arising in the controversy; to eliminate the controverted facts; to arrange the testimony in its bearing on their different aspects, and to instruct the jury with regard to the applicable thereto in such manner as will enable them to see and comprehend the matters which are essential to an intelligent and impartial verdict. State v. Boyle, 104 N. C. 130, 15 S. E. 696.

Possibilities of Fact.—There are several possibilities of fact, different from the inference tended to be drawn from the evidence offered, a judge is not required to note such possibilities in its instructions, but merely to bring it to the attention of the jury. State v. Clara, 53 N. C. 23.

Restricting Evidence to Purpose for Which Admissible.—It is error to admit evidence, competent for one purpose only, to be considered and acted on generally by the jury, without instructions restricting it to the special purpose for which it is admissible. Burton v. Wilkinson, etc., R. Co., 84 N. C. 193. See also, State v. Ballard, 79 N. C. 63.

Recapitulation Unnecessary.—The judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the specific questions they have to try, and to explain the applicable thereto so as to make it plain and correct. Boon v. Murphy, 108 N. C. 187, 12 S. E. 1032; State v. Gould, 90 N. C. 658.


But the rule stated in Bank v. Rochamora, 193 N. C. 1, at p. 8, 136 S. E. 259, that "where the instruction is proper so far as it goes, a party desiring a more specific instruction must require it," is applied to subordinate elaboration, but requires that the court apply the law to the evidence in the case and instruct the jury as to the circumstances presented by the evidence under which the issue should be answered in the affirmative or the negative. State v. Jordan, 194 N. C. 450, 140 S. E. 71; Murphy v. Power Co., 196 N. C. 484, 146 S. E. 204. See Graham v. State, 194 N. C. 459, 140 S. E. 71. The failure of the court to instruct the jury, in conformity with this section, is reversible error. Ryals v. Carolina Coach Co., 197 N. C. 12, 15, 147 S. E. 170.

Second Recapitulation Not Required.—The trial judge is not required to recapitulate the testimony a second time, although one of the parties may request it to be done. State v. Jordan, 193 N. C. 409, 136 S. E. 630.

Judge May Omit Testimony.—Unless there be some reason why the judge should remark particularly on the testimony of a witness, he may with propriety, decline to comply with a request to do so. Findly v. Ray, 50 N. C. 125.

Agreement of Counsel.—The failure of a judge to recite the testimony in his charge to the jury is not error, where it was agreed by the counsel on both sides that the testimony should be omitted. McCall v. Lumber Co., 196 N. C. 597, 130 S. E. 724; State v. Johnson, 208 N. C. 249, 180 S. E. 91.

Effect of a "Slip of the Tongue."—A mere inadvertent "slip of the tongue" in stating the evidence, will not be held as error in the absence of a request by the party injury or prejudice. The judge is not bound to have called attention thereto and had it corrected then and there. State v. Sinodis, 189 N. C. 565, 127 S. E. 601.

Weight and Credibility.—Where the trial judge gives the weight and credibility of the evidence. Williams v. Eastern Carolina Coach Co., 197 N. C. 12, 15, 147 S. E. 170.

Slight inaccuracies in the statement of the evidence in the instructions to the jury will not be held reversible error when not called to the attention of the judge at the time and the charge substantially complies with this section. State v. O'Neal, 187 N. C. 22, 24, 120 S. E. 817; Blake v. Smith, 163 N. C. 74, 79 S. E. 956; Bowen v. Schnibben, 184 N. C. 248, 191 S. E. 585.

As was said in State v. Matthews, 78 N. C. 523, 537, the requirements of this section are not met by a general statement of legal principles which bear more or less directly but not sufficiently to certain issues made by the evidence. Williams v. Eastern Carolina Coach Co., 197 N. C. 12, 15, 147 S. E. 435.

This is the duty of the trial court without request for special instructions to declare and explain the law arising upon the evidence in the case, which duty is not discharged if the judge simply states the applicable principles of law in a general manner, but requires that the court apply the law to the evidence in the case and instruct the jury as to the circumstances presented by the evidence under which the issue should be answered in the affirmative or the negative. Smith v. Kappas, 219 N. C. 850, 15 S. E. (2d) 375.

Trial by jury vouchsafed in the constitution contemplate a verdict of the jury rendered upon the evidence guided by correct instructions as to the law applicable thereto, and not substantive, material and essential features of the charge. McCa v. Lumber Co., 196 N. C. 597, 602, 146 S. E. 204. The duty of the court in charging the jury to do so without request for special instructions, and the failure of the judge to explain the law arising upon the evidence constitutes reversible error. Ryan v. Carolina Contracting Co., 219 N. C. 479, 14, 15 S. E. (2d) 315.

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate elaboration should be given, the evidence of such testimony shall be more fully explained, he should call the attention of the court to it. Acme Mfg. Co. v. McPhail, 179 N. C. 383, 388, 103 S. E. 611; Riverview Milling Co. v. State Highway Comm., 190 N. C. 620, 139 S. E. 724; State v. Johnson, 193 N. C. 701, 135 S. E. 19; State v. Jordan, 216 N. C. 356, 3 S. E. (2d) 156.

Where the charge of the court is sufficiently full to meet the requirements of this section, it will not be held for reversible error on defendant's exceptions, it being incumbent on defendant, if he desires more specific instructions, to make a request therefor. By his contents to apply make request therefor. State v. Caudle, 208 N. C. 249, 180 S. E. 91.

To the indictment is that the evidence constitutes reversible error. Ryals v. Carolina Coach Co., 197 N. C. 12, 15, 147 S. E. 170.

If the indictment does not fully charge the offense, and this was read to the jury by the court, then the charge is in compliance with this section, it being the duty of the defendant, if he desires more elaborate instruction, to apply therefor. State v. Gore, 207 N. C. 618, 15 S. E. 209.

Defendant desiring more full or detailed instructions as to any particular phase of evidence or law should request special instructions. State v. Hendricks, 207 N. C. 621, 178 S. E. 557.

The failure of the court to charge the jury as to the law applicable thereto, and nor corroborated in every respect by other evidence, will not be held for error in the absence of a special request, whether such charge should be given being in the sound discretion of the trial court. State v. Reedy, 216 N. C. 627, 5 S. E. (2d) 533.
The failure of the court to instruct the jury that the fact that a defendant did not testify in his own behalf raises no presumption against him, will not be held for error in the absence of a request for instructions, the matter being in the sound discretion of the trial court. Id.

Explanation Must Cover Any Authorized Finding.—It is the duty of the judge to explain and adapt the law to any authorized finding of the jury under a prayer for instructions. Lawson v. Giles, 90 N. C. 374, 375, 379; State v. Jones, 87 N. C. 547.

Law on Facts and Inferences.—It is necessary to state the law on the various phases of the evidence, and on all facts which the jury should find from the evidence, when such facts constitute a part of the basis for the answers to the issues. Wilson v. Wilson, 190 N. C. 819, 821, 130 S. E. 183. Instructions Based on Assumption.—When instructions are asked for upon an assumed state of facts, which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the question so presented, and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts to be true, and so in respect to every state of facts which may be reasonably assumed upon the evidence. State v. Dunlop, 65 N. C. 288.

But where a prayer for instructions assumes certain facts to be true, and the opinion of the judge thereon is not evidence tending to prove them, he ought to say so, and thus not embarrass the jury by the consideration both of the assumed facts and of the questions of law predicated on them. Jones v. Y. & H. R. R., 191 N. C. 289.

Instruction Necessary to Reach Verdict.—Where an instruction upon the law is necessary for the jury to arrive at a verdict upon a material issue, it is the duty of the trial judge to so instruct the jury. Thus, if the judge thereon is not evidence tending to prove them, he ought to say so, and thus not embarrass the jury by the consideration both of the assumed facts and of the questions of law predicated on them. Jacob Stove Works v. Boyd, 191 N. C. 522, 132 S. E. 257.

Substantial Compliance with Request Sufficient.—The trial judge is not required to give special instructions in the precise words asked, even when unobjectionable. A substantial compliance is sufficient. State v. Booker, 123 N. C. 796, 50 S. E. 284.

Instruction as to Statutory Provisions.—In automobile accident cases it is the duty of the court to charge the jury upon the provisions of the Motor Vehicle Law arising upon the evidence and a charge in respect to the provisions of the common law is not sufficient. Barnes v. Teer, 219 N. C. 833, 15 S. E. (2d) 379.

Charge Covering Subordinate Features.—When a judge has instructed on the general and influential facts and generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be fully explained, he should supply the requested instruction by prayer for instructions or other proper procedure; but on the substantive features of the case arising upon the evidence, the judge is required to give the instruction concerning the same provisions of the common law as are under different obligations is erroneous. State v. Hardy, 189 N. C. 799, 128 S. E. 152.

Request for Special Instructions.—Where the trial judge has instructed the jury correctly but generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should supply the requested instruction by prayer for instructions or other proper procedure; but on the substantive features of the case arising upon the evidence, the judge is required to give the instruction concerning the same provisions of the common law as are under different obligations. Bannister v. Hedgespeth, 184 N. C. 114, 113 S. E. 602.

Waiver of Error.—A failure to comply with this section is error which is not waived by failure to request special instructions. Phillips Bros. v. Velvertons, 185 N. C. 314, 172 S. E. 249.

Refusal to Correct Special Request for Instructions.—When a prayer for instructions to the jury is refused, every correct principle applying under the evidence in the case and all of the special prayers, it is not objectionable that the court refused to correct special requests for instructions under § 15-172.

Charge on Degrees of Crime.—Where a person indicted for a crime may be convicted of a lesser degree of the same crime and there is no evidence tending to support the lesser verdict, he is entitled to have the law with respect to the lesser offense submitted to the jury under a correct charge. A statement of the contentions or of certain phases of the evidence not accompanied with the issue of a lesser principle is not a compliance with this section. State v. Hardee, 192 N. C. 533, 535, 135 S. E. 345, citing State v. Dedmon, 199 N. C. 840, 130 S. E. 838; Wilson v. Wilson, 190 N. C. 819, 130 S. E. 834; State v. Williams, 185 N. C. 685, 116 S. E. 735.

If the defendant admits his guilt of murder in the second degree, it is not error for the trial court to act on the assumption, and after fully charging the elements of murder in the first degree, and defining murder in the second degree, to instruct the jury to return a verdict of murder in the second degree if they should fail to find any one of the elements of first degree murder, as defined, beyond a reasonable doubt. State v. Grier, 209 N. C. 398, 183 S. E. 272.

Instruction Should Apply to Facts Adduced.—An instruction which correctly defines and explains negligence and proximate cause, and assigns to the court the application of the law to the facts adduced by the evidence fails to meet the requirements of this section, and a new trial will be awarded on appellant's exception. Smith v. Safe Bus. Co., 216 N. C. 676, 110 S. E. 2d, 125.

A charge defining negligence and proximate cause and stating the contents of the parties and properly placing the burden of proof, but which fails to apply the law to the evidence, which is held to be within the assumption that the jury may find them to be from the evidence, is a submission of the case to the jury, but must not be given even in the absence of a prayer for instructions. Massey v. Marshall Field & Co., 218 N. C. 697, 12 S. E. (2d) 235.

Waiver of Error.—The failure of the court to explain the law arising on the evidence is not error, where the court charged as to law on the facts as shown by the evidence, and mere silence of counsel upon the statement of the court after charging the law arising upon plaintiff's evidence that it would not recaptulate the evidence is not a waiver of the substantial rights conferred by this section. Carruthers v. Atlantic, etc., Co., 215 N. C. 675, 2 S. E. (2d) 878.

Any Substantial Error Is Material.—Any substantial error in the portion of the charge applying the law to the facts of the case is perforce material. Templeton v. Kel- ley, 216 N. C. 497, 5 S. E. (2d) 355.

Point of Charge: Instruct to such extent on Self Defense.—See State v. Thornton, 211 N. C. 413, 190 S. E. 758; State v. Godwin, 211 N. C. 419, 190 S. E. 761; State v. Greer, 218 N. C. 660, 12 S. E. (2d) 238.

Failure to Charge on Second Degree Murder.—See note under § 15-172.

Cited in State v. Weston, 197 N. C. 25, 26, 147 S. E. 618.

C. Illustrative Cases.

Instructions on Interest of Counsel.—An instruction that "it is the business of counsel to make their side appear the better" is erroneous. State v. Steedle, 189 N. C. 799, 128 S. E. 152.

Failure to Define "Conspiracy."—Where the court charged that the defendant and others had conspired, it was error even if one of the others fired the fatal shot, if it was fired in the execution of their unlawful conspiracy and agreement and the defendant excepted on the ground that...
§ 1-181.

CIVIL PROCEDURE—TRIAL

the court did not define "conspiracy," it was held that the evidence in the case did not justify the giving of the special request for instructions, the term "conspiracy" being used synonymously with "agreement," and the charge being clear and easily understood, and defendant being guilty of no error. It was held that there was no conspiracy, regardless of the existence of a technical conspiracy. State v. Packett, 211 N. C. 66, 189 S. E. 135.

Instruction as to Presumption of Character.—Where the character of a witness had not been impeached either by contradictory evidence or the manner of his cross-examination, it is presumed to be good, and the testimony of other witnesses thereto will be excluded; and where in a criminal action the case has been given to the jury, who return to court with a request for further instruction as to whether a witness's character is considered good until proven bad, the judge's reply that it is presumed to be good until the contrary is shown, is free from error. State v. Pugh, 183 N. C. 800, 111 S. E. 847.

Omission of Necessary Instruction.—Where the defendant, charged with murder, introduced evidence of an alibi which was material to his defense, but the judge in his charge to the jury did not refer to this evidence, it was held to be reversible error. State v. Smith, 163 N. C. 274, 79 S. E. 596.

Charge as Essay.—Though the charge of a judge presiding over a trial for murder is correct as a general essay on homicide, and his propositions taken generally are supported by the authorities, still it is not a full compliance with the mandate of this section and constitutes reversible error. McCracken v. Smathers, 119 N. C. 617, 26 S. E. 157.

Omission in Charge.—Where a charge excluded from consideration important evidence in the case bearing upon the essential inquiry whether defendant had waived, or surrendered, all rights under an agreement, if he had any, and agreed to go back to an original contract, it was erroneous. Aene Mfg. Co. v. McPhail, 179 N. C. 383, 387, 102 S. E. 111.

Instruction as to Subordinate Features.—In the absence of a special request for a further instruction as to whether a witness's character is considered good until proven bad, the judge explained that the degree of care required of a child is not reversible error under this section for the trial judge to have failed to instruct the jury that they should scrutinize the testimony of declarants; that the evidence presented by the plaintiff and the defendant, the same being as to subordinate and not substantive features of the evidence in the case. State v. O'Neal, 187 N. C. 22, 130 S. E. 817.

Prosecution over a Trial for Murder is Correct as a General Essay.—Though the charge of a trial judge was held insufficient in Bradshaw v. Warren, 215 N. C. 442, 2 S. E. (2d) 375.

Duty of Judge in Issue of Contributory Negligence.—When requests for instruction are made by counsel as to the application of the law to the testimony bearing upon an issue involving contributory negligence, it is the duty of the court to give the general definitions of fraud, negligence, mistake, and mistake care. McCracken v. Smathers, 119 N. C. 617, 26 S. E. 157.

Same—Fraud Necessary to Violate Deed.—It is not required to charge the jury with the full definitions of fraud upon which equity will set aside a deed, the subject of the action, if he instructs them correctly and clearly upon such of the principles as are applicable to the issue under the relevant evidence in the case, and the general charge, as so given, is within the intent and meaning of this section. Weeks v. Hedgepeth, 184 N. C. 122, S. E. 17.

Same—Bills and Note.—Where from the pleadings and evidence an issue is raised for the jury to determine whether the holder of a note had elected to sue the original payee instead of the maker, under the provisions of this section, it is the duty of the trial judge to give the general law arising from the evidence. Fisher v. Kennedy, 196 N. C. 64, 146 S. E. 66, distinguishing Bowen v. Schnibben, 184 N. C. 248, 114 S. E. 170.

Negligence in Injury to Passenger.—In an action to recover damages of a bus line where of defendant was the sole proximate cause of the accident, plaintiff's exception to the charge for its failure to submit the question of contributory negligence cannot be sustained. Smith v. Bonney, 215 N. C. 181, 1 S. E. (2d) 37.

Particulars of Duty Required of Automobile Driver.—Where the plaintiff was not walking along the highway at the time of his injury, and not being notified of the collision, the charge that the driver of the car for which injury he seeks to recover damages should not be sustained. Smith v. Buchanan, 215 N. C. 183, 10 S. E. (2d) 371.

Instruction as to Presumption of Character.—Where the judge explained that the degree of care required of a child is not reversible error under this section, it was held that the judge's reply that it is presumed to be good until the contrary is shown, is free from error. State v. Melton, 120 N. C. 591, 597, 26 S. E. 933; State v. Edmonson v. Cox, 121 N. C. 64, 147 S. E. 653.

Instruction as to Contributory Negligence of 8 year old child, held to fully comply with this section, where the judge explained that the degree of care required of a child that he exercised in the circumstances was shown. Leach v. Varley, 211 N. C. 207, 210, 189 S. E. 636.

Concurrent Negligence.—Where the theory of trial in the lower Court was that of defendant was the sole proximate cause of the accident, plaintiff's exception to the charge for its failure to submit the question of contributory negligence cannot be sustained. Smith v. Bonney, 215 N. C. 181, 1 S. E. (2d) 37.

Negligence in Injury to Passenger.—In an action to recover damages of a bus line where defendant was the sole proximate cause of the accident, plaintiff's exception to the charge for its failure to submit the question of contributory negligence cannot be sustained. Smith v. Bonney, 215 N. C. 181, 1 S. E. (2d) 37.

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Court as to whether these two sections should be read together. In Craddock v. Barnes, 142 N. C. 89, 54 S. E. 1003, it was held that these two sections should not be read together and the time limit expressed in section 1-182 had no bearing on this section. In Barringer v. Deal, 246 N. C. 687, 100 S. E. 2d, the headnote into this section and the headnote to the case stated that requests for special instructions had to be made before the close of the evidence. The reason for this, however, for special instructions in this case were handed up after the conclusion of the charge. The headnote to Merrill v. Whitmire, 110 N. C. 367, 15 S. E. 3, also, defined "apt time" as "at or before the close of the evidence." This definition is dicta, therefore, the headnote to Ward v. Albemarle, etc., R. Co., 112 N. C. 168, 47 S. E. 201, makes the same error. Herein, the request for special instructions was made during argument.

The discrepancy here is more apparent than real and the error seems to have crept into the headnotes rather than into the decisions. The Craddock case seems correct. In that case at the close of the testimony the court adjourned until the next day, and at the opening of the court the next morning the plaintiff tendered in writing certain special instructions and the refusal of the judge to consider them was held to be error. There seems to be no reason, other than the construction of the section, as to why the request for special instructions was not considered in that case. The true rule, as garnered from the decided cases, seems to be that requests for special instructions must be made before the beginning of argument. This rule apparently fits all the reasons for permitting the judge to have the case on appeal is sufficient to present the matter on appeal, though no written instruction on the subject was prayed for. Lee v. Williams, 111 N. C. 260, 16 S. E. 175.

The appellate is entitled to have its assignments of error for refusing or granting special instructions, if set out by him in his statement of the case on appeal, incorporated by the court in the case settled. If they are omitted, certiorari will lie. Lowe v. Elliott, 107 N. C. 718, 12 S. E. 383.

Failure to Sign—Discretion of Court.—The trial judge can debar any oral utterance which is in exact accord with the request for special instructions was made after argument had opened. The definition of the court as to "apt time" is dicta, therefore, the headnote to Ward v. Albemarle, etc., R. Co., 112 N. C. 168, 47 S. E. 201, makes the same error. Herein, the request for special instructions was made during argument.

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mandatory in criminal as well as civil cases and if the judge fails to comply with a request duly made that he reduce his charge to writing, a new trial will be ordered. Currie v. Clark, 50 N. C. 355; State v. Connelly, 107 N. C. 463, 12 S. E. 251. The question is not whether the record contains the instructions actually given in court, but whether the request being admitted in regard to it, but whether the request was duly made and refused and the refusal followed by an exception. State v. Block, 109 N. C. 556, 1 S. E. 937.

The court must put its charge, as to the law, in writing, however inconvenient, if the request is made in apt time. Jenkins v. Wilmington, etc., R. Co., 110 N. C. 438, 15 S. E. 835.

Applies to Later Instructions.—It is error to charge the jury orally upon any point when they return into court for instructions, when counsel has requested written instructions. State v. Stewart, 129 N. C. 161, 51 S. E. 815.

“Instructions” Defined.—The word “instructions” as used in this section, relates to the principles of law applicable to the case, and which would influence the action of the jury, after finding the facts, in shaping their responses to the issue. State v. Dewey, 139 N. C. 556, 51 S. E. 937.

Does Not Include Evidence.—A request to give instructions in writing, but is merely dicta.


Request Must be Specific.—A request that the trial judge “charge the jury in writing, and as follows” is a request solely to deliver those instructions to the jury, and is not a request to write them in writing. Phillips v. Wilmington, etc., R. Co., 130 N. C. 582, 41 S. E. 805.

But where the defendant at the close of the evidence requested the court “to put the charge to the jury in writing and in part to charge the jury as follows,” and the whole charge on the law was not put in writing, this was held to be error. Sawyer v. Lumber Co., 142 N. C. 161, 55 S. E. 84.

Oral Instructions Same as Written.—Where the court gave oral instruction from those set out in the written charge, and the appellant makes no suggestion to the contrary, his exception to the oral part of the charge does not constitute ground for a new trial. Currie v. Clark, 50 N. C. 355.

Exception.—An exception to the failure of the judge to put his charge in writing, when asked “at or before the close of the evidence,” is lost if in time no. One of the parties made in apt time, refused by the Supreme Court. State v. Connelly, 107 N. C. 463, 12 S. E. 251.

Judge’s Statement of Oral Instructions Controlling.—A statement by the trial judge, that he had set out in his charge, was not put to his election to move for a judgment of nonsuit. State v. Houston, 155 N. C. 432, 71 S. E. 855.

Effect of Violation.—When it appears from inspection of the record, that the court below refused to put its charge in writing, at the request of one of the parties made in apt time, it will be error. State v. Watson, 143 N. C. 240, 55 S. E. 625.

Request Made after Charge in Hands of Jury.——When the trial judge, having at the request of plaintiff put his charge in writing, read and handed it to the clerk in open court that it was not put in writing, the plaintiff objected upon the ground that the court had not been requested to hand the written charge to the jury. Thereupon, and after his Honor had made those observations, it was handed to the clerk, and the whole charge on the law was not put in writing, this was held to be error. Sawyer v. Lumber Co., 142 N. C. 161, 55 S. E. 48. The headnote to Phillips v. Wilmington, etc., Ry. Co., 130 N. C. 582, 41 S. E. 805, is not the holding of this case.

An exception “for refusal of prayers for instructions” does not embrace a refusal or failure to grant a prayer to put the charge in writing. State v. Adams, 115 N. C. 775, 26 S. E. 863.

Data Other than Charge.—It is error for the trial judge, upon objection, to charge the jury in writing, or to request the court to put the charge to the jury in writing, or to require the clerk to certify to the charge, or to permit the court to announce in open court an involuntary nonsuit and to charge the jury to consider the evidence in their deliberations. Nicholson v. Eureka Lumber Co., 156 N. C. 39, 72 S. E. 85. So with the charge as given, 157 N. C. 93, 78 S. E. 604. An account rendered. Watson v. Davis, 52 N. C. 178. Depositions read on trial. Lafson v. Shearin, 118 N. C. 391, 12 S. E. 1003. An account rendered. Phillips v. Wilmington, etc., R. Co., 68 N. C. 395; Merrill v. Whitmire, 119 N. C. 367, 15 S. E. 3; Cressler v. Asheville, 138 N. C. 518, 15 S. E. 1003; Barringer v. Deal, 164 N. C. 246, 80 S. E. 161.

§ 1-183. Motion for nonsuit. When on trial of an issue of fact in a civil action or special proceeding, the plaintiff has introduced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is refused the defendant may except, and if the defendant introduces no evidence the jury shall pass upon the issues in the action, and the defendant has the benefit of his exception on appeal to the supreme court. After the motion is refused he may waive his exception and introduce his evidence just as if he had not made the motion, and he may again move to dismiss after all the evidence on both sides is in. If the motion is refused he may except, and after the jury has rendered its verdict, he has the benefit of the latter exception on appeal to the supreme court. (Rev., c. 539, 1897, c. 109; 1899, c. 131; 1901, c. 594; C. S. 567.)

Editor’s Note.—The power of the superior court to grant an involuntary nonsuit is altogether statutory, and did not exist prior to the passing of this section in 1897. See Riley v. Stone, 109 N. C. 241, 422, 86 S. E. 348.

Under this section as originally passed, Acts 1897, chap. 109, upon the defendant’s motion being refused, he could introduce evidence, and at the close of the evidence of both sides, renew the motion to dismiss, on the first motion and also on the second motion. Purnell v. Raleigh, etc., R. Co., 122 N. C. 822, 29 S. E. 250, 107 N. C. 527, C. S. 177. But under the amendment of 1899, Acts of 1899, chap. 138, this practice is not allowed. The defendant may stop his case at the close of the plaintiff’s evidence, and move to dismiss upon the ground that the plaintiff has failed to make out a prima facie case. And if his motion is refused he has the right of appeal from the ruling of the court.

But if he does not stop his case and appeal, and introduce evidence, he loses the benefit of any new evidence, he may again move to dismiss upon the ground that the plaintiff has not made out a case, and the only difference between this motion and the one made at the close of the plaintiff’s evidence, is that the plaintiff’s evidence stands as it stood when the first motion was made, and he also has the benefit of any new evidence that may have been introduced since that motion was made, by either side, favorable to the plaintiff.

The rule now seems to stand just as it did before the passage of the Act 1897, chap. 109, and the amendment of 1899, except that the plaintiff has the right of appeal with the defendant whether he will introduce evidence after the motion to dismiss, or not; while before these acts, it was discretionary with the court whether he would allow the defendant to introduce evidence, and making the motion. See Means v. Carolina Central R. R. Co., 126 N. C. 424, 35 S. E. 813.

This was held in Watson v. Wilkes, 52 N. C. 355. This statute did not apply to criminal cases. Thereupon the legislature enacted chap. 73, Laws 1913 (Sec. 15-273), extending this section to all criminal courts. For Criminal Cases, see section 1381.

Section Explained.—Under this section the defendant is not put to his election to move for a judgment of nonsuit or proceed with the evidence unless the plaintiff has produced his evidence and rested his case. If the defendant in his argument or in his written statement of what the plaintiff had offered to withdraw the written charge from the jury in writing, it was held that it was not error upon this ground to permit the jury to take plats of or other evidence in court. Depositions read on trial. Tafoon v. Shearin, 95 N. C. 391.

States not Included.—Where the charge of the court was taken to the jury room on retirement, but by oversight the special prayers asked by appellant and given were not also handed to the jury, this does not constitute error. The exception is not saved as the record did not then, or at any time before verdict, call the matter to the attention of the court. Gaither v. Carpenter, 143 N. C. 240, 55 S. E. 625.

[ 229 ]

§ 1-183. CH. 1. CIVIL PROCEDURE—TRIAL § 1-183
It was not intended to deprive parties of the right to try by jury where there is any evidence to sustain the allegations of the complaint. Fox v. Asheville Army Store, 215 N. C. 124, 16 S. E. 2d 718; and Fox v. Asheville Army Store, 215 N. C. 124, 16 S. E. 2d 718.

Time to Make Motion to Nonsuit.—The allowance of a motion as of nonsuit is based upon purely statutory grounds, and the determination must be strictly followed, and where the defendant fails to move for judgment as of nonsuit at the close of the plaintiff's evidence, his exception to the refusal of his motion thereon is ineffective to raise the point. See Penn v. French Broad Hotel, 199 N. C. 314, 154 S. E. 406.

A demurrer to the evidence is a motion to nonsuit, which waives all objection to its competency, and admits the evidence; and it is regarded in general as analogous to a demurrer upon the facts alleged in pleading. Van Stone v. Stillwell, et al., Mfg. Co., 142 U. S. 128, 134, 12 S. Ct. 151, 125 N. C. 385, 14 S. E. 459.

When Motion Should Be Disallowed.—Defendant's motion as of nonsuit, will be denied when the evidence, taken in the light most favorable to the plaintiff, and every reasonable intendment therefrom, is sufficient to take the case to the jury. While this section requires a consideration of the whole evidence; and it is regarded in general as analogous to a demurrer upon the facts alleged in pleading. Van Stone v. Stillwell, et al., Mfg. Co., 142 U. S. 128, 134, 12 S. Ct. 151, 125 N. C. 385, 14 S. E. 459.

Consideration of Defendant's Evidence.—Upon a motion as of nonsuit the defendant's evidence will be considered only where favorable to the plaintiff. In cases of demurrer to the evidence, which wavers all objection to its competency, and admits the evidence; and it is regarded in general as analogous to a demurrer upon the facts alleged in pleading. Van Stone v. Stillwell, et al., Mfg. Co., 142 U. S. 128, 134, 12 S. Ct. 151, 125 N. C. 385, 14 S. E. 459.

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Nonsuit under this section is "permissible only on de- murrer to the evidence, and not on demurrer to the compla int or motion for judgment on the pleadings. Sykes v. North Carolina R. Co., 196 N. C. 531; Harrison v. North Carolina R. Co., 194 N. C. 656, 141 S. E. 599.

Plaintiff's Evidence Must be Nil.—If there is more than a scintilla of evidence tending to prove the plaintiff's conten tion, the defendant's motion is ineffective. Grant v. Gallant, 177 N. C. 330, 14 S. E. 366. "The party who seeks to defeat the passage of this section, to deprive parties of the right of trial by jury in cases where there is any evidence or to make the weight and effect of the evidence always a question of law for the court. Hamm v. Atlantic, etc., R. Co., 122 N. C. 905, 9 S. E. 941.

How Questions of Law and Fact Presented. — Whether there is evidence from which the jury could answer an is sues of fact, and whether a plaintiff's evidence was objected to by the court for decision by motion for judgment of non suit. McCall v. Textile Industrial, 189 N. C. 753, 128 S. E. 340.

On demurrer to evidence, the court is substituted in the place of the jury, as judges of the facts. Bank v. Guttschick, 14 Pe't 19, 10 L. Ed. 335.

Who are the questions the sufficiency of the evidence to carry the case to the jury and to support a re- covery, which is always a question of law to be determined by the court. Godwin v. Atlantic Coast Line R. Co., 220 N. C. 93, 15 S. E. 931. Additional Evidence Allowable. — Where a motion to non- suit under this section is made, it is discretionary with the judge, before passing on it, to allow the plaintiff to introduce additional evidence. Featherston v. Wilson, 123 N. C. 623, 31 S. E. 843.

The trial court, after the plaintiff had rested his case, and before the defendant had offered any evidence, or was not sure if the defendant was not sure if the defendant's motion for nonsuit was denied, if there was any evidence or of the sufficiency of the evidence by introducing evidence in his own behalf and not renewing his motion after the close of all the evidence. Sykes v. North Carolina R. Co., 196 N. C. 531; Harrison v. North Carolina R. Co., 194 N. C. 656, 141 S. E. 599.

Exception Considered on Appeal. — Where exception is taken to the refusal of the court to dismiss the action, both after the close of plaintiff's evidence and after the defendant's evidence has been introduced, only the exception taken after the close of all the evidence will be considered on appeal, under the express provision of this section, and, so considered, the evidence must be accepted as true and con- structed in the light most favorable to the plaintiff. Butler v. Holoway v. Guffey, 155 N. C. 64, 135 S. E. 339; Guffey v. Holoway v. Guffey, 155 N. C. 64, 135 S. E. 339.

Motion for Judgment on Exceptions. — In a suit under this section is made, it is discretionary with the court setting aside a verdict upon motion for judgment of nonsuit, if there is any weight of evidence in conflict with his further sustaining a motion to nonsuit the plaintiff upon the evidence under the express provision of this section, to deprive parties of the right of trial by jury in cases where there is any evidence or to make the weight and effect of the evidence always a question of law for the court. Hamm v. Atlantic, etc., R. Co., 122 N. C. 905, 9 S. E. 941.

Effect of Remanding Case. — When in the Supreme Court the trial court remands the case to the court of original jurisdiction, or to the district court of admiralty, a motion for judgment as of nonsuit under this section. Holton v. Mocksville, 189 N. C. 144, 125 S. E. 326.

Evidence Sufficient for Jury. — Defendant's motion as of nonsuit made at the close of the plaintiff's evidence, to deprive parties of the right of trial by jury in cases where there is any evidence or to make the weight and effect of the evidence always a question of law for the court. Hamm v. Atlantic, etc., R. Co., 122 N. C. 905, 9 S. E. 941.

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the pleadings and evidence raise the question of the son's good faith and part performance without notice, these questions should be submitted to the jury upon appropriate issues; and motion for nonsuit is properly refused.

Fannie F. Bank, etc., Co. v. Mackrell, 195 N. C. 741, 143 S. E. 518.

In an action for negligence of defendant's delivery truck driver, evidence as to the driver's sight at the time of injury was admitted and, in view of employment at time of injury, is sufficient to take the case to the jury and deny defendant's motion for a nonsuit. Mischheimer v. Hay- man, 195 N. C. 613, 120 S. E. 428.

In an action for injuries against a municipality for failure to keep highway in safe condition, defendant's motion for judgment as in case of nonsuit, provided for by this section, was properly denied. Pearl v. Southern R. Co., 205 N. C. 113, 110 S. E. 146.

Evidence tending to show that plaintiff's intestate was struck and killed by defendant's train, that the engineer could have seen the intestate and the cow for that distance is held sufficient to take the case to the jury on the doctrine of last clear knowledge of a female child under sixteen years of age in violation of § 14-35, is supported by the State's evidence in the case, defendant's motion as of nonsuit under this section is properly denied. State v. Houppe, 207 N. C. 377, 172 S. E. 790.

Where the evidence is sufficient to support a verdict in plaintiff's favor, defendant's motion as of nonsuit under this section is denied. Broughton v. Standard Oil Co., 207 N. C. 561, 172 S. E. 639.

Evidence which raises only a mere suspicion or conjecture of the issue to be proved is insufficient to be submitted to the jury. Pearson v. Simon, 207 N. C. 351, 177 S. E. 327.

Defendant Cannot Withdraw Counterclaim in Order to Enter Motion as of Nonsuit.—Where the defendant in an action on a contract sets up a counterclaim arising out of the same contract declared upon by the plaintiff, the defendant may not withdraw his counterclaim over the plain- tiff's objection in order to enter a motion as of nonsuit as provided by this section, on the plaintiff's motion for action. McGee v. Frohman, 207 N. C. 475, 177 S. E. 327.

When Nonsuit Proper.—Where the evidence of plaintiff is not sufficient to be submitted to the jury it is proper for the court to sustain defendant's motion for judgment as of nonsuit. Wheelock v. Lloyd v. Speight, 195 N. C. 179, 180, 141 S. E. 574; Blackwell v. Coca-Cola Bottling Co., 208 N. C. 712, 183 S. E. 165.

Same—Illustrative Cases.—Where a contract creating a local representative for the sale of automobiles by interpretation as to its effect, creates the relationship of vendor and purchaser, the local representative may not bind the vendor upon a warranty of the machines, and the vendor is not liable for representations or warranties made by the local dealer, and an action against it on the same contract declared upon by the plaintiff, the defendant's motion at the close of all the evidence, for judgment as of nonsuit is properly denied. Ford v. Willys-Overland, 197 N. C. 147, 147 S. E. 822.

Evidence tending to show that the plaintiff was injured by an explosion of a cartridge which the defendant's agent was using in discharging a firearm, and that the son was helping his father therein, is insufficient to hold his father liable in damages, and defendant's motion as of nonsuit in properly granted. Norman v. Porter, 197 N. C. 222, 185 S. E. 41.

A contract of hire at a stipulated hourly wage, without
reference to the number of hours the employment was to continue, gives the employer no right of action for damages because he was employed a fewer number of hours than other employees engaged at the same time, and it was held in the principal case of Sherrill v. Graham County, 205 N. C. 178, 170 S. E. 636.

Where plaintiff's evidence tended to show that his fellow servant in proximately causing the injury in suit, the defendant is liable in damages for the consequent injury, and his motion to nonsuit upon the issue of contributory negligence was properly denied. Beck v. Thomasville Chair Co., 188 N. C. 743, 125 S. E. 615.

Where there is evidence that the defendant railroad company negligently failed to place proper signals where the deceased was killed at a railroad crossing, its motion to nonsuit was properly denied. Bowers v. Lumber Co., 194 N. C. 131, 132 S. E. 532.

Same—Evidence Sufficient to Deny Nonsuit.—Where the evidence was sufficient to overrule defendant's motion as of nonsuit upon the issue of defendant's contributory negligence, it was held that defendant's demurrer to the evidence should have been sustained. Peters v. Great Atlantic & Pacific Tea Co., 194 N. C. 172, 138 S. E. 687.


night watchman was employed to perform his duties only within a certain enclosure; that he had been deputized to act for defendant as special policeman; that he had ar- rested the plaintiff at a remote place on the mill settlement. And the justice of the peace for the lack of evidence and the plaintiff finally discharged: It was held, a question defendant’s night watchman was acting within the scope of was properly denied. Butler v. Holt-Williamson Mfg. Co., 182 N. W. 547, 182 S. E. 852.

Joinder in Demurrer.—No judgment can be rendered upon a demurrer to the evidence, until there is a joinder in de- murrer. Fowl v. Alexandria, 11 Wheat. 320, 6 L. Ed. 484. But it is a matter of discretion with a court, whether it will compel a party to join in demurrer to evidence. Young v. Black, 63 S. E. 553, 6 L. Ed. 440.

One party cannot insist upon the other party joining in demurrer, without distinctly admitting upon the record, every fact, where he was non-suited in the absence of evidence for his adversary conduced to prove. Young v. Black supra.


§1-184. Waiver of jury trial.—Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and with the assent of the court in other actions, in the manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent, entered in the minutes. (Rev., s. 540; Code, s. 416; C. C. P., s. 420; C. S. 568.)

Cross References.—As to waiver of jury trial, see the North Carolina Constitution, Article IV, section 13. As to provision for trial of issue of fact by jury, see §1-172. As to reference of issues, fact or law, by consent, see §1-118.

Consent Necessary.—A party cannot be deprived of the right to a trial by jury except by his own consent. Key- Stone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427.

Consent is Waived by Failure to Make Motion in Apt Time.—The parties to an action may waive their right to trial by jury guaranteed by our State Constitution, Article IV, § 1, by failing to move for a trial by jury under § 1-513, but makes such motion after the judge has heard the evidence and argument, and is ready to decide the facts at issue and enter judgment thereon, the motion shall be considered a waiver of the right to trial by jury. Morisey v. Swinson, 104 N. C. 555, 10 S. E. 10.

Waiver of Motion in Apt Time.—When a trial by jury is waived, the facts found and conclusions of law are conclusive on appeal if there is evidence appearing on the trial of the questions of fact his findings thereof are conclusive on appeal where the judge has heard the evidence and argument, and is ready to decide the facts at issue and enter judgment thereon, the motion shall be considered a waiver of the right to trial by jury. Buchanan v. Clark, 116 N. C. 78, 80 S. E. 1064; Yarbrough v. Moore, 151 N. C. 116, 65 S. E. 763.

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Consent is Waived by Failure to Make Motion in Apt Time.—The parties to an action may waive their right to trial by jury guaranteed by our State Constitution, Article IV, section 13. As to provision for trial of issue of fact by jury, see §1-172. As to reference of issues, fact or law, by consent, see §1-118.

§1-185. Findings of fact and conclusions of law by judge.—Upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately. Upon trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision must be filed with the clerk during the court at which the trial takes place, and judgment upon it shall be entered accordingly. (Rev., s. 541; Code, s. 417; C. C. P., s. 241; C. S. 569.)

Cross Reference.—As to how the issue shall be tried, see §1-172.

Consent Necessary.—On the trial of a civil action a jury was sworn and impaneled and issues framed, but no evidence adduced on either side, and the court thereupon charged without rendering a verdict, it was held that the judge had no right to pass upon the issues, except upon a waiver of jury trial in accordance with this section. Chasteen v. Martin, 61 N. C. 71.

Sufficient Compliance.—Where the court does nothing more than indicate from what source the facts may be gleaned, it is not sufficient compliance with the requirements of this section that the court's decision shall contain a statement of the facts found. Shore v. Norfolk National Bank of Commerce, 208 N. C. 568, 178 S. E. 572.

Separate Conclusions of Facts and Law.—As to the Superior Court, in passing upon a mixed question of fact and law, should, as required by this section, state the facts found and conclusions of law separately. Walker v. Pattershall, 67 N. C. 453; Walker v. Walker, 204 N. C. 210, 197 S. E. 818. See also, Harrison v. Brown, 222 N. C. 613, 24 S. E. (2d) 470.

The decision of the judge in writing, with a separate statement of his findings of fact and conclusions of law is sufficient under this section. Eley v. Atlantic, etc., R. Co., 197 N. C. 766, 150 S. E. 621.

§1-186. Exceptions to decision of court. — 1. For the purposes of an appeal, either party may except to a decision on a matter of law arising upon a trial by the court within ten days after the entry of judgment, in the same manner and with the same effect as upon a trial by jury. Where the decision does not authorize a final judgment, it directs further proceedings before a referee or otherwise, either party may except thereto, and make a case or exception as above provided in case of an appeal.

2. Either party desiring a review, upon the evidence appearing on the trial of the questions of fact of the court, shall make a case or exception in writing, and proceed in the same manner, stating the conclusions of law. Such decision must be filed with the clerk during the court at which the trial takes place, and judgment upon it shall be entered accordingly. (Rev., s. 541; Code, s. 417; C. C. P., s. 241; C. S. 569.)
law, may at any time within ten days after the judgment, or within such time as is prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge in settling the case must be bound by the language of the first two subdivisions of section 1-544, and his conclusions of law. (Rev., s. 542; Code, s. 418; C. C. P., s. 249; C. S. 570.)

See the next foregoing section and the note thereto.

Editor's Note. — In Green v. Castlebury, 70 N. C. 20, which since its decision has been cited as the case particularly necessary to be reviewed by the Supreme Court, unless exceptions appear to have been aptly taken, or error is distinctly pointed out. Chastain v. Coward, 79 N. C. 543.

§ 1-187. Proceedings upon judgment on issue of law.—On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section 1-211 herein upon failure of the defendant to answer, where the summons was personally served. If judgment is for the defendant, upon an issue of law, and if taking of an account or the proof of any fact is necessary to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as provided in section 1-212 herein. (Rev., s. 543; Code, s. 419; C. C. P., s. 243; C. S. 571.)

Cited in Ranson v. McCles, 64 N. C. 17; Morissey v. Swinson, 104 N. C. 555, 10 S. E. 754.

Art. 20. Reference.

§ 1-188. By consent.—Any or all of the issues in an action, whether of fact or law, may be referred, upon the written consent of the parties, except in actions to annul a marriage, or for divorce or annulment. (Rev., s. 518; Code, s. 450; C. C. P., s. 244; C. S. 572.)

Cross References.—As to how issues shall be tried, see § 1-172. As to compulsory reference, see § 1-189.

Editor's Note. — A trial by reference cannot have the effect of withdrawing the actions or the causes of action from the jurisdiction of the court. The referee, by consent of the parties, becomes a mere adjunct, and acts in the place of the court, and, in appropriate cases, in the place of the court and jury, in respect to the trial. However, his report, with his record, proceedings and actions, and his report, unless objected to in the way prescribed, stands as the decision of the court, and on application to the court, the court may enter judgment upon the same. If the judge does not formally find the facts, it is presumed that he accepts the facts as found by the referee. A reference, by consent of the parties, of an entire cause, for the determination of questions of law, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed by the rules of that tribunal. It will be noted that this section is a part of the law of cases, which will be supplied by the administration of justice in tribunals established by law. Oteri v. Scalzo, 145 U. S. 578, 12 S. Ct. 895, 36 L. Ed. 834.

It was not intended by this and the following sections to deprive parties of the right to refer all or any matters in controversy to arbitrators with power to make an award, which should be a rule of the court. It was said by the court in Lusk v. Clayton, 70 N. C. 185, 187, that "the parties can undoubtedly make such a reference, and the only question possible would be whether the judge would recognize the award and make it a rule of court, enforceable by its process, or leave the parties to their action on the arbitration bond or other like remedy. We can not suppose it was intended to provide carefully of the leading rights by indirection, and we think that the power to make an award a rule of court still exists as included to every court under its power to enter judgment by consent." It is often seen by the parties to have been argued that these sections have repealed the common law practice of reference to arbitrators, and that the practice is still extant, notwithstanding them. See Keener v. Goodson, 89 N. C. 623, 626, and citations.

The common law practice was extant until the legislature of 1927 passed a statute regulating arbitration and award. This statute has been codified as §§ 1-544 et seq., and the note thereto. See Keener v. Goodson, 89 N. C. 623, 626, and citations.

What May Be Referred.—All or any of the issues in an action may be referred by consent of the parties. Lusk v. Clayton, 70 N. C. 184, 185, 259, 260.

Waiver of Jury Trial.—A reference made by consent is a waiver of the right of trial by a jury. Green v. Castlebury, 70 N. C. 20; In re Parker, 209 N. C. 693, 184 S. E. 248; Anderson v. McCoe, 211 N. C. 197, 199 S. E. 639. Judge May Disregard Agreement to Refer. — The trial judge, in the exercise of a sound discretion, may disregard the agreement of parties that a reference shall be made. Lusk v. Clayton, 70 N. C. 184, 185, 259, 260.

Strict Words of Statute Not Required. — It is proper that the agreement to refer should specify in terms the "issues of law and fact," but where the purpose is obvious, the strict words of the statute will not be required. Morissey v. Swinson, 104 N. C. 555, 10 S. E. 754; Vaughan v. Lewellyn, 94 N. C. 472.

Order Entered of Record Sufficient. — An order of reference of law or fact entered of record is a sufficient compliance with this section requiring the same to be in writing. And when entered must stand until a full report is made. White v. Upchurch, 86 N. C. 553.

Plea in Bar.—A reference of a cause cannot be ordered when anything is pleaded in bar of plaintiff's right of action, until such plea is tried. Jones v. Beamam, 117 N. C. 259, 25 S. E. 448.

Reference Does Not Deprive Court of Jurisdiction. — Sending a case to be tried by a referee does not deprive the court of its jurisdiction, and it can make any and all necessary orders therein pending the trial before the referee. McNeill v. Lawson, 97 N. C. 16, 1 S. E. 401.

Plaintiff May Take Non-Suit.—A plaintiff may take a non-suit while the case is pending before a referee, if the case be one in which he is entitled to do so. McNeill v. 97 N. C. 16, 1 S. E. 401.

No Appeal from Order of Reference. — Upon a consent reference to try a cause, the question as to whether all the issues raised by the pleadings are to be considered as submitted to the referee under the agreement of the parties and the finding of the trial court is conclusive. Barrett v. Henry, 85 N. C. 332.

Referee Must Discharge Duties. — The referee selected by the parties must remain in the discharge of his duties, unless with like consent another is substituted in his place, thereby revoked; it continues, and a second trial may be had before the same referee, unless with like consent another is substituted in his place. Perry v. Tupper, 77 N. C. 413.

When for cause the referee's report is set aside, the order of reference is not thereby revoked; it continues, and a second trial may be had before the same referee, although a party may not apply for such order of reference. Perry v. Tupper, 77 N. C. 413.

Consent Necessary to Vacate Reference. — Where an action is once referred the order of reference cannot be vacated by the consent of all parties. Keystone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427; Morissey
Mrmev., s. 519: Code, s. 421; 1897, c. 237, ss. 1, 2; 532, 125 S. E. 119; Andrews v. Jordan, 205 N. C. 618, 623, § 1-189 GH 1.

cause therefor is made to appear. Patrick vy. Richmond, 92 0. G. 602, 85 S. H. 172.

or for carrying a judgment or order into effect.

because in the compulsory reference the parties reserve their

any stage of the action.

and decide the whole issue, or to report upon any

specific question of fact involved therein.

The compulsory reference under this section does not deprive either party of his constitutional

right to a trial by jury of the issues of fact aris-
ing on the pleadings, but such trial shall be only

upon the facts as taken before the referee.

(Rev., s. 519; Code, s. 421; 1897, c. 237, § 1; C. C. P., s. 245; 1917, c. 280; 1919, c. 7; C. S. 573.)

I. Editor's Note.
II. General Consideration.
III. Illustrative Cases.

I. EDITOR'S NOTE.

Editor's Note. — It is the order of reference that ex-
tends the jurisdiction and controls the relation of the court

to the trial of the issues of fact and law, and extends its authority to compel the parties to the action,

by proper judgments and orders in the regular course of procedure, to do and submit to what ought to be done as the result of the reference.

The referee, once appointed, is like the judge when there

is a waiver of a jury trial, invested with the powers of both, but it would be useless to take an account, if the plea in

bar would defeat the plaintiff's action, if found for the

defendant. But it is otherwise where the matter pleaded

in bar would not defeat the plaintiff's action, if found for the

defendant. Humble v. Mebane, 89 N. C. 410. This is so

for the reason that what is pleaded in bar is not a bar.


When a reference is ordered for any of the reasons set

forth in this section, it should appear clearly and affirmative-
ly that the cause of action of which the rights of the parties have been

found. See Kerr v. Hicks, 133 N. C. 175, 177, 45 S. E. 529.

No order of reference should be permitted by the court

until the pleadings are in and the parties are at issue. The

failure to observe the law of procedure in connection with

mechanical and time consuming causes is too common a

cause for the dismissal of cases. See Pomona Mills, 206 N. C. 768, 175 S. E. 150.

What Constitutes a "Long Account."—There is no sta-
development of a "long account," but a correct conclusion as to whether an account was "long" would depend upon the facts and circumstances of each case. The

account in controversy was correctly classified as a "long account." Dayton Rubber Mfg. Co. v. Horn, 203 N. C. 367, 167 S. E. 42.

What constitutes a "long account" must be determined

upon the facts of each particular case, it not being neces-
sary that the action be for an accounting, it being suffi-
cient if a long account is directly and not merely collateral-


Where action was instituted to recover for services ren-
dered for the defendant in circumstances of the same

transaction or series of transactions are properly joined in

the complaint, the court may not ordinarily order that one

of them be referred to a referee, but under the facts and

circumstances of this case the court's order of compulsory

reference of one of the causes of action was upheld, it ap-

tearing that the action involved a long account and that

controversy where the facts and circumstances of the case

be judi-

cally presented to a jury, this section being liberally construed

to afford the salutary procedure therein provided. Fry v. Pomona Mills, 206 N. C. 768, 175 S. E. 150.

No Waiver of Jury Trial. — By a compulsory reference

the parties waive nothing, and are still entitled to a trial

by jury, on the issues as if no reference had been made.


But a failure to object to an order of reference, at the
time it is made, is a waiver of the right to a trial by jury.


To an exception to an order of reference to a referee, and submitting issues, secures his right thereby to a trial by jury upon the evidence thus taken, unless he

waives his right during the progress of the reference; and

while an issue determinative of the action should first be tried before a reference is ordered, a party excepting to the order may not successfully insist upon the determination of the issue of fact by the referee provided for by this section. Green Sea Lumber Co. v. Pemberton, 188 N. C. 532, 125 S. E. 119.

A party duly and aptly excepting to an order of refer-
ence and also to the admissions of evidence before the

referee, and submitting issues, secures his right thereby to a trial by jury upon the issues presented by him. Brown v. Manor excavation, 194 N. C. 149, 137 S. E. 792.

But the failure of a party to except to an order for

compulsory reference and to file exceptions in apt time to particular findings of fact by the referee when the re-

court is unfavorable and to tender issues on the exceptions

[237]
and demand a jury trial thereon will be deemed a waiver of his right to trial by jury. Section 1-189. Booker v. High-
lands, 198 N. C. 282, 151 S. E. 635.

A party who would preserve his right to a jury trial in a compulsory reference should have his request, in writing, at the time it is made, and on the coming in of the re-
port of the referee. If it be advisable, he should reasonably file exceptions to particular findings of fact made by the referee, and on the coming in of the exceptions, the facts pointed out in the exceptions and raised by the pleadings, and de-
mand a jury trial on each of the issues thus tendered. Marshville Cotton Mills v. Maslin, 200 N. C. 328, 329, 156 S. E. 484.

Where a case is one properly subject to a compulsory refer-
cence under this section, a party excepting to the order of reference has a right to have issues tendered, and on the hearing of exceptions to the referee's report submitted to the jury when the issues do not arise upon the exceptions. Atlantic Joint Stock Land Bank v. Fisher, 206 N. C. 412, 173 S. E. 987.

Where defendant sets up no plea in bar, and the plead-
ings indicate the necessity of examining a long account
between the parties, defendant's exception to an order of
compulsory reference will not be sustained under this sec-

Common Law Arbitration. — The provisions of the code
of civil procedure have not abrogated the common law practice of reference to arbitrators. Keener v. Goodson, 99 N. C. 233, 270.

Judge of Probate Court Cannot Refer. — A judge of the court
of probate cannot refer the taking of the account to a
referee, and, if he does, the account will be set aside as
irregularly taken. This section does not extend the juridi-
cion of the probate judge. Rowland v. Thompson, 5 N. C. 110.

Power of Court to Vacate Reference.—Where the trial
judge has ordered a compulsory reference upon the ground
that the complaint stated a long and involved account,
and where no exception is taken to the order by either
party, the court is without authority to set aside the order of reference and submit the case to the jury when upon his
rulings the referee has committed error in excluding cer-
tain evidence materially bearing upon the controversy.
American Trust Co. v. Jenkins, 196 N. C. 428, 146 S. E. 68.

Motion to Refer Must Be Timely. — A motion for a com-
pulsory reference should be made in an action before the
jury has been impaneled, or the rights of a party thereto
will be considered as waived. Peyton v. Hamilton-Brown Shoe Co., 167 N. C. 280, 83 S. E. 487.

It is not error to refuse a compulsory reference, when the
motion to refer is not until after the close of the evidence.

Reference Should Follow Pleas. — A reference should not be
had, and a compulsory reference should be made in an action before the
jury has been impaneled, or the rights of a party thereto
will be considered as waived. Peyton v. Hamilton-Brown Shoe Co., 167 N. C. 280, 83 S. E. 487.

But it is irregular to proceed with a reference to state an
account while there are matters of defense left open
which, if sustained by evidence, would bar the claim to

Reference Precedes Court Adjudication of Liability. — A
reference may precede the determination of matters in controversy,
under this section, precedes any adjudication by the court of
the liability of the parties. Governor v. Lassiter, 83 N. C. 254, 58 S. E. 1091. (2) Account stated. Kerr v. Hicks,
126 N. C. 320, 35 S. E. 588. (3) Account referred to without notice of
plea. Duckworth v. Duckworth, 144 N. C. 620, 57 S. E. 396.

Consent Necessary to Vacate Reference. — Where an
action is once referred the order of reference cannot be

Failure to Refer Not Error. — Where the controversy in-
volves the taking of a long account, it should be referred
but where it has otherwise been tried, without error or prejudice to the
appellant, the judgment of the trial court will not be disturbed.

Appeal before Judgment Premature. — In Leroy v. Sal-
burn, 182 N. C. 575, 108 S. E. 303, it was said: "The jury
having found that the partnership existed, an appeal from the
order of reference before judgment, when the same is allowed by this section
and the compulsory reference is once referred the order of reference cannot

It has been said, however, that where an amendment
of the pleadings is allowed, after the report is in, contain-
ing an additional charge, the parties ought to be allowed
to offer evidence before the jury as to such charge, for
it was not embraced in the reference. See Moore v.

Applied in Marshville Cotton Mills v. Maslin, 200 N. C. 328, 156 S. E. 484; Perry v. Pulley, 206 N. C. 701, 702, 175 S. E. 89.

III. ILLUSTRATIVE CASES.

Division of Line. — A compulsory reference may be ordered by the trial judge in an action involving the true
location of a dividing line between the owners of adjoining
lands, where the same was carefully surveyed by a surveyor
of timber, where the location of the line is complicated or
requires a personal view of the premises. Waller v. Dud-
low, 113 N. C. 235, 8 S. E. 467, 94 S. E. 467.
adultery is in bar of the wife's right, and whether the compulsory order of reference be treated as one of consolidation and reference of the consolidated action, or a reference to a complaint on an administration bond of "performance of the covenant of the condition of the bond by payment to the next of kin," is good in substance, and an issue taken upon it may be decided by the jury does not require a view of the premises, entitling the party requesting it to a compulsory order of reference under the provisions of this section. Kearns v. Haskell & Florence Mfg. Co., 176 N. C. 179, 97 S. E. 106. 

Suit on Confessed Judgment. — A compulsory reference cannot be ordered by the court in a suit on a judgment confessed by the defendant before the Civil War, where the only matters of defense are payments made by them in Confederate currency during the war, and alleged counter-claims for notes due from the plaintiffs to themselves, as executors. Hall v. Craige, 65 N. C. 51. 

Suit on Confessed Judgment. — A compulsory reference cannot be ordered by the court in a suit on a judgment confessed by the defendant before the Civil War, where the only matters of defense are payments made by them in Confederate currency during the war, and alleged counter-claims for notes due from the plaintiffs to themselves, as executors. Hall v. Craige, 65 N. C. 51. 

Action by Farquhar against Guard.—Where in an action by a guardian to impeach a former decree, it appeared that alleged expenditures for the benefit of the ward should be ascertained, and the parties of the same term of court, the amount to be determined by the jury does not require a view of the premises, entitling the party requesting it to a compulsory order of reference under the provisions of this section. Sutton v. Schonwald, 80 N. C. 20. 

Action on Administration Bond. — A plea in an answer to an administration bond of "performance of the condition of the bond by payment to the next of kin," is good in substance, and an issue taken upon it may be decided by the jury does not require a view of the premises, entitling the party requesting it to a compulsory order of reference under the section. Fleck v. Dawson, 69 N. C. 42. 

Suit by Creditor against Executor. — In an action by a creditor against an executor if the defendant is made to answer a debt, and the amount or existence of the debt is tried in the ordinary way: and if the debt be established a reference is to be had to ascertain the amount of the debts and their several classes, the course of the coming into court, just as the court would have upon the trial of the case, and constitute a part of the record. (Rev., s. 1354, Code, 6.-423; C.-C.) P., 9. 247: C) S, 574.) 


§ 1-190. How referee chosen or appointed.—In all cases of reference the parties as to whom issues are joined in the action (except when the defendant is an infant or an absentee) may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to have such three, and to no other person or persons. And if such parties do not agree, the court shall appoint an odd number of referees, not more than three, who are free from exception. No person may be appointed referee to whom all parties in the action object. No judge or justice of any court may sit as referee in action pending in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate. (Rev., s. 520; Code, s. 423; C. C. P., s. 247; C. S. 574.) 

§ 1-191. Referees may administer oaths.—Every referee has power to administer oaths in any proceeding before him, and has generally the power vested in a referee by law. (Rev., s. 521; Code, s. 599; C. C. P., s. 356; C. S. 575.) 

§ 1-192. Powers of referee of trial.—The trial by referees shall be conducted in the same manner as a trial by the court. Referees have the same power to grant adjournments and to allow amendments to pleadings and to the summons as the court upon such trial, upon the same terms and with like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment and to punish them as for contempt or nonattendance or refusal to testify, as is possessed by the court. (Rev., s. 522; Code, s. 422; C. C. P., s. 246; C. S. 576.) 

Referee Has No Inherent Power.—A referee has no inherent or original powers and can only do those things expressly enumerated by statute, and such as he is authorized to do by the court which sends him the case. While he may "allow amendments to pleadings," he is not authorized to allow a defendant who has not previously done so to file an answer, except by consent. Jones v. Hites, 137 N. C. 569, 48 S. E. 576. 

May Make New Parties.—Under this section, a referee has power to admit new parties to an action. Perkins v. Berry, 103 N. C. 131, 9 S. E. 621. 

Before a notice issued by a referee and served upon a surety on the administrator's bond to appear before him, no order having been made to make sure such party is, is not a legal process effective to bring him into court. Koonce v. Pelletier, 105 N. C. 582, 10 S. E. 48; Waller v. Dudley, 194 N. C. 139, 138 S. E. 595; Bank of Rose Hill v. Graham, 198 N. C. 530, 532, 132 S. E. 493; Nissen v. Baker, 198 N. C. 433, 134 S. E. 34, 35. 


§ 1-193. Testimony reduced to writing.—The testimony of all witnesses on both sides must be reduced to writing by a referee, or under his direction, and signed by the writer. In case such evidence so taken and signed shall be filed in the cause, and constitute a part of the record. (Rev., s. 523; 1897, c. 247, s. 3; C. S. 577.) 

The referee should ordinarily enter his rulings on each objection to the evidence taken before him; but where the objections are very numerous and relate to a single ground of objection, it is sufficient compliance with this section for the referee to incorporate in his report a general statement of his rulings sufficient to give the parties and the reviewing court full opportunity to consider the referee's rulings on each objection. Pack v. Katsin, 215 N. C. 233, 1 S. E. (2d) 556. 

§ 1-194. Report; review and judgment.—The referee shall make and deliver a report, within the time limited by the court, to the clerk of the court in which the action is pending. Either party, during the term or upon ten days notice to the adverse party out of term, may move the judge to review the report, and set aside, modify or confirm it in whole or in part, and no judgment may be entered on any reference except by order of the judge. (Rev. s. 524; Code, s. 423; C. C. P., s. 247; C. S. 578.)

See note under § 1-195.

Editor's Note. — Originally, as cited in C. C. P. sec. 247, the time limit of the referee's report was 69 days, and default of either party would end the reference. The power of the trial judge over the referee's report is broad and comprehensive. Dumas v. Morrison, 175 N. C. 431, 95 S. E. 775. In the exercise of the power the trial judge may recommit the report for the correction of errors and irregularities, or for more definite statement of facts or conclusions of law, and such order recommitting the report for such purpose is not appealable. Mills v. Apex Ins., etc., Realty Co., 196 N. C. 223, 225, 145 S. E. 470. In such cases the court must act with due care and discretion, and its ruling in the latter respect is not reviewable unless it appears that such discretion has been abused. Cummings v. Sweepson, 124 N. C. 579, 39 S. E. 566.

Reference to Another Referee. — Where a compulsory reference is made, and the report filed containing findings of fact and conclusions of law, the trial judge may not refuse to accept the report. If a referee refuses to proceed, either party may apply to the court for action upon the unapproved parts. Mills v. Apex Ins., etc., Co., 196 N. C. 223, 145 S. E. 26, citing Commissioners v. Magnin, 85 N. C. 115; Dumas v. Morrison, 175 N. C. 431, 95 S. E. 775; State v. Jackson, 183 N. C. 695, 158 S. E. 136; California Mineral Co. v. Young, 211 N. C. 387, 188 S. E. 508; Carolina Mineral Co. v. Young, 211 N. C. 387, 193 S. E. 165; Holder v. Home Ind. Ins. Co., 212 N. C. 241, 193 S. E. 165; Garner v. Mitchell, 196 N. C. 223, 145 S. E. 470.

§ 1-195. Report, contents and effect.—The referee must state the facts found and the conclusions of law separately. His decision must be given, and may be excepted to by either party within thirty days from the filing of the report and reviewed in like manner and with like effect in all respects as in cases of appeal; and he may in like manner settle a case or exceptions. The report of the referee upon the whole issue stands as the decision of the court, and judgment may be entered thereon upon application of the judge. When the reference is to report the facts, the report has the effect of a special verdict. (Rev. s. 525; Code, s. 428; C. C. P., s. 246; 1948, c. 219; C. S. 579.)

Cross Reference. — As to reviewing case, findings of fact by referee, see § 1-194 and the note thereto.

For reference by consent, see annotations under sect. 1-188. As to compulsory reference, see annotations under sect. 1-189. For a striking illustration of the use of a reference, see note under § 1-196. When Decisions Reviewable. — The decision of the judge in revising the report of a referee, is available as to questions of law, but not as to the findings of fact. Vaughan v. Lewellyn, 94 N. C. 472. The Superior Court has no power to review the conclusions of fact as found by the referee and sustained by the judge, unless it appears that such findings have no evidence to support them. Boyle v. Stallings, 140 N. C. 524, 6 S. E. 280.

The court retains the cause and its jurisdiction in every case of reference, with power to review and reverse the conclusions of law of the referee; and a discretion is vested in the court, and its ruling in the latter respect is not reviewable unless it appears that such discretion has been abused. Cummings v. Sweepson, 124 N. C. 579, 39 S. E. 566.

One valid objection may be raised to the findings of fact by the referee adopted by the judge, directly or by failure to modify them, or to those of the judge substituted for the referee's, but this raises in reality only a question of law, i. e., whether there is any evidence to support the conclusions of fact. When no such objection is made in apt time, the findings of the judge, whether made or adopted, are final and not subject to review.


One exception to the order of the court should conform to the ruling of the Supreme Court in Keystone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427. For a striking illustration of the confusion and uncertainty into which the rights of the parties litigant are thrown by these provisions of the holdings thereunder, see Kerr v. Hicks, 133 N. C. 175, 45 S. E. 529.

Referee's Duty under This Section. — It is the duty of a referee to state positively and definitely all the facts constituting the grounds of action or defence, and not to inference what is the precise fact intended to be found. Conclusions of law and fact must be stated separately; otherwise the appellate court cannot review the referee's conclusions of law, and the report of the referee will be set aside as being defective. Earp v. Richardson, 75 N. C. 84; State v. McKenzie, 65 N. C. 102.

§ 1-196. Defined.—Issues arise upon the pleadings, when a material fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

1. Of law.
2. Of fact.

(Rev., s. 544; Code, s. 391; C. C. P., s. 519; C. S. 550.)

In General. — An issue is a single, certain and material point, arising out of the allegations or pleadings of the parties, and, generally, should be made up by an affirmative and negative. Simonton v. Winner, 2 Pet. 141, 160, 8 L. Ed. 75.

An issue is a statement of a material fact in the pleadings of one party which is denied in the pleadings of another party. 7 Ohio Law 163, 164.

Form of Issues. — Defendant cannot complain of the form of the issues where he did not except or submit other issues. Dreeman v. Wilkes, 178 N. C. 513, 103 S. E. 9.

Failure to Submit Issue. — Where defendant in a proceeding proceeding did not tender any issues, and did not except to the ones submitted, he can not complain on appeal that no issue of title was submitted, particularly where he offered no evidence to support his allegations of title. Exum v. Chase, 180 N. C. 95, 104 S. E. 67.

Province of Judge and Jury. — The province of the jury is restricted to passing upon issues of fact raised by the pleadings in the light of the testimony offered. When no testimony is offered, it is the duty of the trial judge to determine the issues of law, if any are raised, and then to proceed to enter such judgment as either of the parties may have the right to demand upon the admissions of fact contained in the pleadings and the issues of law or controverted questions of law. McQueen v. Peoples Nat. Bank, 111 N. C. 599, 513, 15 S. E. 270.


§ 1-197. Of law. — An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof. (Rev., s. 545; Code, s. 392; C. C. P., s. 220; C. S. 581.)

§ 1-198. Of fact. — An issue of fact arises—
1. Upon a material allegation in the complaint controverted by the answer; or,
2. Upon new matter in the answer, controverted by the reply; or,
3. Upon new matter in the reply, unless an issue of law is joined thereon. (Rev., s. 546; Code, s. 393; C. C. P., s. 221; C. S. 582.)

Pleadings Must Raise Issues. — The issues in a cause are made by the pleading, and it is not error to refuse to submit an issue which the pleadings do not raise. McQueen v. Blackwell Co., 120 N. C. 345; Wright v. Cain, 93 N. C. 296; Patton v. Western N. C. R. Co., 96 N. C. 455, 1 S. E. 863. But see Lackett v. Rumbaugh, 45 Fed. 21. See also, Ellis Motor Co. v. Belcher, 204 N. C. 769, 169 S. E. 708.

An issue should be directed to the matter alleged on the one side and denied on the other. The judge may, in addition to the issue, submit an issue of law or controverted by the defendant, but he is not compelled to do so and his refusal is not reviewable. Crawford v. Masters, 140 N. C. 205, 52 S. E. 653.

However, it is error to submit an issue as to a contract different from that alleged in the complaint. Dickens v. Perkins, 134 N. C. 220, 46 S. E. 490.

In an action for the recovery of land, if the defendant wishes to disclaim as to any portion of the locus in quo, and put in issue the title to only a specific portion, he...
should do so in his answer. Crawford v. Masters, 140 N. C. 205, 52 S. E. 663.

Error to Submit Issue Not Raised by Pleadings.—Where the contract sued on is admitted in the answer, and there is no existence of the contract in the pleadings, and it is error for the court to submit such issue to the jury. Fairmont School v. Bevis, 210 N. C. 565, 185 S. E. 366.

Issue Cannot Be Raised by Evidential Fact. — Where there are no allegations in the pleadings which suggest the matter set out in the issue, it is improper to submit such issue to the jury. Teague v. Blount, 176 N. C. 217, 199 S. E. 235.

It is only necessary to submit such issues as arise out of the pleadings material to be tried and such as will admit all material evidence upon the whole matter in controversy. Cull v. Hender- son, 129 N. C. 246, 58 S. E. 481.

Refusal to Submit Defendant's Issue. — Where an issue raised by the new matter in the answer, controverted by the reply, is material to the defense, there is error in refusing to submit the issue tendered by defendants, or at least an issue involving the matters relied upon by the defendants, and alleged in their answer. Brown v. Ruffin, 189 N. C. 265, 220 S. E. 280.

Cited in Abbott v. Georgia, etc., R. Co., 90 N. C. 452.

§ 1-189. Order of trial.—Issues both of law and of fact may arise upon different parts of the pleadings in the same action. Where the issues are not satisfactorily made up from the pleadings, the first trial must be first, unless the court otherwise directs. (Rev., s. 547; Code, s. 394; C. C. P., s. 222; C. S. 583.)

Editor's Note.—Pleads in bar must be tried before a reference is ordered. See annotations under sections 1-188, 1-189.

§ 1-200. Form and preparation.—Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues arising upon the pleadings, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reduced to writing, before or during the trial. (Rev., ss. 548, 549; Code, ss. 395, 396; C. S. 584.)

Editor's Note.—The Supreme Court in construing this section has laid down three rules: (1) only issues of fact raised by the pleadings must be submitted; (2) the verdict, whether in response to one or many issues must establish the substance of the law and fact, so that justice may be administered between the parties litigant with regularity and certainty." See Tucker v. Satterthwaite, 120 N. C. 118, 27 S. E. 45; Braswell v. Johnston, 108 N. C. 150, 12 S. E. 911.

If the pleadings fail to state the provisions and requirements of this section see Piedmont Wagon Co. v. Byrd, 11D N. C. 460, 26 S. E. 144.

When Sufficient. — It seems that the law is settled that if the issues submitted by the pleadings are such as to present all phases of the controversy, there is no ground for exception to the same. Bailey v. Hassell, 113 N. C. 380, 17 S. E. 865.

Issues Precede Testimony. — This section contemplates that the issues shall be drawn before the introduction of testimony. Besley v. Surles, 140 N. C. 605, 53 S. E. 360. See annotations under sections 1-188, 1-189.


Complaint Differs with Issue. — Where a contract alleged in the complaint from one set forth in the issue, it is error. Dickens v. Perkins, 134 N. C. 220, 46 S. E. 490.

Issues Not Determinative. — A judgment upon the verdict of the jury upon issues raised by the pleadings which are not determinative of the controversy between the parties, is erroneously entered. Merchants Nat. Bank v. Carolina Broom Co., 188 N. C. 508, 125 S. E. 12.

Insufficient Issues. — When issues of fact are raised by the pleadings it is error to submit only the question whether the plaintiff is entitled to recover; that is a question arising after verdict and addressed solely to the court. Braswell v. Johnston, 108 N. C. 150, 12 S. E. 911.

Example of Insufficient Issues. — Where in an action for damages it was alleged that the plaintiff's injuries were caused by (1) were plaintiff's injuries caused by the defendant's negligence? (2) Was there contributory negligence on the part of the plaintiff? (3) What damage was the plaintiff entitled to recover? The court adding the issues of contributory negligence and alleged in the complaint, Griffin v. Atlantic, etc., R. Co., 134 N. C. 101, 46 S. E. 7.

Inconsistent Causes of Action. — Where the pleadings alleged inconsistent causes of action in different counts of his complaint, it was error for the court to submit the case on two distinct causes of action as to the same injury. Satterthwaite v. Satterthwaite, 120 N. C. 118, 27 S. E. 45.

It should be born in mind that the code system contemplates distinct findings upon material issues. These should be submitted where it can be done without repetition or confusion. Emery v. Raleigh, etc., R. Co., 102 N. C. 249, 9 S. E. 139. It is not necessary that the language of the pleadings should be incorporated into the issues, or that they should be clearly followed in drawing them.

While the pleadings are to be construed liberally with a view to substantial justice between the parties, the proof must be limited strictly to the issues as submitted by the Supreme Court in Parsley v. Nicholson, 65 N. C. 297. 209. "The rules of pleadings at common law have not been abrogated by the Code of Civil Procedure, the principles still remain, and have only been modified as to the technicalities and matters of form. The object of pleading, both in the old and the new system, is to produce
issue arising on the pleadings, but the plaintiff waived this contention, and allowing the case to be tried on that theory. Ammons v. Fisher, 208 N. C. 712, 182 S. E. 479.


Art. 22. Verdict.

§ 1-201. General and special.—A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. (Rev. s. 550; Code, s. 408; C. C. P., s. 232; C. S. 585.)

I. General Consideration.

II. Rendition and Reception.

III. Polling Jury.

I. GENERAL CONSIDERATION.

General Verdict.—The verdict is general when the jury, under appropriate instructions from the court as to the law applicable, simply respond affirmatively or negatively to the issues submitted. Porter v. Western, etc., R. Co., 97 N. C. 66, 71, 2 S. E. 591; Morrison v. Watson, 95 N. C. 479. The right of the parties to have a special verdict on the ground that it is inconsistent with the general verdict on the ground that it is inconsistent with the general verdict it must appear that the special findings are necessarily repugnant to it. To be inconsistent with the general verdict the court must admit of no rational conclusion which is consistent with the general verdict.

Special Verdict.—The adoption of this section wrought a radical change upon the old practice in regard to what should be stated in special verdicts. Under the former practice, after finding as to all the facts necessary in determining the rights of the parties, with a prayer for the advice of the court as to the law arising thereon, the special verdict concluded conditionally, that if, upon the whole matter, the court shall be of opinion that the plaintiff has a cause of action, the jury will find in favor of the plaintiff.

Under the law as it now stands it is no longer necessary for the plaintiff to demand that the verdict be stated in writing, and may direct a written special finding to prevail over a general (under section 1-202) one has no application. Porter v. Western, etc., R. Co., 97 N. C. 558, 62 S. E. 851.

II. RENDITION AND RECEIPTION.

Presence of Court.—A special verdict requires the presence and assent of the court. Suydam v. Williamson, 20 How. 427, 15 L. Ed. 978.

If it is not received by the court, nor in any way made known to the court, and where, with the assent of the attorney of the party in whose favor it was given, the jury retire by the court’s direction and consider further of their findings, it is of no weight as evidence for any purpose. United States v. Addyson, 6 Wall. 291, 18 IL. Ed. 919.

Where Findings of Jury in Conflict.—If there be an irreconcilable conflict in the findings of the jury upon the issues submitted, or between the verdict and the judgment, the court shall set aside the verdict and require a new trial. See 69 Ohio State Reports 101. In other words the special verdict must admit of no rational conclusion which is inconsistent with the general verdict.

Editor’s Note.—It is well settled by the reported cases in other states, construing provisions of their codes similar to this section, that a general verdict should stand unless the special findings are necessarily repugnant to it. To be inconsistent with the general verdict it must appear that the special findings are irreconcilable, in a legal sense, with the general verdict; and to justify the court in setting aside the general verdict on the ground that it is inconsistent with such findings the conflict must be clear and irreconcilable. See 69 Ohio State Reports 101. In other words the special verdict must admit of no rational conclusion which is consistent with the general verdict. See note of Porter v. Western, etc., R. Co., 97 N. C. 66, 2 S. E. 581, under sec. 1-201, analysis line “General Considerations.”

§ 1-203. Character of, for different actions.—In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict is in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer which the jury finds the plaintiff is entitled to by reason of the detention or taking and withholding the property. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the

[243]
§ 1-204. Jury to assess damages; counterclaim.

When a verdict is found for the plaintiff in an action for the recovery of money, or for the delivery of personal property, when the property cannot be re-delivered by plaintiff in specie, the value thereof, in case of the judgment for the defendant, should be assessed at the time of the trial and not at the time of its seizure by the sheriff. Holmes v. Godwin, 69 N. C. 467, 468.

Account and Settlement of Trust Fund.—The court has the power in certain cases, to direct a special finding of the issue in an action for an account and settlement of a trust fund, and so also in all other cases except where the suit is for ‘money only’ or for ‘specific real property.’

§ 1-205. Entry of verdict and judgment.

Exceptions as Condition for Appeal.—See section 1-282 and 2. If there is error, either in the refusal of the court to give or in its instructions generally, the same is deemed excepted to without the filing of any formal objections. (Rev., s. 554; Code, s. 412; C. C. P., s. 236; C. S. 589.)

To Whom Returnable.—The verdict should be returned before the presiding judge, Zagier v. Southern Exp. Co., 171 N. C. 692, 89 S. E. 43, but by consent of the counsel, the clerk of the superior court can represent the judge in taking the verdict. Barger Bros. v. Alley, 167 N. C. 362, 83 N. C. 612.

The discretionary act of the trial judge in rendering judgment upon a verdict of the jury returned during recess of the court without the consent of counsel will not be reviewed on appeal when it appears from the finding of the court that the jury had not discussed the case before delivering it to the clerk, although several of them so thereafter with appellée’s attorney; that the verdict was agreed to before the jurors separated, no improper influence had induced it, and the issues were not recorded until after the verdict was returned to the judge. Zagier v. Southern Express Co., 171 N. C. 692, 89 S. E. 43.

An agreement empowering the judge to sign judgment “out of terms” gave him no power after the adjournment of the term to hear and pass upon a motion to set the verdict aside. Knowles v. Savage, 140 N. C. 372, 374, 52 S. E. 930.

Verdict Must Be Accepted.—Before a verdict returned upon an open court by a jury is complete, it must be accepted by the court as a whole. See § 1-204, and it is the duty of the judge to look after the form and substance of a verdict, so as to prevent a doubtful or insufficient finding from passing into the records. State v. Godwin, 138 N. C. 582, 50 S. E. 277.

In Informal and Irregular Verdict.—When a jury returns an informal, insensible, or a repugnant verdict, or one that is not responsive to the issues submitted, they may be directed by the court to retire and reconsider the matter and bring in a verdict in proper form; but it is incumbent upon the judge not even to suggest the alteration of a verdict in substance. State v. Godwin, 138 N. C. 582, 50 S. E. 277.

§ 1-206. Exceptions.

If an exception is taken upon the trial, it must be reduced to writing at the time with so much of the evidence or subject matter as may be material to the exception taken; the same must be entered in the judge’s minutes and filed with the clerk as a part of the case upon appeal.

2. If there is error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same is deemed excepted to without the filing of any formal objections. (Rev., s. 554; Code, s. 412; C. C. P., s. 236; C. S. 590.)
II. INSTRUCTIONS.

§ 1-207. Motion to set aside.—The judge who tries the case may, after hearing the argument, grant a motion to set aside a verdict, before rendering judgment, and where the attention of the court was not called to any error in the record, and the consent of the party against whose judgment it is sought to be set aside is obtained, the exercise of the discretion is not in the nature of an appeal, and the court may set aside a verdict, as against the weight of the evidence, or to correct an inadequate or defective verdict, or for insufficiency of evidence, or for excessive damages; but such motion can only be heard at the same term at which the trial is had. When the motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had. (Rev., s. 534; Code, s. 412; C. C. P., s. 236; C. S. 591.)

§ 1-207. Motions to Grant a Prayer for Instructions.—Motions to grant a prayer for instructions have been construed as not to require the attorneys for the excepting party to prepare them in writing. Buckner v. Madison County R. Co., 164 N. C. 201, 80 S. E. 63.

Section Should Be Specific.—Exceptions taken upon the trial should be as specific as possible and should point out the nature of the error complained of. Williams v. Johnston, 94 N. C. 631; State v. English, 164 N. C. 497, 498, 80 S. E. 72, and cases cited.

Indefinite Exception.—An indefinite exception will be overruled. Stroud v. Stroud, 145 N. C. 357, 9 S. E. 112; Hendrick v. Randell, 162 N. C. 523, 77 S. E. 1011.


Motions to set aside a verdict or to set aside a verdict and grant a new trial upon exceptions, as provided by this section, was made at the trial. Staev. v. Harvell, 208 N. C. 103, 106, 179 S. E. 448.


The court under this section has the power to set aside the verdict, but none to reverse the answers of the jury. Risen v. Smith, 68 N. C. 354, 345; Lee v. Pearce, 68 N. C. 77, 80; McCown v. Sims, 69 N. C. 159, 161.

While the trial court has the power to set aside a verdict when he is of the opinion that it is not supported by the evidence or is against the weight of the evidence, under this section he may not modify the verdict as modified by his opinion the jury made an error in computing the amount returned in their answer, and a new trial will be ordered upon agreement of the judgment rendered on the verdict as modified by the court. Edwards v. Upchurch, 212 N. C. 249, 193 S. E. 439.

Agreement Made by Attorney for Client.—Where the trial judge has announced his decision to set aside a verdict unless the parties should agree in a certain particular, to which the plaintiff’s attorney agreed without the consent of his client and against her instructions, and the judgment so agreed is entered, the plaintiff’s attorney is estopped from resisting the entry of judgment setting aside the verdict nunc pro tunc. Bizzell v. Auto Tire, etc., Co., 182 N. C. 98, 108 S. E. 439.

Where Matter Determined Out of Term. — Where the judgment is for money to be paid after the trial, as within the statutory discretion of the trial judge, and the judge intimates he will grant the motion, but the parties agree that he may determine the matter out of the term, and the judgment is thus agreed upon by the court and the parties, they acquire the matter, and not hearing from the parties the judge renders his previous intimation, and sets a time and place for hearing, at which one of the parties appears and refuses to consent to the trial of the motion, the verdict is then set aside within his reasonable discretion deals with the record as it originally stood, and is not a substitute for the discretion given him by this section. Bailey v. Dibrell Mineral Co., 183 N. C. 525, 112 S. E. 29.

SUBCHAPTER VIII. JUDGMENT.


§ 1-208. Defined.—A judgment is either interlocutory or the final determination of the rights of the parties in the action. (Rev. s. 555; Code, s. 384; C. C. P., s. 210; C. S. 592.)

Definition of Final Judgment. — A judgment is final which decides the case upon its merits without reservation for other and future directions of the court. Sanders v. Michael, 173 N. C. 47, 91 S. E. 526; Fleming v. Roberts, 84 N. C. 532.

Definition of Interlocutory Order. — An interlocutory order or decree is provisional or preliminary only. It does not finally adjudge and determine the rights of the parties, but it remains subject to further proceedings preparatory to the final decree. Johnson v. Robertson, 171 N. C. 194, 88 S. E. 231.

It remains in the control of the court to modify or rescind at any time, and on good cause shown they may be amended, modified, charged or rescinded, as the court may think proper. Maxwell v. Blair, 95 N. C. 317, 318.

Jurisdiction. — It is a well established principle that in order that a judgment or decree may be valid and binding, the court rendering the same must have jurisdiction over both the parties and of the subject matter. Wetmore v. Karrik, 235 U. S. 141, 34 S. Ct. 141, 45 L. Ed. 743, 744, 14 S. E. (2d) 833.

Nature of Judgment. — In its ordinary acceptation, a judgment is the conclusion of the law or facts admitted or established in the case. Sedbury v. Southern Exp. Co., 107 N. C. 350, 10 S. E. 94. 212 S. E. 197.

JUDGMENT AS A CONTRACT. — While judgments are some- times spoken of as contracts, that is not the case in the ordinary acceptation of the term, in view of attempting to compromise the disputed rights and claims of the parties, equitable as well as legal. Hutchinson v. Smith, 68 N. C. 354, 355; Lee v. Pearce, 68 N. C. 77, 80; McCown v. Sims, 69 N. C. 159, 161.

Judgment Granted. — Since the gist of the accepted definition of a judgment is “the final determination of the rights of the parties to an action,” courts are required to recognize both the legal and equitable rights of the parties, and the judgment is not to be confined to the rights of the parties, equitable as well as legal. Hutchinson v. Smith, 68 N. C. 354, 355; Lee v. Pearce, 68 N. C. 77, 80; McCown v. Sims, 69 N. C. 159, 161.

Judgment as a Contract. — While judgments are sometimes spoken of as contracts, they are not in reality contracts, and are never so considered in reference to the clause in the federal constitution which forbids that contracts should be required by the state legislature. Motto v. Davis, 131 N. C. 217, 65 S. E. 969.

However, judgments are considered as contracts to distinguish a cause of action thereon from one ex delicto. Moore v. Lowell, 94 N. C. 299.

A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of re- cord, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law, the promise to pay is implied where such legal obligation exists. Louisiana v. New Orleans, 109 U. S. 285, 3 S. Ct. 211, 27 L. Ed. 936.

It is upon this principle that an action in form ex con- tractu will lie on a judgment rendered on Contracts § 70. Garrison v. New York, 21 Wall. 196, 22 L. Ed. 612. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily falls under the term contracts. Louisiana v. New Orleans, 109 U. S. 285, 3 S. Ct. 211, 27 L. Ed. 936.

Operation of Judgment in Rem as Passing Title. — A condemnation in a proceeding in rem does not necessarily involve all the interests of those which were seized, but does not vest the property in the condemnor. Day v. Mico, 18 Wall. 156, 156 L. Ed. 860. In admiralty cases and in revenue cases a condemnation does not pass the entire property to the thing condemned and sold. Day v. Mico, 18 Wall. 156, 156 L. Ed. 893.

But such is not the case in many proceedings which are in reality suits to quiet title or to enforce a priority of the plaintiff directing sales for the payment of a decedent’s debt or for distribution are proceedings in rem. So are sales under attachments or proceedings to foreclose a mortgage in rem. In none of these is anything more sold than the estate of the decedent, or of the debtor, or of the mortgagor in the thing sold. The interests of others are not cut off or affected, Day v. Mico, 18 Wall. 156, 156 L. Ed. 890.

Extrinsic Evidence. — Extrinsic evidence to aid in the interpretation of a judgment or decree is inadmissible, unless, after reference to the pleadings and proceedings, there remains some ambiguity or uncertainty in it. Burthe v. Dibrell, 191 N. C. 314, 137 S. E. 365.


§ 1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.—The clerks of the superior courts are authorized to enter the following judgments: (a) All judgments of voluntary nonsuit. (b) All consent judgments. (c) In all actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the superior court. (d) All judgments by default final and default and inquiry as are authorized by §§ 1-211, 1-212, 1-213, and in this section provided. (e) In cases where the clerks of the superior court enter judgment by default on any debt secured by mortgage, deed of trust, conditional sale contract or other conveyance of any kind, either real or personal property, or by a pledge of property, the said clerks of the superior court are authorized and empowered to order a foreclosure of such mortgage, deed of trust, conditional sale contract, or other conveyance, and order a sale of the property so conveyed or pledged upon such terms as appear to be just; and the said clerks of the superior court shall have all the power 

[246]
§ 1-210. Return of execution; order for disbursement of proceeds.—In all executions issued by the clerk of the Superior Court upon judgment before the clerk of the Superior Court, under § 1-200, and execution issued thereon, the sheriff shall make his return to the clerk of the Superior Court, who shall make the final order directing the sheriff to disburse the proceeds arising from the sale, and may issue writs of assistance and possession upon ten days notice to parties in possession. The commissioners appointed to make foreclosure sales, as herein authorized, may proceed to advertise such sales immediately after the date of entering judgment and order of foreclosure, unless otherwise provided in said judgment and order.

In any tax foreclosure action pending on March 15, 1939 or thereafter brought under the provisions of § 105-144 in which there is filed no answer which seeks to prevent entry of judgment for tax or for judgment of foreclosure of a lien created by said tax, the court may, in its discretion, confirm the report of sale or to order a resale, to receive the reports thereof, and to make all necessary orders disbursing the funds arising from the sale, and may issue writs of assistance and possession upon ten days notice to parties in possession. The commissioners appointed to make foreclosure sales, as herein authorized, may proceed to advertise such sales immediately after the date of entering judgment and order of foreclosure, unless otherwise provided in said judgment and order.

Local Modification.—Vance: 1941, c. 139, s. 1.

Editor's Note.—The primary object of this section is to provide for the hearing and determination of uncontested rights involved in the particular class of actions enumerated herein. It was settled even when the section provided for a different return day, that this section was not repugnant to section 1-89 which purports to apply to "all civil actions in the superior court," and hence the general repealing clause of that section did not serve to "all civil actions in the superior court," and hence the general repealing clause of that section did not serve to repeal the remedy herein provided for in these specifically designated actions. Under the circumstances, the courts, in their endeavor to effect a speedy hearing and determination of uncontested rights involved in the particular class of actions enumerated herein, have construed the two sections together and section 1-209, although ratified four days prior to the amendments of section 1-89 in 1919, was considered an exception to that section and the remedy prescribed thereby to be an additional and more speedy method of relief in the stated classes of suits. Young v. Davis, 182 N. C. 200, 108 S. E. 630.

Prior to the amendment of this section by the Public Laws 1921, the section pertained merely to what is now the third class (c); the other classes (a), (b), (d) and (e), were added by the act of 1921. See 1 N. C. Law Rev. 16.

This section was amended twice by the Public Laws 1929, Ch. 32. The amendment added the words "without taking any other action under the provisions of the statute regulating an appeal from a judgment entered by the clerk, and to appeal therefrom to the judge, as provided by the statute for appeals from orders and judgments upon other grounds. The proper practice, we think, is for the complaining party to except to the judgment, as entered by the clerk, and to appeal therefrom to the judge, as in other cases provided for in the statute. An appeal will then lie from the judgment of the superior court to the Superior Court. Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329; McFetters v. Caldwell, 219 N. C. 731, 14 S. E. (2d) 833.

Appeals from Clerk to Judge.—There is no provision in the statute authorizing an appeal from a judgment rendered by the clerk under the authority of the statute upon the ground that such judgment is erroneous. It would seem that the appeal from judgment, upon this ground, may be taken from the clerk to the judge, as provided by the statute for appeals from orders and judgments upon other grounds. The proper practice, we think, is for the complaining party to except to the judgment, as entered by the clerk, and to appeal therefrom to the judge, as in other cases provided for in the statute. An appeal will then lie from the judgment of the superior court to the Superior Court. Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329, 332.

In Ward v. Agullo, 194 N. C. 321, 139 S. E. 451, cited in Howard v. Queen City Coach Co., 211 N. C. 339, 331, 190 S. E. 478, it was held that the statute was not intended to provide an additional and more speedy method of relief in the stated classes of suits. This statute is an enabling act and regarded as an additional and more speedy method of relief in the stated classes of suits. Young v. Davis, 182 N. C. 200, 108 S. E. 630.

§ 1-210. Return of execution; order for disbursement of proceeds.—In all executions issued by the clerk of the Superior Court upon judgment before the clerk of the Superior Court, under § 1-200, and execution issued thereon, the sheriff shall make his return to the clerk of the Superior Court, who shall make the final order directing the sheriff to disburse the proceeds received by him under said execution: Provided,
that any interested party may appeal to the Superior Court, where the matter shall be heard de novo. (1925, c. 222, s. 1.)

§ 1-211. By default final.—Judgment by default final may be had on failure of defendant to answer—

1. Where the complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. Upon proof of personal service of summons, or of service of summons by publication, on one or more of the defendants, and upon the complaint being verified, judgment shall be entered for the amount mentioned in the complaint, against the defendant or defendants, or against one or more of several defendants.

2. Where the defendant, by his answer in such action, does not deny the plaintiff’s claim, but sets up a counterclaim, amounting to less than the plaintiff’s claim, judgment may be had by the plaintiff for the excess of his claim over the counterclaim, in like manner in any such action, upon the plaintiff’s filing with the court a statement admitting the counterclaim, which statement must be annexed to and be a part of the judgment roll. Or the court may in its discretion, order the pleadings to be so amended and the action severed as to entitle the plaintiff to judgment upon all of the claims admitted over and above the setoff or counterclaim pleaded by the defendant; and, upon application of the plaintiff, shall enter judgment for the plaintiff for so much of the claim as is admitted. The action shall thereupon be continued as to subsequent proceedings, as if it had been brought for the remainder of the claim, and the counterclaim or setoff as pleaded by the defendant shall apply thereto. Said remainder of the claim shall in any event be sufficient to cover the full amount of the principal and interest set up by the defendant in the counterclaim or setoff, and an amount in excess thereof, if in the discretion of the court the same is necessary, the court being empowered to designate and determine what part of the plaintiff’s claim shall be held for the subsequent proceedings herein referred to.

3. In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and the court may thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant is not a resident of the state, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to receive. But the court may in its discretion require the plaintiff to cause to be filed satisfactory security to abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under and by virtue of said judgment, in case the defendant or his representatives apply and are admitted to defend the action, and succeed in such defense.

4. In actions for the recovery of personal property, or for the possession thereof, upon the failure of the defendant to file the undertaking required by law, or upon failure of his sureties to justify according to law, unless the defendant is excused from giving such undertaking before answering.

5. In actions for the recovery of personal property, or for the possession thereof, or to have the plaintiff or plaintiffs adjudged the owner or owners thereof, if the complaint be verified. (Rev. s. 556; Code, ss. 353, 390; C. C. P., s. 217; 1870-1, c. 42; 1859-70, c. 193, s. 4; 1919, c. 26; 1939, c. 66; C. S. 595.)

I. In General.

A. Failure to File Answer.

B. The Complaint.

II. Nature and Essentials.

A. Definite Debt.

B. Service of Summons.

III. Affirmative Relief by Defendant, (Counterclaim).

IV. Real Property.

V. Personal Property.

VI. Setting Aside.

I. IN GENERAL.

A. Failure to File Answer.

Cross Reference.—See also, § 1-209.

Against State.—It has been held in several instances by the U. S. Supreme Court that judgment by default for want of appearance may be entered against a state. United States v. Girault, 11 How. 22; 13 1. Bd. 587.

Time to Answer.—As to time for answering, see sec. 1-69 and the notes thereto. As to time of filing complaint and extension thereof, see sec. 1-121 and notes thereto.

In a suit to set aside certain deeds alleged to be void and to declare the plaintiff the owner of the title to lands, a judgment by default is regularly entered when the defendant has failed to file an answer within the statutory time, and the summons has been duly served. Jernigan v. Jernigan, 178 N. C. 84, 100 S. E. 184.

Where a complaint in an action set up two causes of action, one for indebtedness due on a note and the other for fraudulent conversion of money, the court may, where the defendant makes no appearance or defense, enter judgment by default of the first charge but not as to the second. Stewart v. Bryan, 121 N. C. 46, 28 S. E. 18.

Where Answer Insufficient.—When matters are alleged in the complaint to be in the personal knowledge of the defendant, an averment in the answer thereto that he "has no knowledge or information sufficient to form a belief as to the truthfulness thereof and, therefore, denies the same," is insufficient, and judgment can be rendered for want of an answer if such allegation goes to the cause of action. Streator v. Streator, 145 N. C. 337, 59 S. E. 112.

Effect of Failure Promptly to Take Judgment by Default.—A failure to take a judgment by default as soon as the same is allowable does not work a discontinuance. Governor v. Lassiter, 83 N. C. 38.

B. The Complaint.

Should Conform to the Complaint.—Judgment by default should be so drawn as to be in strict conformity with the complaint filed. Currie v. Mining Co., 157 N. C. 359, 72 S. E. 981.

Complaint Should Be Definite.—A pleader desiring a judgment by default must set forth clearly the facts upon which the admission of which, by failure to answer, he bases his right to relief, that the court may, upon the interpretation by the complaint, adjudge his rights to correspond with such facts, for otherwise the judgment would be irregular. Currie v. Mining and Milling Co., 157 N. C. 209, 72 S. E. 989.

Court Must Construe Complaint.—Upon motion made before the clerk to set aside a judgment by default final for the want of an answer, under this section, and also when an appeal in, or to, the failure of the defendant to have filed his answer only admits the truth of the facts alleged in the complaint, leaving the court to construe the complaint to ascertain if the facts alleged are sufficient to sustain the judgment, and if not, the judgment will be set aside. Beard v. Sovereign Lodge, 184 N. C. 154, 113 S. E. 663.
New Parties. — Where a complaint was filed against the defendant, and in the progress of the action another party defendant is brought in, the complaint must be amended or a new complaint filed as to him, unless he waive his right to the same by answer or contest. Vass v. Building, etc., Ass'n, 91 N. C. 55. If no complaint is filed as to such new parties the judgment is irregular and cannot be confirmed.

Verification of Complainant Essential. — A complaint which is not verified as required by statute is insufficient and must be regarded as unverified, upon which a final judgment can not be rendered, for it is only when the complaint is properly verified that the court before an officer authorized to administer oaths, Currie v. Mining Co., 157 N. C. 209, 72 S. E. 980; Miller v. Curl, 162 N. C. 1, 77 S. E. 952.

Same—Where Complaint Improperly Verified. — Where a properly verified complaint would entitle a plaintiff to a judgment final, for want of an answer, if the complaint is not properly verified, the judgment should be by default and inquiry. Cole v. Boyd, 125 N. C. 466, 34 S. E. 557.

Breach of Contract. — In order to authorize a judgment by default final in an action based on the contract the complainant must establish not only that the alleged breach, so that the court may determine proper to render a final judgment when the complaint is verified. Witt v. Long, 93 N. C. 388.

Same-Substantial Compliance Sufficient. — While it is essential that the complaint fully and specifically set out the facts essential to the judgment final, each of the alleged breaches, but the alleged breach, so that the court may determine whether the action as stated can be maintained. Baker v. Corey, 195 N. C. 299, 141 S. E. 892.

II. NATURE AND ESSENTIALS.

A. Definite Debt.

Editor's Note. — This section, authorizing the clerk to enter judgment in all cases where the defendant fails to answer, which has been entered in the due course of practice of the courts, such judgment will be upheld. Bost v. Tripp, 111 N. C. 264, 265, 52 S. Biv. L. 577.

Express Promise to Pay. — When personal service on the defendant has been properly made, a judgment by default for want of an answer may be obtained, if the complaint alleges an express promise to pay a sum due. Currie v. Mining and Milling Co., 157 N. C. 209, 72 S. E. 980.

Express Promise to Pay. — When the allegation is of a sum certain expended for the benefit of the defendant and there is a failure to render an account, the judgment should be by default and inquiry. Hartman v. Farrier, 95 N. C. 177, 178.

Goods Sold and Delivered. — Where the action is on an implied contract to pay for goods sold and delivered the judgment rendered should be by default and inquiry and not by default final. Jefferies v. Aaron, 120 N. C. 167, 52 S. E. 73.

On Note. — A judgment by default on a note for the payment of money only, against one who fails to appear and answer the complaint, is regular in all respects. Morehead Banking Co. v. Duke, 121 N. C. 110, 28 S. E. 191.

Failure to Allege Promise to Pay. — Where the complaint only alleges the value of the goods sold without also alleging a promise to pay, upon a default in the defense to a refusal to render an account there is no need of proof, as the judgment by default admits the claim. Adrian v. Jackson, 75 N. C. 536, 539.

 DAMAGES Must Be Certain. — When the amount of the debt is precise and final by the agreement of the parties, or can be ascertained by computation, there is no need of proof, as the judgment by default admits the claim. Adrian v. Jackson, 75 N. C. 536, 539.

Same—Breach of an Official Bond. — In an action on an official bond, on failure of a defendant to answer, a judgment entered against him on account cannot be final since the action is not for the breach of an express or implied contract to pay a definite sum of money. Battie v. Baird, 110 N. C. 529, 14 S. E. 248.

Same—Bail Bond. — A judgment by default final for want of an answer in a suit upon a bail bond cannot be sustained. It should be by default and inquiry. Roulhae v. Miller, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745.

Sum Certain or Computable. — A judgment by default final is irregularly entered upon a pleading that does not allege a sum certain or computable, due upon contract, ex-
Judgment is sought against a defendant it is essential that personal service of summons on him. Currie v. Mining Co., 157 N. C. 209, 72 S. E. 980.

Charged with Notice. — Notice to the adverse party of a motion in term for a judgment by default for the want of an answer is void, for in legal contemplation, the defendant is in court by service of a summons and is charged with notice of whatever action the court takes during the pendency of the suit. Reynolds v. Greensboro Boiler, etc., Co., 157 N. C. 342, 69 S. E. 248; Jernigan v. Jernigan, 178 N. C. 84, 100 S. E. 184.


III. AFFIRMATIVE RELIEF BY DEFENDANT.

Judgment by Default Not Allowed Where Court Permits Formal Denial. — The defendant is not entitled to judgment by default on his counterclaim where the court in the exercise of its discretion allows a formal denial to be entered. Tillinghast Co. v. Cotton Mills, 143 N. C. 268, 55 S. E. 621; Bernhardt v. Dutton, 146 N. C. 206, 59 S. E. 651.

IV. REAL PROPERTY.

Recovery of the Property Sought. — Where in an action to recover land, the defendant fails to file, or is not excused even if there has been a failure to file an answer arising from excusable neglect. Vick v. Baker, 122 N. C. 98, 100, 29 S. E. 64.

Possession of the Property. — In an action to recover possession of land, where the defendant fails to file a bond or the required bond, and does not ask leave to answer without giving bond until the time for answering has expired, it is proper to enter judgment by default. Jones v. Baker, 122 N. C. 98, 100, 29 S. E. 64.

Where a tenant is joined with his landlord as co-defendant, and the tenant fails to give the required undertaking, judgment may be entered against him. Harkey v. Houston, 150 N. C. 417, 60 S. E. 117.

Time of Filing. — The trial judge, in his discretion, may permit a defendant at the trial to file the required bond. Carraway v. Stancill, 157 N. C. 472, 49 S. E. 957.

Notice. — Upon the failure of the defendant to file the necessary bond, it is error to strike out his answer and judgment by default without due notice and an opportunity to show cause. Cooper v. Warlick, 109 N. C. 672, 14 S. E. 106. See also, McMillan v. Baker, 92 N. C. 111.

Waiver of Bond. — The bond required of the defendant is for the benefit of the plaintiff and he can waive it, and will be deemed to have done so even if there has been a failure to file an answer and judgment by default without due notice and an opportunity to show cause. Cooper v. Warlick, 109 N. C. 672, 14 S. E. 106. See also, McMillan v. Baker, 92 N. C. 111.

Failure to "Justify" Bond. — A failure to file a "justified" bond, as is required, does not necessarily avoid the bond, but it is a defect which may be cured by waiver. Becton v. Dunn, 137 N. C. 559, 560, 59 S. E. 269.

V. PERSONAL PROPERTY.

Editor's Note.—The Act of 1929 added subsection 5.

VI. SETTING ASIDE.

Meritorious Defense. — A judgment by default final for want of an answer, when it is made to appear on appeal that one by default and inquiry should have been entered, is an irregular judgment, but on defendant's motion to set aside, he must show a meritorious defense. Baker v. Corey, 195 N. C. 299, 141 S. E. 892. See also, Marshal Supply Co. v. Vance Farm Co., 195 N. C. 629, 143 S. E. 248.

Remand for Determination of Question. — Where on appeal from the setting aside an irregular judgment of default final does not appear or pass upon, and that the movant intended to allege one, the case will be remanded for the determination of this question as to whether the defendant has such meritorious defense to pass upon as to render the judgment void. Baker v. Corey, 195 N. C. 299, 141 S. E. 892.

§ 1-212. By default and inquiry. — In all other actions, except those mentioned in §§ 1-211, when the defendant fails to answer and upon a like proof, judgment by default and inquiry may be had, and inquiry shall be executed at the next succeeding term. If the taking of an intricate or long account is necessary to execute properly the inquiry, the court, at the return term, may order the account to be taken by the clerk of the court or some other fit person, and the referee shall make his report at the next succeeding term; in all other cases the inquiry shall be executed by a jury, unless by consent the court is to try the facts as well as the law. (Rev., s. 557; Code, s. 386; C. S. 596).

Cross References.—See also, § 1-209. See note under § 1-209.

Editor's Note. — This section is somewhat in the nature of a "residual clause," the provisions of which are applicable to all those classes of cases not falling within the provisions of section 1-211. The same purpose found in section 1-211 is likewise embodied in this section, although the procedure herein provided is more time-consuming since it is necessary in these cases to determine, by way of inquiry, the respective rights of the parties and, more particularly the precise amount of recovery the one is entitled to receive.

Nature in General. — A judgment by default is one that results from default and inquiry. It consists of two things. There are two kinds of judgments by default—one final, the other interlocutory. In actions sounding in damages recovery of the property sought is an interlocutory judgment, which is rendered for want of an answer, is an admission or confession of the cause of action; and there follows a writ of inquiry by means of which the damages are to be assessed. (Black v. Womble, 170 N. C. 577, 148 S. E. 285; 286, 49 S. E. 474. See also Bowie v. Tucker, 206 N. C. 55, 173 S. E. 28, also referring to sections 1-209 to 1-211.

A judgment by default and inquiry for the want of an answer establishes the cause of action and leaves the question of the amount of damages open to the inquiry. Farmer-Cole Plumbing Co. v. Wilson Hotel Co., 168 N. C. 577, 84 S. E. 1038; Armstrong v. Ashbury, 170 N. C. 160, 189 S. E. 266.

A judgment by default and inquiry is conclusive that the plaintiff has a cause of action and entitles him to nominal damages without further proof. Foster v. Hyman, 197 N. C. 189, 148 S. E. 36.

A judgment by default final as authorized by § 1-211, is different in effect and result from a judgment by default and inquiry as authorized by this section. The former establishes the allegations of the complaint and concludes the action. The latter does not but it goes beyond such as are nominal still rests upon the plaintiff. Hill v. Hotel Co., 188 N. C. 586, 125 S. E. 266.

A judgment by default and inquiry is conclusive that the plaintiff has a cause of action and entitles him to nominal damages without further proof. Moore v. Mitchell, 61 N. C. 304.

In actions sounding in damages, as in assumpsit, covenant and a trespass, the amount of the final judgment is ascertained by a hearing in damages and final judgment thereon. DeHoff v. Black, 206 N. C. 667, 689, 175 S. E. 179.

Where Action Sounds in Damages. — In an action sounding in damages, for a violation of an official bond, the action should be by default and inquiry. Moore v. Mitchell, 61 N. C. 304.

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tion or be fixed by the terms of the contract sued on, it is proper to enter judgment by default and inquiry. Skinner v. Terry, 107 N. C. 103, 12 S. E. 118.

Time of the Inquiry.—An inquiry as to damages cannot be made in the same term for which judgment by default is rendered, unless it is expressly allowed by statute. Brown v. Rinehart, 112 N. C. 772, 774, 16 S. E. 846.

Where it appears on appeal that the inquiry was made at the same term the cause will be remanded so that the inquiry may be made as this section provides. And this is true although the defendant was in the courtroom and did not except to the inquiry or to the submission of the issues there in the capacity of a witness for plaintiff. As to whether a party may waive this provision of the statute, see Qu andre v. Gregory, 148 S. E. 28.

Cited in Ward & Ward v. Agrillo, 196 N. C. 95, 96, 144 S. E. 697.

§ 1-213. By default for defendant.—If the answer contains a statement of new matter constituting a counterclaim, and the plaintiff fails to reply or demur thereto, the defendant may move for such judgment as he is entitled to upon such statement; and if the court finds that the defendant is entitled to the recovery of damages by a jury may be made. (Rev., s. 558; Code, s. 249; C. C. P., s. 106; C. S. 597.)

Editor's Note.—In the dissenting opinion by Walker, J., in Wilmington v. Bryan, 141 N. C. 666, 682, 54 S. E. 543, it is intimated that in view of the fact that the section does not expressly allow the defendant to take judgment for the excess of his counterclaim, as is the case of the plaintiff whose claim exceeds the defendant's counterclaim, it is contemplated that there be rendered a separation of damages and judgment for the respective claims of the parties.

But there was an inclination to construe the section so as to conform with the general spirit of the code that all controversies should be settled in one action and as far as possible by judgment on the counterclaim.

Section Applicable Only Where Affirmative Relief Sought.—It is only when a counterclaim is relied on as grounds for the recovery of damages that the plaintiff’s failure to reply or demur thereto, as set forth in the defendant’s answer, can be made a basis of a judgment by default. Where the plaintiff seeks affirmative relief in his answer, the defendant's counterclaim, and the plaintiff fails to reply or demur thereto, he is not entitled to judgment by default. (Rev., s. 558; Code, s. 249; C. C. P., s. 106; C. S. 597.)

Recovery by Administrator Prior to That on Defendant's Counterclaim.—Where an administrator recovers judgment upon his cause of action, and the defendant also upon his counterclaim, the former is entitled to an execution for the entire amount of his recovery; but the execution on the defendant’s judgment will be stayed until it is ascertained whether the estate of the intestate is applicable thereto. Rountree v. Britt, 94 N. C. 104.

Where in an action in which defendants set up a counterclaim, the plaintiff failed to reply thereto, and the defendant moved for judgment by default, it was held, that the defendants had waived the right to judgment on their counterclaim for failure to except. Foust v. Louden, 117 N. C. 170, 171, 21 S. E. 173.

Recovery by Administrator Prior to That on Defendant’s Counterclaim.—Where an administrator recovers judgment upon his cause of action, and the defendant also upon his counterclaim, the former is entitled to an execution for the entire amount of his recovery; but the execution on the defendant’s judgment will be stayed until it is ascertained whether the estate of the intestate is applicable thereto. Rountree v. Britt, 94 N. C. 104.


§ 1-214. Judgment by default where no answer filed; record; force; docket.—If no answer is filed, the plaintiff shall be entitled to judgment by default, whether the judgment be of the same force and effect as if rendered in term and before a judge of the superior court and be of the same force and effect as if rendered in term and before a judge of the superior court, and in all cases of judgment by default and inquiry rendered by the clerk, the clerk shall docket the case in the superior court at term time for trial upon the issues raised before a jury, or otherwise, as provided by law, and all judgments by default and inquiry shall be of the same force and effect as if rendered in term and before a judge of the superior court. (Ex. Sess., 1921, c. 92, s. 9; C. S. 597(a).)


§ 1-215. Time for rendering judgments and orders.—Judgments and orders may be rendered by the clerk on any day of the week except Sundays. All judgments rendered by the clerk in any county on the same day and docketed on that day, or within ten days thereafter, are held and deemed to have been rendered and docketed on the same day for the purpose only of establishing equal priority as among such judgments. In a special proceeding, the clerk may enter any judgment or order, either interlocutory or final, and confirm any sale on any day of the week except Sundays. (Ex. Sess., 1921, c. 92, s. 10; 1923, c. 68; 1943, c. 301, s. 2; C. S. 597(b).)

Local Modification.—Vance: 1941, c. 139, s. 2.

Editor's Note.—Prior to the 1941 amendment, which made this section applicable to orders, judgments were required to be entered by the clerk on Mondays.

As to judgments authorized to be entered by clerk, see § 1-209. As to validation of certain deeds and judgments made after foreclosure of mortgages and deeds of trust wherein confirmation of sale was made on a day other than the first or third Monday of the month, see § 45-31.

§ 1-215.1. Judgments or orders not rendered on Mondays validated.—In any case where, prior to the ratification of this section, any judgment or order, required to be rendered or signed on Monday, has been rendered or signed by any clerk of the superior court on any day other than a Monday, such judgment or order is hereby declared to be valid and of the same force and effect as if the day on which it was signed or rendered had been a Monday; and any conveyance executed by any commissioner or other person authorized to make a conveyance in any action or special proceeding where the appointment of the commissioner or other person, the order of sale, the order of resale, or the confirmation of sale was made on a day other than Monday, is hereby declared to be valid and to have the same force and effect as if the day on which such judgment or order was rendered had been a Monday. (1943, c. 301, s. 4.)

Editor’s Note.—The act from which this section derives was ratified February 26, 1943.

§ 1-216: Repealed by Session Laws 1943, c. 301, s. 3.

§ 1-217. Certain default judgments validated.—In every case where, prior to the first day of January, one thousand nine hundred and twenty-seven, a judgment by default final and having been entered by the clerk of the Superior Court of any county in this state on a day other than Monday, contrary to §§ 1-215 and 1-216, such judgment shall be deemed to have been entered as of the first Monday immediately following the default and is hereby to all intents and purposes validated; [ 251 ]
provided, however, nothing in this section shall be construed to affect the rights of any interested party, as provided in section 1-220 other than for irreality as to date of entry of the judgment by the clerk of the court. (1927, c. 187.)

§ 1-217.1. Judgments based on summons erroneously designated alias or pluries validated.— In all civil actions and special proceedings where the defendants were served with summons and judgment thereafter entered, or any final decree made, the said judgments or decrees shall not be invalidated by reason of the fact that the summons, although designated an alias or pluries, was not actually such: Provided, that this section shall not apply where the first summons was issued more than five years preceding March 6, 1943. (1943, c. 532.)

§ 1-218. Rendered in vacation; confirmation of judicial sales.—In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election.

Sales made by receivers or commissioners appointed by the superior court, unless governed by the provisions of § 45-28, as amended, may after ten days from the date of sale, in the absence of objection or raise in bid, be confirmed, or in case of objection or raise in bid, resales may be ordered, without notice, in chambers in any county in the judicial district, in which the proceedings are pending, by the resident judge or the judge holding the courts of said district; but this shall not diminish the power of the court in term time to act in such matters as now provided by law where no order has been made under this section. (Rev., s. 599; Code, s. 230; 1871-3, c. 3; 1937, c. 361; C. S. 598.)

Cross References.—As to jurisdiction, in vacation and at term, see § 7-65. As to appeal from decision of utilities commission, at term or in vacation, see §§ 62-20, 62-22. As to relief in mandamus, at term or in vacation, see § 1-513. For corresponding sections to the second paragraph of this section, see also, §§ 1-404, 1-506, 55-154, 45-28, 46-45.

Editor's Note.—The 1937 amendment added the second paragraph of this section.

For article discussing effect of amendment, see 15 N. C. Law Rev. 338.

Judgment May Be Taken out of Term by Consent.—By consent of the counsel of both sides, a judgment may be entered in vacation. Westhall v. Hoyle, 141 N. C. 337, 53 S. E. 863, and cases cited.

Amendment of Judgment after Adjournment without Consent Invalidation.—An amendment of a judgment made by a judge after the last session of the court, in his room at a hotel, or at his home, without the consent, and in the absence of the counsel opposing counsel, is invalid, Hinton v. Insurance Co., 115 N. C. 22, 21 S. E. 201.

Recalls.—Where a commissioner, appointed to hold a foreclosure sale, advertises and sells the property in conformity with the order, but reports that the last and highest bid is less than the value of the property and recommends a resale, and the clerk orders a resale, the judge of the superior court, upon the appeal of one of the trustees from the order of the clerk, has jurisdiction to hear and determine the matter and order a resale at chambers while holding the answer frivolous, no appeal lies, but the plaintiff's counsel may apply to the court or judge for judgment thereon, which may be given accordingly. (Rev., s. 560; Code, s. 388; C. C. P., s. 218; C. S. 599.)

Cross References.—As to sham or irrelevant defenses, stricken out on motion, see § 1-126. As to irrelevant or redundant matter in pleading, stricken on motion, see § 1-153.

Purpose of the Section.—The main object of this section is to prevent the rights of the one from being prejudiced by the impertinent and unwarranted pleadings of the other, and to accomplish this result the provision of the section, when brought into operation, simply sets the demurrer (or answer) aside, and leaves the question to be determined by it to obtain his judgment as if it had not been filed. Shinner v. Terry, 107 N. C. 103, 12 S. E. 118.

Nature of Frivolous Answer.—A frivolous answer, entitling the plaintiff to a judgment on the pleadings, is one which is manifestly impertinent, as alleging matters which do not affect the plaintiff's right to recover. Dail & Bros. v. Harper, 83 N. C. 5, 100 S. E. 271.

When the answer is filed in good faith, and the matter of it is not manifestly impertinent, the defendant is entitled to have the facts alleged therein admitted by demurrer or passed on by the jury. Dail & Bros. v. Harper, 83 N. C. 5, 100 S. E. 271.

Its Bad Character Should Be Apparent.—An answer should never be held frivolous unless it is so clearly and purely bad in its tendency to remove a cause of action as to show its character. Hull Co. v. Carter, 83 N. C. 249.

Manner of Objecting.—On the refusal of the court to hold the answer frivolous, no appeal lies, but the plaintiff's counsel may apply their exception noted in the record, and if they should lose their case at the trial term the exception would then come up on appeal from the final judgment, or by motion for judgment non obstante veredicto. Bylars v. Starres, 118 N. C. 111, 113, 16 S. E. 917; Abbott v. Hancock, 123 N. C. 89, 90, 31 S. E. 271.

Judgment on Frivolous Answer.—When the complaint in an action on a note is verified, judgment may be rendered on a frivolous answer. Bank v. Pearson, 119 N. C. 494, 26 S. E. 46.

Nature of Frivolous Demurrer.—A demurrer is not frivolous that raises a question fit for consideration or discussion. New Bern Banking Co. v. Duffy, 156 N. C. 83, 72 S. E. 96.

Relief.—When a demurrer to the complaint is frivolous, the plaintiff is entitled to judgment by default, unless the trial court is of the opinion that in the exercise of a discretion the facts justify permission to answer over. Morgan v. Harris, 141 N. C. 358, 54 S. E. 381.


§ 1-220. Mistake, surprise, excusable neglect.—The judge shall decide as terms may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding. The clerk may hear and pass upon motions to set aside judgments rendered by him, whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term, who shall hear and pass upon such motion de novo: Provided, however, nothing in this section shall be construed to affect the rights of innocent purchasers for value in foreclosure proceedings where personal service is obtained. (Rev., s. 513; Code, s. 274; 1893, c. 81; C. C. P., s. 133; Ex. Sess. 1921, c. 92, s. 14; C. S. 600.)

I. In General.

II. The Relief.

III. Application of the Principles.

A. Neglect of Party.

B. Neglect of Counsel.

C. Omissions.

IV. Pleading and Practice.

Cross References.—As to authority of a judge to enlarge time for pleadings, etc., in his discretion, see § 1-152.
I. IN GENERAL.

Editor's Note.—The last provision of this section was added by the Ex. Sess. of 1921.

The older decisions indicate that this section was received, at first, with caution, because the court was seeking relief hereunder was required to show that his case fell within the accepted definition, which was a rigid one, of the particular term on which he based his request. However, the courts, in the meantime, have more generally recognized that it is remedial in its nature and bespeaks the legislative intent for the courts to discover the substantial rights and equities of the parties and to prevent as far as possible the miscarriages of justice in the courts from which the judgment is sought to be set aside.

In reference to the conflicting decisions under this section, the court in Depriest v. Patterson, 85 N. C. 376, 378, said: "The cases are numerous and not, without reason, particularly in the nature of the cause, which enforces the necessity of some restriction, which enforces the authority of the court over its own judgments, and permits, in specified cases, their reversal (or modification) within a year after notice of their rendition, at the discretion of the court." (Parentheses supplied.)

Applies only to Matters of Fact.—This section does not extend to matters as to which the law applicable, but only as to matters of facts by which the party may reasonably be misled or surprised. Skinner v. Terry, 107 N. C. 103, 13 S. E. 118.

The remedy provided by this section is restricted to the parties aggrieved by the judgment or order sought to be set aside. The court has no power to set aside a judgment or order once rendered upon motion of a stranger to the cause. In re Hood, 208 N. C. 509, 511, 187 S. E. 268; Duke v. New Bern, 73 N. C. 305; Edwards v. Phillips, 91 N. C. 355.

Applicable to Both Adult and Infant Parties.—In application for relief under this section no distinction is made between adult and infant parties. Where the application is presented according to the requirements of the law and the practice of the court, Mauney v. Gidney, 88 N. C. 200.

Not Applicable to Irregular Verdicts.—Where an irregular verdict is rendered on the court the same cannot be set aside or altered under the provisions of this section. Becton v. Dunn, 137 N. C. 559, 50 S. E. 269; Gough v. Bell, 187 N. C. 266, 197 S. E. 355; Hood v. Stewart, 203 N. C. 424, 162 S. E. 944.


Where Judgment Rendered on Verdict.—The statute, in conferring the power, confines its exercise to judgments rendered under the specified conditions, and does not embrace such as necessarily follow the verdict, and the setting aside of which, without at the same time disturbing the verdict, would be of no advantage to the party, for it must again be shown, in a former term, for the party's benefit, that there was a sufficient ground for setting aside a judgment entered by default. However, the courts, in the meantime, have more generally recognized that it is remedial in its nature and bespeaks the legislative intent for the courts to discover the substantial rights and equities of the parties and to prevent as far as possible the miscarriages of justice in the courts from which the judgment is sought to be set aside.

The "Mistake, etc.," Must Be of the Party Seeking Relief.—In order to set aside a judgment for mistake, surprise or excusable neglect, there must be a showing of a meritorious defense so that the courts can reasonably pass upon the question whether another trial, if granted, would result advantageously to the party seeking relief. Farmers, etc., Bank v. Duke, 187 N. C. 385, 123 S. E. 1; Hill v. Huffman Hotel Co., 188 N. C. 386, 125 S. E. 265. And see also Fellos v. Allen, 202 N. C. 375, 162 S. E. 905; Hookery v. (agent; 216 N. C. 162, 162 S. E. 903), 319:150 S. E. 200; Jones v. Gregory, 195 N. C. 203, 141 S. E. 236; Garrett v. Trent, 216 N. C. 163, 162 S. E. 93.

A party seeking to have a judgment set aside on the ground of excusable neglect must at least set forth in his application facts which will entitle him to relief. Gardiner v. Parson, 111 N. C. 248, 16 S. E. 319. Hence, where a judgment has been rendered upon motion of a stranger to the cause, the record disclosing that the answer of the party to whom the judgment was rendered was signed by movent's attorney without authority, the court corrects a judgment he has inadvertently signed because the court was seeking relief hereunder was required to show that his case fell within the accepted definition, which was a rigid one, of the particular term on which he based his request. Where, upon a motion to set aside a judgment for excusable neglect and the showing of a meritorious defense, the court has had entered, without notice to defend or to be heard, a judgment by default and inquiry for the want of authority by movent's attorney, the finding is conclusive on the Supreme Court upon appeal, and the supreme court will not consider affidavits for the purpose of finding facts in motions of this sort. Clayton v. Clark, 212 N. C. 374, 193 S. E. 604.

When Voluntary Motions.—A judgment obtained against one who was non compos mentis is not void, but voidable, and can only be set aside for excusable neglect and the showing of a meritorious defense. Farmers, etc., Bank v. Duke, 187 N. C. 386, 123 S. E. 1.

Under this section a verification of a complaint which is sworn to with uplifted hand rather than on the Bible is not a sufficient ground for setting aside a judgment entered by default. Fellos v. Allen, 202 N. C. 375, 162 S. E. 905.

Where the trial court upon conflicting evidence finds as a fact that the summons in the action was in fact served on the defendant, the finding is conclusive. Hookery v. (agent; 216 N. C. 162, 162 S. E. 903), 319:150 S. E. 200; Jones v. Gregory, 195 N. C. 203, 141 S. E. 236; Garrett v. Trent, 216 N. C. 163, 162 S. E. 93.

Consent Judgment.—Where the court enters a judgment on its record appearing to have been by the consent of the defendant, it cannot be set aside. Where a judgment has been rendered on a verdict the judgment and verdict may not be set aside for excusable neglect under this section. Brown v. Craig, 137 N. C. 546, 16 S. E. 840; Clemons v. Field, 59 N. C. 400, 6 S. E. 790.

Applicable only to Judgments Rendered at Prior Terms.—A motion to set aside a judgment for excusable neglect, made at the time the judgment was signed, will be denied, unless matters being in fieri during the term, as this section applies only to judgments rendered at prior terms. Gold v. Maxwell, 172 N. C. 149, 90 S. E. 115.

Excusable Neglect and Meritorious Defense.—A judgment may be set aside upon motion if the moving party can show excusable neglect, and that he has a meritorious defense. Dunn v. Jones, 195 N. C. 354, 356, 142 S. E. 330. And see Henderson Chevrolet Co. v. Ingle, 202 N. C. 365, 162 S. E. 905; Jones v. Craddock, 211 N. C. 382, 190 S. E. 224.

The action of the trial court in setting aside the judgment for excusable neglect, and the finding of the parties in statu quo, will be upheld on appeal, under this section, the record disclosing that the answer of the defendant was a valid defense. Cagle v. Williams, 200 N. C. 727, 158 S. E. 391.

The court's order setting aside the judgment by default because the court was seeking relief hereunder was required to show that his case fell within the accepted definition, which was a rigid one, of the particular term on which he based his request. Where, upon a motion to set aside the judgment of the clerk of court, the finding is conclusive on the Supreme Court upon appeal, and the order refusing the motions will be upheld. Alton v. Southern Ry. Co., 207 N. C. 114, 176 S. E. 292.

The "Mistake, etc." Must Be of the Party Seeking Relief.—This section applies only where the mistake, surprise, etc., is that of the party seeking to have the judgment set aside. Where a motion is made to correct an erroneous judgment rendered at a former term if it appears that the error committed was

§ 1-220

CH. 1. CIVIL PROCEDURE—JUDGMENT

§ 1-220

| 253 |
that of the court and not that of the party. Simmons v. Dowd, 77 N. C. 155.

Time.—A party operating under this section has a right to set aside a judgment rendered against him within a year after notice thereof, Howell v. Harrell, 71 N. C. 161, 162; Long v. Cole, 74 N. C. 267; and where the motion is not made within such time it is fatal to the proceedings. Young v. Greenlee, 85 N. C. 593, 594. But an irregular judgment need not be rendered within this period. Monroe v. Whited, 79 N. C. 508, 510.

Same—Estimation of Period Allowed.—Where the judgment complained of is rendered on a summons personally served within the four years of this one-year period shall be ame-

Personal Notice Required.—The language "through his" contained in this section indicates that notice must be personally served, Foster v. Allison Corp., 191 N. C. 166, 131 S. E. 648. Where no personally served, the party may make his motion within twelve months after actual notice of the judgment. McLean v. Allison Corp., 191 N. C. 366, 427; Jernigan v. Jernigan, 178 N. C. 84, 109 S. E. 184.

Where a party has been brought into court by the personal service of a summons, or voluntarily does so as a party defendant, he is presumed to take notice of all the various legal steps in the proceedings, and when he seeks to have a judgment therein rendered set aside after notice, etc., he must show the surprise, mistake or excusable neglect necessary for his purpose within one year, under the provisions of this section. Foster v. Allison Corp., 191 N. C. 166, 131 S. E. 648; Askew v. Capchart, 79 N. C. 17.

Where a judgment is rendered against the defendant in a justice's court, from which he appealed to the superior court, the judgment taken against him through his "inadvertence or excusable neglect, as a ground for relieving a party against a judgment taken against him, where it appears that a defendant had no notice of the judgment, it was held to be error. McDaniel v. Watkins, 76 N. C. 39.

Same—Where Service Had by Publication.—The question in this section, in terms, applies only to a judge of the superior court, the spirit and equity of its provisions extend equally to the Supreme Court, and the same power resides here to relieve from a judgment rendered against a party through "mistake, inadvertence, surprise or excusable negligence." Wade v. New Bern, 73 N. C. 318, 319.

Facts Must be Stated.—Before a judge can vacate a judgment under this section on the grounds of excusable neglect he must find and state the facts. Clegg v. New York White Soapstone Co., 66 N. C. 391; Powell v. Weith, 66 N. C. 423. Notice of the motion must be personally served, unless the negligence is not excusable, and where a court has the right to relieve a party from a judgment, it must be shown that there was no notice to the party, either in person or by attorney, even although he supposed he was not required by the law to answer the complaint until served with a copy, Churchill v. Brooklyn Life Ins. Co., 16 N. Y. 221.

Mistake as to Nature of Summons.—The fact that a defendant supposed a summons which was served on him to be a paper in another cause pending between himself and plaintiff, that the summon did not contain any measure to answer the complaint, is not such excusable neglect as entitled him to relief. White v. Snow, 71 N. C. 232, 233. See Holden v. O'Briant, 183 N. C. 163, 167, 13 S. E. 484, where relief was granted a party who thought he was being summoned as a witness when in fact he was summoned as the defendant.

Where Party Very Old And Forgotten.—That the defendants were old and feeble, although of sound mind, and that they forgot about the service of summons upon them, and therefore took no steps to defend the action does not show excusable neglect. Pierce v. Eller, 167 N. C. 672, 83 S. E. 758.

Sickness of Party.—Where the defendant was of sound mind when the summons was served, but his health failed, and although he carried on business and defended other suits, a default judgment against such defendant will not be vacated on account of excusable neglect, because of his infirmities. Jernigan v. Jernigan, 179 N. C. 287, 102 S. E. 301.

Sickness of Family.—Where the defendant indorser of a note was required by the illness of his wife to be outside the state, and the complaint was filed on the first day of the term at which the default was entered, later, there was sufficient excuse for failure to answer to justify the opening of the default. Bank v. Brock, 174 N. C. 37, 94 S. E. 77.

Where Party Obligated to Question His Counsel.—When, as a general rule a client will be relieved against a judgment by default taken against him through the negligence of his attorney, yet where it devolves upon the client to question his counsel in regard to his case, his failure to do so is invalid. He v. McLaurin, 125 N. C. 185, 34 S. E. 269. As to setting aside a judgment taken against him through his "inadvertence, mistake, surprise, or excusable neglect." Injunction Improper. — An injunction to restrain a plaintiff from executing his judgment against defendant will not be granted. The proper remedy to remove an alleged grievance is an application to modify the terms of the judgment. Parker v. Fumbee, 87 N. C. 143, 80 S. E. 292.

Modification by One Judge of Judgment Rendered By Another.—Where a party supposes that he is entitled to relief against a judgment rendered against him, where it appears that a party who thought he was being summoned as a witness when in fact he was summoned as the defendant.

III. APPLICATION OF THE PRINCIPLES.

A. Neglect of Party.

For the personal inattention of a suitor no relief can be granted under this section. Royster & Co. v. Wicker, 87 N. C. 65.

Where Summons Regularly Served.—A party is guilty of inexcusable neglect, and is not entitled to relief against a judgment rendered against him, where it appears that a party who thought he was being summoned did not take any measure to answer the complaint, as to either person or by attorney, even although he supposed he was not required by the law to answer the complaint until served with a copy. Churchill v. Brooklyn Life Ins. Co., 16 N. Y. 221.

B. Neglect of Attorney.

Where a party has been brought into court by the personal service of a summons, or voluntarily does so as a party defendant, he is presumed to take notice of all the various legal steps in the proceedings, and when he seeks to have a judgment therein rendered set aside after notice, etc., he must show the surprise, mistake or excusable neglect necessary for his purpose within one year, under the provisions of this section. Foster v. Allison Corp., 191 N. C. 166, 131 S. E. 648; Askew v. Capchart, 79 N. C. 17.

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Where Party Obligated to Question His Counsel.—When, as a general rule a client will be relieved against a judgment by default taken against him through the negligence of his attorney, yet where it devolves upon the client to question his counsel in regard to his case, his failure to do so is invalid. He v. McLaurin, 125 N. C. 185, 34 S. E. 269.

Mislaid by Conversation of Counsel.—The fact that the party was misled by a conversation between his counsel and the opposing counsel may not be resorted to under this section. Hutchinson v. Rumfelt, 83 N. C. 441, 443.

Change of Post Office.—A judgment by default will not be set aside on the ground of excusable neglect, when it appears that defendant's attorney was not served with the answer and did not receive the answer mailed to them by their counsel until eleven months after it was mailed, no inquiry for letters having been made by them at the post office, and no communication being addressed to their counsel contained in the answer. Abbit v. Gregory, 195 N. C. 203, 141 S. E. 587.

Where a defendant has employed a licensed, reputable attorney of good standing, residing in one county of the state, to defend an action brought against him in another county, and that attorney put him in possession of the facts constituting his defense, and the attorney has prepared and duly filed an answer, and the cause been calendared and called for trial without notice to the defendant or his attorney, upon a judgment being obtained by default against the defendant, the defendant may, upon his motion made, have the judgment set aside, and seeks to set aside a judgment by default therein entered against him for his excusable neglect, the negligence of the attorney, if any, not being imputed to the client, and the latter being without fault. Meece v. Commercial Credit Co., 201 N. C. 561.

This section has no bearing on a case of neglect to file answer to a summons and complaint. Washington v. Johnson, 200 N. C. 269, 106 S. E. 568.

Where Counsel Instructed to Employ Other Counsel.—Where the defendant in an action has retained an attorney to defend, of high character and reputation for diligence and fidelity, and it appears that the defendant was misled by a conversation concerning the litigation, the defendant had no cause to complain, and the court was right in denying motion to set aside judgment. Clegg v. New York White Soapstone Co., 67 N. C. 302, 304.

Where the trial court finds that defendant and their attorney were present in court, that defendants' motion for a continuance was refused, and that defendants and their attorney thereupon left the court room without definite agreement with the court or opposing counsel, and did not return to defend the case, and that both defendants and their attorney were present in court, the refusal of the motion to set aside the judgment will be affirmed. Carter v. Anderson, 206 N. C. 529, 181 S. E. 750.


B. Neglect of Counsel.

Editor's Note.—As to what acts of an attorney are or are not excusable neglect, see an article under this section, entirely in accord. All seem to adhere to the same general principles, but an almost irreconcilable conflict arises upon the application of these principles to the particular cases. The cases in each case had been predicated upon one or two outstanding features found therein, and the great weight attached thereto by the courts. A few of the leading cases illustrative of the applicability of the provisions of this section to this particular subject are found in the following passages.

Dividing Line between the Cases Difficult to Determine.—It is impossible to draw a well-defined line separating those neglects that are, from those that are not excusable in the sense of the statute, and hence the facts referred to must be arranged on the one and then on the other side of that line, in each case as they arise. Mebane v. Mebane, 80 N. C. 34, 40.

Gross Negligence of Attorney.—The omission of an attorney, not having a good excuse, to perform his duty as such, in the conduct of the cause is excusable neglect in the party, and the judgment may be vacated under this section. Wiley v. Brown, 94 N. C. 514, 566; Griel v. Vernon, 65 N. C. 76; and this is especially true where the counsel is insolvent and unable to respond in damages for his neglect. Ice Mfg. Co. v. Raleigh, etc., R. Co., 125 N. C. 17, 24, 34 S. E. 100, 197 S. E. 497, and also in Deal v. Palmer, 68 N. C. 215.

Where Reputable Counsel Employed.—Where a party to an action employs a reputable attorney and is guilty of no negligence himself, the attorney's neglect in failing to appear and answer will not be imputed to the client proceeding to vacate default judgment, but the law will excuse the party and afford him relief. Stallings v. Spruill, 176 N. C. 96, 98 S. E. 277.

Where defendants who employed counsel, learned in the law, and skillful and diligent in its practice, whose zeal and fidelity to the cause of a client are unquestioned, verified by the finding of the court, that in the defendants' case they were imputed to them by their attorneys for filing, attorneys' failure to attend and perform the duty required by law was not due to such negligence on part of defendants as deprived the judge of power to grant them relief from a default judgment under this section. Abbit v. Gregory, 195 N. C. 203, 141 S. E. 587.

Where a defendant has employed a licensed, reputable attorney of good standing, residing in one county of the state, to defend an action brought in another county, and that attorney put him in possession of the facts constituting his defense, and the attorney has prepared and duly filed an answer, and the cause has been calendared and called for trial without notice to the defendant or his attorney, upon a judgment being obtained by default against the defendant, the defendant may, upon his motion made, have the judgment set aside, and seeks to set aside a judgment by default therein entered against him for his excusable neglect, the negligence of the attorney, if any, not being imputed to the client, and the latter being without fault. Meece v. Commercial Credit Co., 201 N. C. 561.

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Where the trial court finds that defendant and their attorney were present in court, that defendants' motion for a continuance was refused, and that defendants and their attorney thereupon left the court room without definite agreement with the court or opposing counsel, and did not return to defend the case, and that both defendants and their attorney were present in court, that defendants' motion for a continuance was refused, and that defendants and their attorney thereupon left the court room without definite agreement with the court or opposing counsel, and did not return to defend the case, and that both defendants and their attorney were present in court, the refusal of the motion to set aside the judgment will be affirmed. Carter v. Anderson, 206 N. C. 529, 181 S. E. 750.


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Where Reputable Counsel Employed.—Where a party to an action employs a reputable attorney and is guilty of no

[255]

The court's permitting counsel for defendant to withdraw from the case, upon the calling of the case for trial, in the absence of order, of course, does not entitle defendant to have the judgment set aside in the absence of a showing of a meritorious defense. Seeliger v. Santos, 217 N. C. 95, 6 S. E. (2d) 801.

Mistaken Legal Advice.—Mistaken legal advice by counsel acted on by client, is not remediable under this section—being a mistake of law and not of fact. Phifer v. Travellers Ins. Co., 123 N. C. 405, 406, 31 S. E. 715.

Order of Court Not on Motion of Party.—On motion to set aside a judgment on the ground of excusable negligence, it appeared that the defendant had twice called on the clerk to enter upon the docket the name of the attorney whom he had employed, and the clerk refused to do so. The attorney himself applied to the clerk to examine the plaintiff's complaint, but was unable to see it, and during the remainder of the term was absent in obedience to a summons made by the court to hold that the defendant's neglect was excusable. Wynne v. Prairie, 85 N. C. 73.

Where Negligence of Attorney Attributable to Party.—A judgment will not be set aside for irregularity and surprise when it appears that it had to come and was regularly set upon the trial docket, and judgment entered in the due course and practice of the court, the only grounds upon which relief is sought being the employment of nonresident attorneys, who were not notified, though means of easy communication in ample time were available, the neglect of the attorneys being personally attributable to the party of the moving party, who also failed to employ attorneys, as well as to employ attorneys for the purpose. Hyde County Land, etc., Co. v. Thomasville Chair Co., 190 N. C. 437, 139 S. E. 514.

Failure of Defendant's Attorney to File Answer.—Where it appears upon the defendant's motion to set aside a judgment by default, pursuant to this section, that the same was rendered, the findings of fact made by the trial court on relevant findings of the trial judge, including that of meritorious defense, the action of the trial judge in setting aside the judgment and permitting the defendant to file an answer will not be disturbed on appeal. Abbitt v. Gregory, 195 N. C. 203, 141 S. E. 597.

Removal to Federal Court.—Where the clerk has erroneously granted defendants' motion to remove a cause to the Federal Court under § 1-256, the moving defendants may assume that no further proceedings will be had in the State Court. The order has been made from the Superior Court, and where a function by default and inquiry has been entered therein for the want of an answer, without notice, nothing else appearing to have occurred, laches cannot be set aside by motion under the provisions of the statute. Gaster v. Thomas, 188 N. C. 346, 124 S. E. 69; but where no laches are attributable to the client he will be granted relief. Geer v. Reams, 89 N. C. 477.

Omissions.

IV. PLEADING AND PRACTICE

Burden of Proof.—A party seeking to vacate a judgment under this section is always at default and the burden is upon him to show which the petitioner, in order to sustain his motion, must show that the facts upon which the motion is founded are true. Carter v. Anderson, 82 N. C. 469, 470.

May Not Be Collaterally Attacked.—The effect of an amendment made by the court cannot be collaterally attacked on a motion for an order of judgment for excusable negligence, the judge does not state the ground on which he ordered his action will be upheld if in any aspect of the case it would be proper. Foley, Bro. & Co. v. Blank, 92 N. C. 476.

In setting aside a judgment under this section, the court is required to find the facts not only in regard to the excusable neglect relied on, but also the facts in regard to a meritorious defense, and a finding of a "meritorious defense" without finding the facts showing a meritorious defense, is insufficient. Parnell v. Ivey, 213 N. C. 644, 197 S. E. 728.

Rehearing.—A rehearing under this section is not a matter of right, but rests in the sound discretion of the court. Williams v. Alexander, 70 N. C. 665.

Failure of Defendant's Attorney to File Answer.—Where it appears upon the defendant's motion to set aside a judgment entered by the clerk, as authorized by statute, may be made before and passed upon by either the judge or the clerk. From an order made by the judge, upon defendant's motion to vacate judgment, the defendant may, by appeal, pass upon the jurisdiction to pass upon and determine all matters of law or legal inference duly presented by appeal. Const. of N. C., art. 4, § 12. In order made by the clerk, upon such motion, an appeal will lie to the judge and the clerk of the court on the motion, de novo. Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329, 332.

Right of Appeal May be Lost.—The right of appeal from a judgment, and a review thereof for errors of law in it, cannot be restored to a party who has lost the right by a failure of defendant's attorney to file answers to the complaint within the time required by statute. Weil & Bro. v. Woodard, 104 N. C. 355, 10 S. E. 259.

C. Questions Requiring Appeal. —Whether upon the facts found by the judge, the neglect of attorneys for defendants, will be corrected, and the motion remanded, to the end that the findings of fact are based upon sufficient evidence in the absence of exceptions to the findings, and the order will be affirmed if the findings sustain the court's holding that movents have shown excusable neglect and a meritorious defense. Pfeiffer v. Royal Pines Park, 207 N. C. 309, 176 S. E. 285.

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§ 1-221. Stands until reversed.—Every judgment given in a court of record having jurisdiction of the subject is, and continues to be, in force until reversed according to law. (Rev., s. 561; Code, s. 935; R. C., c. 31, s. 105; 4 Hen. IV, c. 23; C. S. 601.)

Editor's Note.—See 11 N. C. Law Rev. 251, for note on the “Effect of judgment pending” with reference to this section.

Injurial Judgments.—Even though the judgment is irregular it stands until vacated or reversed, Stearns v. Goebel, 123 N. C. 19, 20, 31 S. E. 265; and such judgment may be corrected only in a direct proceeding. Pinnell v. Burroughs, 168 N. C. 115, 117, 75 S. E. 354; Brown v. Harding, 170 N. C. 253, 86 S. E. 1093.

Applied in Myers v. Wilmington-Wrightsboro, etc., Causeway Co., 204 N. C. 260, 167 S. E. 858.


§ 1-222. For and against whom given; failure to prosecute.—1. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

2. It may grant to the defendant any affirmative relief to which he may be entitled.

3. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a sever judgment is proper.

4. The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. (Rev., s. 563; Code, s. 424; C. C. P., s. 248; C. S. 602.)

Editor's Note.—The primary object of the provisions of this section is to prevent as far as possible multiplicity of actions, and to avoid expense to suit all the controverted matters arising or likely to arise out of the transaction. That this end may be accomplished, the courts, wherever the peculiar case can be justly and equitably brought within the provisions of this section, have allowed, and sometimes compelled, the parties to submit and litigate all the issues that may be presented, whether the respective claim be against a party on the same side or against one on the other side.

Judgments Not to Be Cumulative.—The courts in North Carolina are required to recognize both the legal and equitable rights of the parties, and to frame their judgments under this section so as to determine all the rights of the parties, equitable as well as legal. Hutchinson v. Deaton, 11 N. C. 354, 355, 4 Hen. IV, c. 23; Melvin v. Stephens, 82 N. C. 284, 288. And this is true of any relief to which the facts alleged and proved entitle him, whether it be an Injunctive Relief or not. McNeil v. Hodges, 105 N. C. 53, 55, 11 S. E. 365.

Anyone or All May Be Compelled to Answer.—The proper construction of this section is that where the plaintiff brings the defendant into court to answer a claim for a debt which he owes them, he cannot only require them, but either one or all of them, to answer for a debt due him, whether it is a debt specially with their debt against him or is an independent claim. Sloan & Co. v. McDowell, 71 N. C. 356, 357.

The Rights and Liabilities of the Parties May Be Determined.—The court is fully empowered under this section to determine the rights and liabilities of the defendants, not to the plaintiff but among themselves. Clark v. Williams, 70 N. C. 29, 48; Melvin v. Stephens, 82 N. C. 284, 288. And where a judgment is rendered in favor of a plaintiff and an affirmative one in favor of a defendant, they constitute but one judgment, if written and attested separately. Hall v. Youngs, 87 N. C. 283.

Where the Defense Set up Applies to Entire Res.—When a bill is filed for the specific performance of a contract to convey a tract of land, it is the defendant's right to determine that the tract consists of two parts, of which he admits that he is the owner of one, but avers that the other belongs to his wife, and sets up a defense which, if good, applies to the whole contract, it is proper to make a decree in favor of the plaintiff as to the part of which the defendant admits he is the owner, and to reserve the question as to the other part. Swepson v. Brown, 65 N. C. 431.

Primary and Secondary Liability.—The primary and secondary liability as between two joint tort-feasors should be adjusted in the same action, where there are two defendants for the same act or transaction alleged in the complaint, and judgment in the consolidated action may be rendered under this section. Bowman v. Greensboro, 190 N. C. 611, 130 S. E. 502.

Where Action is in Suit Pending.—The entire spirit of our code procedure is to avoid multiplicity of actions and where an action for damages arising by tort from a collision between two automobiles has been brought by one of the parties, he may successfully move to dismiss the action brought against him by the opposing party in another county, and have it dismissed, the remedy of the defendant in the action for damages against the other defendant is an equitable relief to which he may be entitled, pursuant to this section; and that relief may be asked for and granted. But where an action does not affect the fact that the subject of both actions is the same acts or transactions, to be determined by one judgment either in favor of one or against the other in the case. Allen v. Salley, 179 N. C. 147, 101 S. E. 545.

“Cross Complaint” Allowed.—Under this section the defendant is entitled to file a cross complaint1 to establish his rights in the premises and to seek the appropriate relief. Dillon v. Raleigh, 124 N. C. 184, 186, 32 S. E. 548.

Same.—Conformity to Original Claim Required.—A cross action by a defendant against a co-defendant or third party must be in reference to the claim made by the plaintiff and based upon an adjustment of that claim. Independent and unrelated causes of action cannot be litigated by cross action. Bowman v. Greensboro, etc., Causeway Co., 204 N. C. 260, 167 S. E. 858.

A defendant may file a cross action against a co-defendant or a third party only if such cross action is founded upon or is necessarily connected with the subject matter and purpose of plaintiff’s action, and must not be directed to the discovery of questions of primary and secondary liability and the right to contribution as between joint tort-feasors, it does not permit cross actions between defendants which are independent of the suit against him. Montgomery v. Blades, 217 N. C. 654, 9 S. E. (2d) 297.

Recovery on Counterclaim.—Where an action on contract has originally and properly been brought in the superior court because of an equity involved, or its being for the possession of personal property, the recovery on a counterclaim, in the superior court, will not be denied for want of jurisdiction on the ground that the demand thereof was for a less sum than two hundred dollars, the jurisdiction as to matters of counterclaim coming within the provisions of G. S. sections 1-135, 1-137, and this section. Singer Sewing Mach. Co. v. Bur- ger, 116 N. C. 582, 11 S. E. 365.

Where There is Concert of Action Among the Defendants.—Where an injury is caused by the separate action of several persons who are adverse to the plaintiff, it is proper under this section, to join them all in the single action for damages. Long v. Swindell, 77 N. C. 176.

Where, however, there is no unity of design or concert of action and the injuries are not adverse to the plaintiff, the single injury, the share of each in causing it is separable and may be accurately measured. In such case the jury can properly assess several damages. Long v. Swindell, 77 N. C. 176.

General of Railroads, following the opinion of the Supreme Court of the United States, there is no liability upon the railroad company, but the car owner may be sued against the railroad company for the provisions of this section. Where there is a joint and several judgment, each several judgment may be rendered. Kimbrough v. R. R. Ante, 214, cited and applied. Smith v. Seaboard Air Line R. Co., 182 N. C. 290, 109 S. E. 22.

1-17

[257]
Dismissal "as of Nonsuit."—A nonsuit under § 1-183 is permissible only on demurrer to the evidence, and when the court refuses plaintiff's motion for a continuance, it is error for the court to enter an involuntary nonsuit, but the court should allow an involuntary nonsuit and discontinue the action if the defendant should refuse to go to trial, the court may then dismiss the cause "as of nonsuit" under this section or in its inherent power. Sykes v. Blakey, 215 N. C. 61, 200 E. 171; City of Greenville v. Speed, 163 N. C. 702, 12 S. E. (2d) 553; Bost v. Metcalfe, 219 N. C. 607, 14 S. E. (2d) 648.

§ 1-223. Against married women.—In an action brought by or against a married woman, judgment may be given against her for costs or damages or both, in the same manner as against other persons, to be levied and collected solely out of her separate estate. (Rev., 593: C. S. 603.)

Cross Reference.—As to statutes concerning married women generally, see § 52-1 et seq.

Where the Wife Can Sue and be Sued Alone.—It is not required that the wife, as such, prosecute or defend an action concerning the lands by guardian or next friend. Craddock v. Brinkley, 177 N. C. 125, 98 S. E. 280.

Same—Husband, When Joined, is the Agent of the Wife.—The joinder of the husband in an action maintainable against the wife alone, though unnecessary, makes the husband the agent of the wife for the purpose of the suit. Craddock v. Brinkley, 177 N. C. 125, 98 S. E. 280.

Consent Not Binding on The Wife.—Where a married woman, pending an appeal by her from a personal judgment rendered against her husband on notes given for property bought by her husband and secured partly by a mortgage on her land, consented to withdraw the appeal and to allow a compromise judgment to be entered against her husband for a certain amount payable in installments, it was held, that she had no power to consent to such judgment, and it was held that the judgment was void, as no binding force on her although she was personally present, for the purpose of the suit. Craddock v. Brinkley, 177 N. C. 125, 98 S. E. 280.

§ 1-224. Nonsuit not allowed after verdict.—In actions where a verdict passes against the plaintiff, judgment shall be entered against him. (Rev., s. 1530; Code, s. 938; R. C., c. 31, s. 110; 2 Hen. IV., c. 7; C. S. 604.)

Cross Reference.—As to entry of verdict and judgment, see § 1-226.

Theory of Nonsuit Explained.—"A plaintiff can at any time before verdict withdraw his suit, or, as it is termed, 'take a nonsuit,' by absence himself at the trial term. If he chooses to take an after-verdict nonsuit, by authority of his attorney, the court directs a nonsuit to be entered, the cost is taxed against him, and that is an end of the case. Even when the plaintiff appears at the trial, takes a part in the trials, with his witnesses, examining and cross-examining witnesses, and by the argument of his counsel, if he finds from an intimation of the court that the charge will be against him, he may submit to a nonsuit and appeal. This is every day's practice. It is based upon the idea that the plaintiff announces his purpose not to answer when called to hear the verdict, and the advantage is that the plaintiff can have his Honor's opinion reviewed, and should the decision of the Su- preme Court be against him, he can commence another action; whereas if he allows a verdict to be entered it is conclusively lost unless set aside." Graham v. Tate, 77 N. C. 120; Southern Cotton Oil Co. v. Shore, 171 N. C. 51, 55, 87 S. E. 938.

The Principle Stated.—The principle would seem to be that a plaintiff may elect to be nonsuited in every case where no binding force for costs can be recovered against him by the defendant, and when such judgment may be recovered he cannot so elect. McKesson v. Mendenhall, 64 N. C. 502, 504; Retirement of Jury for Correction of Formal Defect.—It is too late to withdraw a verdict for formal defects of form after a plaintiff has taken a nonsuit; and when the jury, after rendering a verdict, had returned to the jury-room to correct a mere formal defect in the verdict, and as they retired the counsel for the plaintiff desired the jury to withdraw, the plaintiff would not be allowed to take a nonsuit, there was no error in refusing it. Strauss v. Sawyer, 133 N. C. 64, 45 S. E. 346.

When Dismissal "as of Nonsuit."—Where, when the pleadings, the plaintiff ceases to be merely an actor, and becomes also a defendant, as, for example, if the defendant seeks affirmative relief and demands judgment, the right to take a nonsuit ceases. McKesson v. Mendenhall, 64 N. C. 502, 504; McLean v. McDonald, 173 N. C. 429, 92 S. E. 148. But after a plea of tender or payment of money into court the plaintiff may take a nonsuit. Id.

General Relief Where Answer Filed.—If there be an answer to the complaint which is consistent with the case made by the complaint and embraced within the issue, although other and different relief may be sought by the pleader and demanded in the prayer for judgment, Wright v. Teclina Co. Affirmative Relief.—When, by the pleadings, the plaintiff ceases to be merely an actor, and becomes also a defendant, as, for example, if the defendant demands affirmative relief, the right to take a nonsuit ceases. Teclina Co. v. Wright, 133 N. C. 488, 492, 51 S. E. 55; Bryan v. Canady, 169 N. C. 579, 86 S. E. 584; Council v. Bailey, 154 N. C. 54, 69 S. E. 760.

Relief Limited To That Demanded Where No Answer Filed.—
§ 1-227. Where no answer is filed then the relief shall not exceed that demanded in the complaint. Jones v. Mial, 83 N. C. 252, 257. And when judgment grants relief in excess thereof it is irregular and rendered, in the discretion of the court, to have it set aside. Simms v. Sampson, 221 N. C. 379, 20 S. E. (2d) 554.

Where Improper Action Brought.—Where a plaintiff, in his complaint alleged and set out a case in trover, and the proof showed that it should have been in the nature of an assessment for money had and received, it was held that the plaintiff was entitled to recover, notwithstanding the variance. Oats, et al. v. Kendall, 67 N. C. 241.

Where Amount Tendered is Larger than Amount Due.—The verdict of the jury rendered in an action upon a mortgage note will not be affected by a tender of a larger amount made before the return of the verdict of the action, which was refused and not kept good, and the judgment was to be entered as it was held to be due. DeBruhl v. Hood, 156 N. C. 52, 72 S. E. 83.


§ 1-227. When passes legal title.—In any action wherein the court declares a party entitled to the possession of real or personal property, the legal title of which is in another party to the suit, and the court orders a conveyance of such legal title to him so declared to be entitled, or where, for any cause, the court orders that one of the parties holding property in trust shall convey the legal estate therein to another person although not a party, the court after declaring the right and ordering the conveyance, has power, also, to be used in its discretion, to declare in the order then made, or in any made in the progress of the cause, that the effect thereof is to transfer to the party to whom the conveyance is directed to be made the legal title of the said property, to be held in the same plight, condition and estate as though the conveyance ordered were in fact executed; and shall bind and entitle the parties ordered to execute or to take benefit of the conveyance, in and to all such provisions, conditions and covenants as are adjudged to attend the conveyance, in the same manner and to the same extent as the conveyance would if the same were executed according to the order. A party taking benefit under the judgment has the same redress at law on account of the matter adjudged as he might have on conveyance, if the same had been executed. (Rev., s. 566; Code, s. 428; R. C., c. 32, s. 24; 1850, c. 107; 1874-5, c. 17; C. S. 607.)

Strict Conformity with the Section Required.—A decree does not operate as a conveyance, unless it complies with the requirements of this section and section 1-228 declaring that it shall be regarded as a conveyance of the described estate and the mere fact that the court, while omitting this statement, intended that the decree should have such effect, is not sufficient for this purpose. Morris v. White, 96 N. C. 91, 2 S. E. 254.

This decision was criticized in the case of Evans v. Brendle, 173 N. C. 149, 91 S. E. 723; it was said that a too narrow construction was being given to the statute. The precise point arose in both cases, namely, the failure of the court to insert in the decree the words "that it shall be regarded as a deed of conveyance," although it was left undecided in the Evans case, the court expressing an intention to do so, and the former holding and then restoring its own decision upon a different ground. In the dissenting opinion in Evans v. Brendle, it was said, "The court had the power to include such a provision in the decree, but until it was made a part of the decree it was not a conveyance."

Same—Where Specific Performance Asked for.—If a decree of court adjudges a deed to be void, no marginal cancellation of record, as in the case of mortgages and deeds of trust, is required, but it is commendable and convenient practice. Smith v. King, 107 N. C. 271, 277, 12 S. E. 57.

Cited in Ayden v. Lancaster, 197 N. C. 556, 563, 150 S. E. 40.

Marginal Cancellation Not Essential but Advisable.—When a decree of court adjudges a deed to be void, no marginal cancellation of record, as in the case of mortgages and deeds of trust, is required, but it is commendable and convenient practice. Smith v. King, 107 N. C. 271, 277, 12 S. E. 57.

Cited in Ayden v. Lancaster, 197 N. C. 556, 563, 150 S. E. 40.

§ 1-228. Certified registered copy evidence.—In all legal proceedings, touching the right of parties derived under such judgment, a certified copy from the register's books is evidence of its existence and of the matters therein contained, as fully as if proved by a perfect transcript of the whole case. (Rev., s. 560; Code, s. 428; R. C., c. 32, s. 26; 1850, c. 107, s. 3; 1874-5, c. 17, s. 3; C. S. 609.)

§ 1-230. In action for recovery of personal property.—In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return cannot be had, and damages for taking and withholding the same. (Rev., s. 570; Code, s. 431; C. C. F., c. 251; C. S. 610.)

Cross References.—As to the provisional remedy of claim and delivery for personal property, see § 1-42 et seq.
ings, in an action to declare valid a sale of property under personal property, see § 1-203.

Defendant, if successful, is entitled to judgment "for a return of the property" and issues were properly submitted to the jury to ascertain the value of the property alleged to have been wrongfully taken and detention, with interest thereon, together with the cost of the action. Orange Trust Co. v. Hayes, 191 N. C. 542, 132 S. E. 466.

Where the defendant in the action has retained possession of the property in claim and delivery, and the plaintiff is successful in the action, the latter is entitled to summary judgment against the surety on the replevin bond given in accordance with this section, is liable for the full amount thereof to be discharged upon the return of the property and the payment of damages and cost recovered by the plaintiff; and, second, if the return cannot be had, the judgment should order that the surety be discharged upon the payment of the plaintiff of the amount of his recovery, within the amount limited in the bond, for the value of the property at the time of its wrongful taking and detention, with interest thereon, together with the cost of the action. Orange Trust Co. v. Hayes, 191 N. C. 542, 132 S. E. 466.

Applicability of Doctrine of Res Judicata.—Where judgment rendered against the defendant and the surety on his bond in claim and delivery, and therein no issue is submitted to the jury on the question of damages for the wrongful detention of the property, the plaintiff shall not, after obtaining judgment for an independent action to recover such damages. Moore v. Edwards, 192 N. C. 446, 135 S. E. 302; Woody v. Jordan, 69 N. C. 189.

Same—Where Judgment Unsatisfied.—Where the plaintiff, who had recovered judgment in an action of claim and delivery (in which he was defendant) for the return of the property, but the same had not been returned, thereafter brought suit against the plaintiff in such action for damages for the conversion of the property, it was held that he was entitled to recover. Asher v. Reizenstein, 103 N. C. 213, 10 S. E. 887.

Same—Applicable Only as to Matters Litigated upon.—The fundamental reasons for the application of the doctrine of res adjudicata are that there should be an end of litigation and that a person or corporation cannot twice for the same cause therefor, when the defendant in claim and delivery proceedings has recovered of the plaintiff therein such damages for his wrongful seizure of the defendant's property as allowed by this section and he has claimed no more, he may, by an independent action, sue for such damages to his business as may have been caused by the malicious prosecution of the plaintiff's action, for such was not the subject of recovery in the claim and delivery proceedings. The doctrine of res adjudicata has no application. Ludwig v. Penny, 158 N. C. 104, 105, 73 S. E. 228.

Where Counterclaim Filed.—A suit for maliciously prosecuting a preceding action of claim and delivery for the purpose of breaking up the business of another will not lie before the termination of the case and delivery proceedings, and the defendant in such proceedings cannot therefore set up a counterclaim in that action for the damages he may have sustained in his business. Ludwig v. Penny, 158 N. C. 104, 105, 73 S. E. 228.

Measure of Damages When Property Beyond Control of Court.—In an action of claim and delivery, where it appears that the defendant was in possession under a contract of sale, and the property had been placed beyond the control of the court, the defendant is not entitled to judgment for the full amount of the indebtedness, but is entitled to judgment for the balance due upon the debt, and for the benefit of the surety, in the event of his being made liable for the action of conversion being a tort and the damages unliquidated; and when on appeal the judgment of the court is erroneous in this respect only, it will be ordered to be amended and affirmed. Penny v. Ludwig, 152 N. C. 375, 67 S. E. 919.

Where Additional Item Allowed by Consent.—When the defendant in such proceedings, when the defendant in the action has retained possession of the property in claim and delivery, and the plaintiff is successful in the action, the latter is entitled to summary judgment against the surety on the replevin bond given in accordance with this section, is liable for the full amount thereof to be discharged upon the return of the property and the payment of damages and cost recovered by the plaintiff; and, second, if the return cannot be had, the judgment should order that the surety be discharged upon the payment of the plaintiff of the amount of his recovery, within the amount limited in the bond, for the value of the property at the time of its wrongful taking and detention, with interest thereon, together with the cost of the action. Orange Trust Co. v. Hayes, 191 N. C. 542, 132 S. E. 466.

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§ 1-231. What judge approves judgments.—In all cases where a judgment, decree or order of the superior court is required to be approved by a judge, it shall be approved by the judge, having jurisdiction of receivers and injunctions. (Rev., s. 571; Code, s. 432; 1876-7, c. 223, s. 3; 1879, c. 633; 1881, c. 51; C. S. 611.)

Motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district, or one holding the courts thereof by express or for the purpose of circumventing the operation of the moratorium. Corbin v. Berry, 84 N. C. 25.

Restraining Orders must be made returnable before the judge in the district in which the action is pending. Galbreath v. Everett, 84 N. C. 546.

§ 1-232. Judgment roll.—Unless the party or his attorney furnishes a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers which constitute the judgment roll:

1. In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment. (Rev., s. 572; Code, s. 434; C. C. P., s. 253; C. S. 612.)

Section Directory.—The provisions of this section as to the permanent judges are subject to the control by the superior court, and the clerk's failure to "attach together" the papers did not vitiate the judgment which was entered of record and regular in form. See Brown v. Harding, 117 N. C. 686, 59 S. E. 226. The provision of the house's resolutions of May 31, 1915, § 12-138, 39, 13 S. E. 923, to the effect that a judgment to constitute a lien must be docketed in the "prescribed manner."
ing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.

All judgments rendered in any county by the superior court, during a term of the court, and docketed during the same term, or within ten days thereafter, are held and deemed to have been rendered and docketed on the first day of said term, for the purpose only of establishing equality of priority among such judgments. (Rev., c. 573; Code, s. 433; C. C. P., s. 522; Supr. Ct. Rule VIII; 1909, c. 709; 1929, c. 183; 1943, c. 301, s. 415; C. S., 613.)

Local Modification.—Durham: 1929, c. 88.

Editor's Note.—The Act of 1929 added to the second paragraph the words "for the purpose only of establishing equality of priority among such judgments."

The purpose in the first paragraph is to enforce the requirement that the entry contain the hour and minute of docketing.

For article on Names—Married Women—Change of Name by Judgment see 11 N. C. Law Rev. 365, 367.

Strict Compliance Necessary.—The observance of this law is regarded as so important to subsequent purchasers and mortgagees that it is a system of docketing obtains, a very strict compliance with its requirements is required. Jones v. Currie, 190 N. C. 260, 129 S. E. 605.

Clerk Liable upon Failure to Index Judgment.—An action of trespass to wit, personation his name, in an index a judgment, such neglect resulting in damage to the plaintiff. Shackelford v. Staton, 117 N. C. 73, 23 S. E. 101.

Same.—Duty of Judgment Creditor to See Judgment Properly Docketed.—It is the duty of a judgment creditor to see that his judgment is properly docketed. If the clerk neglects to docket the judgment, subsequent encumbrancers and claimants under the judgment debtor are not to be prejudiced thereby, and the remedy of the judgment creditor is against the clerk for loss suffered by reason of the failure to docket the judgment. Holman v. Miller, 103 N. C. 118, 9 S. E. 459.

When Judgment is Recorded in Foreign County.—Where the transcript of a judgment recovered in one county is sent to another for docketing, the transcript must not only be docketed but must be entered on the cross-index, giving the names of all judgment debtors and the name of at least one plaintiff. Jones v. Currie, 190 N. C. 260, 129 S. E. 605; Dewey v. Sugg, 109 N. C. 328, 13 S. E. 923.

Contents of the Index and Purpose Thereof.—When there are several judgment debtors in the docketed judgment, the index should and must specify the name of each one, because the index as to one would not point to all or any of the others. The purpose is, that the index shall point to a judgment against the particular person inquired about if there be a judgment on the docket against him. A judgment not thus indexed does not serve the purpose of the statute, and a judgment not thus recorded renders the judgment invalid under the provisions of this section, is a lien upon the equitable estate of the judgment debtor. McKeithan v. Walker, 66 N. C. 86.

§ 1-234. Where and how docketed; lien.—Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the superior court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the superior court of any other county upon the filing of the clerk thereof of a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for ten years from the date of the rendition of such judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith (Rev., s. 574; Code, s. 435; C. C. P., s. 254; C. S. 614.)

I. IN GENERAL.

II. Creation of the Lien and Priorities.

A. Sufficiency.

1. Realty.

2. Personalty.

B. Priorities.

III. Property Subject to the Lien.

A. Property Located in County where Judgment Docketed.

B. After-Acquired Property.

C. Nature of Right Acquired.

IV. Issuing Execution.

V. Loss of the Lien.

Cross Reference.

As to docketed judgment for a fine constituting a lien, see § 15-185.

L. IN GENERAL.

See 11 N. C. Law Rev. 255.

Applicable to Legal and Equitable Estates.—This section is sufficiently comprehensive to include equitable as well as legal estates. Mayo v. Staton, 137 N. C. 697, 50 S. E. 321. The principle is equally applicable when the sale to satisfy the judgment is made by an administrator. Mannix v. Irrie, 76 N. C. 299, 301.

Where a debtor executes a deed in trust to a trustee to secure certain debt and mortgages, and the conveyance to the trustee does not contain the name of the debtor or the corporation as well as the name of the corporation, the deed is void. Ray v. Chastain, 117 N. C. 738, 23 S. E. 101.
A judgment from the time it is docketed has a lien on all the interest of whatever kind the defendant has in real estate, whether it be such as can be seized under execution or not. Glenn Co. v. Shober, 69 N. C. 154. No property is ever freed from the lien of judgment while in the possession of the judgment debtor, and the lien is a mere matter of procedure. So far as it relates to lands, it is a technical term, that means a charge upon the lands running with them, and incumbering them in every change of ownership. In re, supra, 77 Fed. 189, 216, 1 L. Ed. 167.

Property converted from its original nature, as land into money, is not subject to the lien of a judgment, or to sale under execution issued thereon, although the statute gives a lien on personal property in the county, in which the property is situate. By virtue of the judgment, the court orders the sheriff to levy on the property, and advertise it for sale. Hopkins v. Bowers, 111 N. C. 175, 175, 16 S. E. 1; see also, section 1-233 and notes thereto.

Liability of Trustee. — A trustee having a surplus in his hands after the sale of land under a conveyance to secure a judgment lien, who is affected with notice by docketing of judgments against the trustee, or the one who otherwise is entitled to receive it, under the provisions of this section may not pay the same to the trustor without incurring liability; and in an action brought for the purpose the judgment creditors are necessary parties, and a final judgment therein entered without them is reversible error. Barrett v. Barnes, 156 N. C. 154, 119 S. E. 154.

Requirement That Clerk to Docket Judgment Mandatory. — A judge cannot, under this section, validly issue an order to the clerk not to docket a judgment pending the appointment of persons as receiver of the property, or to order the receiver to file his report, etc., until an order has been given by the court to docket the judgment. Hopkins v. Bowers, 111 N. C. 175, 175, 16 S. E. 1; see also, section 1-233 and notes thereto.


II. CREATION OF THE LIEN AND PRIORITIES.

A. Sufficiency.

1. Realty.

Docketing Fixes the Lien. — The docketed judgment fixes the lien and the debtor cannot escape it; if he sells thereafter the purchaser takes subject to the statutory lien given by this section. Moore v. Jordan, 117 N. C. 85, 89, 23 S. E. 259. The mere rendition of a judgment will not constitute a lien, Alsop v. Mosely, 104 N. C. 60, 63, 10 S. E. 134; nor does the execution fix the lien. Pasour v. Rhyme, 82 N. C. 149, 152.

A judgment having become final, duly docketed, constitutes a lien on realty under § 15-185, and attaches immediately upon the docketing of the judgment under the provisions of this section. Osborne v. Board of Education, 207 N. C. 503, 187 S. E. 669.

In other words, the section specifies two requisites as conditions precedent to the fixing of the lien, namely (1) rendition and (2) docketing; and the lien attaches as of the date of rendition. Ed. Note.

Same—Subsequent Purchasers. — The docketing of the judgment having fixed the lien, the rights of the judgment creditor become fixed thereby, and the subsequent registration of a deed or mortgage to or on the same property cannot divest those rights. Cowen v. Withrow, 112 N. C. 736, 741, 17 S. E. 375. See post, this note, "Priorities" II, B.

Same—Not Essential to Issuing an Execution. — Docketing is not a condition precedent to the enforceability of the judgment, nor to the levy of the proceeds of the land. Martin v. Brown, 122 N. C. 587, 594, 29 S. E. 884. See also, Holmon v. Miller, 103 N. C. 119, 8 S. E. 429, where it was said, "under the present system no lien is acquired on land in the possession of an executory or levy until the judgment has been docketed."

Strict Compliance with Requirement as to Docketing.— To be available as a real estate lien, the judgment must be docketed in the office of the clerk of the superior court of the county where such property is situate. And, for a lien to be obtained, the requirement as to docketing must be strictly complied with. Southern Dairies v. Banks, 92 F. (2d) 282, 286.

Docketing First in County of Rendition. — A judgment rendered in one county can not be a lien upon lands first docketed in the county where it was rendered. Mcdan v. Banister, 61 N. C. 479; Essex Inv. Co. v. Pickelsamer, 210 N. C. 541, 187 S. E. 813.

B. Priorities.

Record as Notice. — A plaintiff will be charged with notice of a judgment entered at a regular term of court as of the time of the entry. Sluder v. Graham, 118 N. C. 835, 23 S. E. 982.

Consent Judgments, under this section, have priority in accordance with the section, providing the title of the judgment debtor is at the time the judgment is docketed a lien on the land of the defendant from the time when they were docketed, and will have a priority over judgments obtained in any other county against the same defendant at a subsequent time, and though an execution be issued on the latter and the sheriff levies it on the land and advertises it for sale, yet, if the sale execution be issued on a part of the judgment debtor's land, and are placed in the hands of the sheriff, the proceeds of the sale of the land must be first applied to the payment of all the justice's judgments. Faye v. Morris, 63 N. C. 157.

A prior assignee of a judgment for a valuable consideration takes the title of his assignor unaffected by a subsequent assignment of the same judgment by the assignor to another for a valuable consideration without notice of the prior assignment, in the absence of fraud, even though the second assignee has his assignment first recorded on the judgment docket, and not an assignment of a judgment to be recorded. In re Wallace, 212 N. C. 490, 193 S. E. 819.

Between Docketed Judgment and Unrecorded Deed. The lien of a judgment docketed in the superior court is superior to a claim under an unrecorded deed from the judgment debtor. Eaton v. Doub, 190 N. C. 14, 128 S. E. 494.

Between judgments, under this section, have priority in accordance with the section, providing the title of the judgment debtor is at the time the judgment is docketed a lien on the land of the defendant from the time when they were docketed, and will have a priority over judgments obtained in any other county against the same defendant at a subsequent time, and though an execution be issued on the latter and the sheriff levies it on the land and advertises it for sale, yet, if the sale execution be issued on a part of the judgment debtor's land, and are placed in the hands of the sheriff, the proceeds of the sale of the land must be first applied to the payment of all the justice's judgments. Faye v. Morris, 63 N. C. 157.

Between Lien and Subsequent Purchaser.—Upon the docketing of a judgment it becomes a lien on all the land to which the judgment debtor has title for a period of ten years from the time of docketing, under this section, and the land is not relieved of the judgment lien by a subsequent transfer of title by the judgment debtor. Moses v. Morgan v. Jordan, 117 N. C. 86, 89, 23 S. E. 259.

A judgment creditor or his assignee has a lien on the lands of the judgment debtor, and where the judgment is duly docketed, under this section, the lien exists against
a subsequent purchaser from the judgment debtor, carrying with it the right to subject the property and improvements thereto to the satisfaction of the debt, but the judgment lien has no title or estate in the lands. Byrd v. Pilot Fire Ins. Co., 201 N. C. 407, 160 S. E. 458.

A judgment upon individual debt against holder of mere legal title held in trust for another has no lien upon the standing timber. Jackson v. Thompson, 214 N. C. 539, 543, 200 S. E. 16.

Title to Standing Timber. — An estate created by a deed conveying standing timber, with a right to cut and remove the same within a specified time, is, while it exists, subject to the lien of a docketed judgment and to the ordinary methods of enforcing collection of the same as in other cases of realty. Fowle v. McLean, 168 N. C. 537, 146 S. E. 853.

Property converted from its original nature, see note of Clifton v. Owens, ante this note, analysis line "In General" I.

Homestead Not Subject to Judgment Lien. — The mere right of homestead is not such an estate or interest in lands as is subject to a lien by judgment. Kirkwood v. Peden, 173 N. C. 407, 189 S. E. 256.

Same—Reversionary Interest May Be Subjected. — The only reason for keeping a judgment in full force and effect during the existence of the homestead is to subject the reversionary interest in payment when the homestead expires, as such interest cannot be sold under execution during the life of the homestead. Kirkwood v. Peden, 173 N. C. 460, 52 S. E. 264.

A docketed judgment is a lien on all the land of the debtor in the county where docketed from the date of the docketing, and the creditor may presently enforce the lien on all of the debtor's land outside of the homestead boundaries, but this right is subject to the homestead estate to subject the land to which it pertains, and no act of the debtor can change or impair the creditor's right under such lien. Vanstory v. Thornton, 112 N. C. 196, 204, 17 S. E. 556.

A judgment upon individual debt against holder of mere legal title held in trust for another has no lien upon the land so held. Jackson v. Thompson, 214 N. C. 539, 543, 200 S. E. 16.


B. After-Acquired Property.

In General. — Under the section of the lien docketed judgments attaches to after-acquired lands in the same manner at the moment that the title vests in the judgment debtor, and the proceeds of a sale under such judgments should be distributed pro rata without reference to the date when the judgment debtor acquired. Moore v. Jordan, 117 N. C. 86, 87, 23 S. E. 529.

The lien extends to and embraces only such estate as the judgment debtor has at the time of the docketing thereof, or thereafter acquires while the judgment subsists. Thompson v. Avery County, 216 N. C. 465, 5 S. E. (2d) 146. See also, Durham v. Pollard, 219 N. C. 750, 14 S. E. (2d) 218.

Judgment by Confession. — Though a judgment by confession is given out of the ordinary course of procedure, nevertheless, inasmuch as the judgment becomes a lien upon the judgment debtor's real property. Sharp v. R. R., 106 N. C. 308, 319, 11 S. E. 530; Keel v. Bailey, 214 N. C. 159, 198 S. E. 69.

Judgments against Land Held in Remainder. — The docketing of judgments against a debtor who holds land in remainder, dependent upon a life estate in another, creates a lien on the life estate, which, not being susceptible of immediate occupancy, is not protected from sale under execution by the Constitution and laws relating to homestead exemptions. Stern Bros. v. Lee, 115 N. C. 426, 190 S. E. 72.

Successive Transfers of Different Tracts. — Where there is a judgment lien on land, part of which is sold by the debtor, the remaining portion will be first sold in satisfaction of the judgment before resorting to the land first sold, and the rule applies equally in the case of land from the judgment debtor, but this equity is never enforced against the creditor when he will in any substantial way be prejudiced by it. Brown v. Harding, 170 N. C. 253, 86 S. E. 1010, rehetting 171 N. C. 656, 99 S. E. 222.

Attaches upon Conveyance to Judgment Debtor. — The lien of a judgment attaches when the land is conveyed to the judgment debtor. The judgment lien is subject to the lien of any prior lien or mortgage on land which heo his grantor could retain by a parol agreement or a subsequently recorded conveyance. Colonial Trust Co. v. Sterchi Brothers, 169 N. C. 21, 85 S. E. 40.

C. Nature of Right Acquired.

No Estate Vested. — The lien created by a docketing judgment does not vest any estate or interest subject to it in the judgment creditor, but only secures to the creditor the right to have the property applied to the satisfaction of his judgment, and such lien extends only to such estate, legal or equitable, as may be sold or disposed
Title to Property in Third Party. — A docketed judgment constitutes no lien upon real property purchased and paid for by the debtor, where title to the property was acquired prior to the time it attaches. Bruce v. Nicholson, 109 N. C. 202, 13 S. E. 790.

Same—Remedy of Creditor. — In such case the creditor has a right to follow the fund in equity, but the institution of an appropriate suit, and entering and maintaining thereof, will effect more than to give the creditor first bringing his suit a priori over other creditors, and to disable the holder of the property from defeating, by a conveyance, the object of the proceedings. Dixon v. Dixon, 81 N. C. 323, 324.

Persons Entitled to Enforce. — In an action to enforce the lien of judgments against land formerly owned by the judgment debtor, it was no concern of the defendants that the person in whose name the judgments were taken was not the beneficial owner of the judgments, as defendant was not the holder of the property from which the lien arose. Dixon v. Dixon, 81 N. C. 323, 324.

Where Equitable Execution and Accounting Necessary. — Where there was a conflict as to the priorities of the secured creditors the plaintiff, whose docketed judgment constituted a lien on the resulting trust in a deed of trust, could not enforce his lien by the ordinary process of execution, nor resort to an action of assumpsit, but could only by an equitable execution where an account could be taken. Trimble v. Hunter, 104 N. C. 129, 134, 10 S. E. 291.

Purpose. — The sole office of the execution is to enforce the lien of a judgment docketed under this section, and the motion is heard and execution issued after ten years from the date of its rendition in the superior court, and an action to enforce the lien by the sale of the land upon which it has attached. Pasour v. Rhyne, 82 N. C. 149, 152.

Time Allowed. — Leave to issue execution upon a docketed judgment may be granted at any time within ten years from the docketing. Adams v. Guy, 106 N. C. 275, 278, 11 S. E. 535.

Same—Appeal. — The motion for leave to issue execution is made in apt time, though the ten years expired pending the appeal and though no undertaking is given; this is true because the time during which the judgment creditor was restrained by the operation of the appeal is not to be counted, as the appeal had the effect to prevent the issuing of execution within the time prescribed. Adams v. Guy, 106 N. C. 278, 11 S. E. 535.

Motion to Revive. — Where a judgment creditor de lays issuing execution until within a short time before the expiration of the lien of his judgment and then gives notice of judgment to revive and moves for an order to issue, the motion is heard and execution issued after ten years from the date of the judgment, a purchaser at the execution sale of land gets no title as against one who bona fide bought the land during the ten years. Pipkin v. Adams, 114 N. C. 201, 19 S. E. 105; Lilly v. West, 97 N. C. 276, 1 S. E. 834. The same principle applies where the execution is levied before the expiration of the lien but the sale does not take place until after the expiration of the lien. Spicer v. Gambill, 93 N. C. 378, 383.

Failure to Docket Judgment. — If a party who obtains judgment below neglects to docket it in any county, then upon the failure to docket and file for an action to enforce the lien by condemning land of the judgment debtor to be sold is barred by the statute when sale of the land cannot be made and concluded within the ten-year period, even though the action is instituted within such period, when the running of the statute is not interrupted at any time or in any manner by order restraining and proceeding on the judgment. Lupton v. Edmundson, 220 N. C. 188, 16 S. E. (2d) 840.

Appeal as Stopping Statute. — Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, motion denied and appeal taken to the judge, and the clerk ordered that execution should not issue until the adjournment of the August, 1931, term of court, and the appeal to the judge was never heard, the appeal was valid, and execution should not issue until the effect of stopping the statute and the judgment was barred in 1939 by the ten years statute of limitations. Exum v. Carolina R. & R. Co., 222 N. C. 222, 22 S. E. (2d) 424.

V. LOSS OF THE LIEN. In General. — The lien of a judgment docketed under this section is lost by the lapse of ten years from the date of the docketing of the judgment, provided it is so docketed as required. Adams v. Guy, Pasour v. Rhyne, 82 N. C. 149, 152; Lyon v. Russ, 84 N. C. 588.

The life of the lien of a judgment is ten years from the date of its rendition in the superior court, and an action to enforce the lien by condemning land of the judgment debtor to be sold is barred by the statute when sale of the land cannot be made and concluded within the ten-year period, even though the action is instituted within such period, when the running of the statute is not interrupted at any time or in any manner by order restraining and

[264]
until then) in the proper county the judgment forms a lien upon the land on which the judgment debtor sat; the lien of the judgment is a lien upon the property of the judgment debtor, and the judgment debtor is estopped to deny the existence and enforcement of the lien formed by the judgment.

Rendition Does Not Perfect Lien.—The simple rendition of a judgment in a court of record in another State will not constitute a lien upon the judgment debtor's land until "docketed" in the county where the land lies, as required by the statute. Alspach v. Moseley, 104 N. C. 60, 64, 10 S. E. 124.

Issuing Execution Prior to Docketing.—See note of Bernard v. Brown, under section 1-235.

Judgment of Supreme Court Applied to Docketed Lower Court Judgment.—The defendant, by a decree in the Supreme Court, had recovered from the plaintiff a sum of money; while the execution was in the hands of the sheriff the plaintiff recovered from the defendant, by a magistrate order, a like amount for items in their account not allowed in the case in the Supreme Court. These latter judgments were docketed as to the plaintiff by any court of record, heretofore certified under the official seal of said court, by any person other than the clerk, shall be made in the presence of the clerk or his deputy, who shall witness the same, and when entries of full payment or satisfaction have been made, the clerk or his deputy shall enter upon the judgment index kept by him, opposite and on a line with the names of the parties to the judgment, the words "Paid" or "Satisfied." (Rev. S. 577; Code, s. 438; R. C., 31, s. 127; 1823. c. 1212; 1911, c. 76; C. S. 617.)

Payment Made to Clerk.—A trustee may properly pay money to the clerk as part payment in satisfaction of a judgment, Sugg v. Bernard, 127 N. C. 155, 156, 29 S. E. 221.

A judgment debtor under this section is entitled to credit on the judgment for amounts paid by him on the judgment and the clerk of the Superior Court in whose office the judgment is docketed, although the clerk fails to enter payment on the judgment docket, the judgment debtor being under no duty to make entry of payment. New England Trust Co. v. Wood, 163 N. Y. 160, 58 N. E. 1094, 57 Am. St. 392.


§ 1-236. Fees for filing transcripts of judgments by clerks of superior courts.—The fee for filing, docketing and indexing transcripts of judgments in the offices of the several clerks of the superior court in North Carolina shall be the same fee charged for filing, docketing and indexing transcripts of judgments in the office of the clerk of the superior court of the county from which the transcript of judgment is sent to said county. (1933, c. 435, s. 1.)

§ 1-236.1. Transcripts of judgments certified by deputy clerks validated.—Each transcript of judgment from the original docket of the superior court of a county where the same was rendered and docketed, heretofore certified under the official seal of said court, by a deputy clerk thereof, in his own name as such deputy clerk, and docketed on the judgment docket of another county in the state, is hereby validated and declared of full force and effect in such county where docketed, from the date of docketing of the same, to the same extent and with the same effect as if said transcript of judgment had been certified in the name of the clerk of the superior court of said original county, and under his hand and official seal. (1943, c. 11.)

§ 1-237. Judgments of federal courts docketed; lien on property; recordation; conformity with federal law.—Judgments and decrees rendered in the district courts of the United States within this state may be docketed on the judgment dockets of the superior courts in the several counties of this State for the purpose of creating liens upon property in the county where docketed; and when a judgment or decree is registered, docketed and indexed in a county in like manner as is required of judgments and decrees of the courts of this state, it shall become a lien and shall have all the rights, force and effect of a judgment or decree of the superior court of said county. When a judgment roll of a district court is filed with the clerk of the superior court, the clerk shall docket it as judgments of the superior court are required to be docketed. It is the intent and purpose of this section to conform the state law to the requirements of the Act of Congress entitled "An Act to Regulate the Liens on Judgments and Decrees of the Courts of the United States" being the Act of August first, one thousand eight hundred and eighty-eight, Chapter seven hundred and twenty-nine. (Rev. S. 576; 1889, C. 439; 1943, C. 543; C. S. 616.)

Editor’s Note.—Prior to the 1943 amendment this section also applied to judgments and decrees rendered in the federal circuit courts. This amendment made other changes in the wording of the section.

Judgment Rendered in District Court.—Judgment rendered by the district courts of the United States may take advantage of any state or federal statute or provision of this section authorizing the docketing of judgments and decrees of the federal courts on the judgment dockets of the superior courts of this state for the purpose of creating liens, such judgments on a money demand are liens on real property only from the date of their docketing in the county where the land is situated. Riley v. Carter, 165 N. C. 1104, 81 S. E. 414.


§ 1-239. Repealed by Session Laws 1943, c. 543.

§ 1-239. Paid to clerk; docket credited; transcript to other counties.—The party against whom a judgment for the payment of money is rendered, by any court of record, may pay the whole, or any part thereof, to the clerk of the court in which the same was rendered, at any time thereafter, although the execution is in the hands of the sheriff. The judgment rendered in the Supreme Court will not constitute a lien of the judgment in its favor though barred by the three years limitation contained in this statute. United States v. Minor, 235 Fed. 101.

§ 1-240. Date of Docketing Fixes the Lien.—Under the act of Congress as to docketing judgments of federal courts, and the provisions of this section authorizing the docketing of judgments and decrees of the federal courts on the judgment dockets of the superior courts of this state for the purpose of creating liens, such judgments on a money demand are liens on real property only from the date of their docketing in the county where the land is situated. Riley v. Carter, 165 N. C. 1104, 81 S. E. 414.


§ 1-241. Where execution is in the hands of the sheriff. — A debtor has no right to pay the money to the clerk when the execution is in the hands of the sheriff. Bynum v. Barefoot, 127 N. C. 155, 156, 29 S. E. 221.

Clerk Receiving Depreciated Currency.—Whenever it is sought to establish an authority in a clerk to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it must be shown either that the receipt was expressly authorized by the plaintiff or that the plaintiff has done acts in furtherance that he was so authorized. Purvis v. Jackson, 69 N. C. 474.

Misappropriation of Payment by Clerk.—Where a judgment debtor has paid the judgment entered against him in the office of the clerk of the Superior Court, and the
clerk has misappropriated the payment, so that the debtor has again paid the judgment, the equitable doctrine as to whether he is subrogated to the right of the judgment creditor does not apply, and a right action will lie against the surety on the clerk's bond for the direct misappropriation of the money. Gilmore v. Walker, 196 N. C. 460, 142 S. E. 579.

**Liability for Loss.—** The clerk of the Superior Court and the surety on his bond are liable for loss resulting to the owner of a judgment from the clerk's failure to perform his statutory duty to enter the judgment and pay the judgment debt, and a right action will lie against the surety on the judgment debtor, as provided by this section. Dalton v. Strickland, 238 N. C. 27, 179 S. E. 20.

§ 1-240. Payment by one of several; transfer to trustee for payee.—In all cases in the courts of this state wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof, if one of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the amount due on said judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereon in law and in equity, and in the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant, and against whom judgment was obtained, may, in an action therefor, have the assignment of the judgment, which it transferred to payee, who brought suit thereon against the makers. Held: the commissioner of banks in the payment of the judgment and in taking the assignment represented the bank and such acts were taken in the same right and with the effect as though the bank had been the transferee, and therefore the commissioner of banks may not act as a trustee for the transfer of judgment under this section, and the payment of the judgment by the commissioner of banks extinguished such judgment lien and enforce it for his reimbursement, is required on payment to have it assigned to some third person for his benefit, and in case of collateral security, he is in such instances entitled to the full equitable doctrine of subrogation; but if he pays the judgment debt on which he himself is bound, without having it assigned, as indicated, he then becomes the simple contract creditor of his principal. Bank v. Sprinkle, 180 N. C. 580, 104 S. E. 477.

**Assignment to Third Party Necessary to Claim Subrogation.—** A surety defendant in a judgment with the principal according to principles heretofore obtaining in North Carolina, without the aid of a statute, in order to preserve the judgment lien and enforcing an equality of obligation between them. Fowle v. Mclean, 168 N. C. 537, 84 S. E. 852.

**Proportionate Liability of Sureties.—** The liability of sureties among themselves is controlled by the equitable principle of equality arising out of a common risk, and in case of insolvent co-sureties and have the same action, as contemplated by this section, shall not thereafter be entitled to an execution against the judgment debtor so tendering payment. (1919, c. 194, ss. 1, 2; 1929, c. 68; C. S. 618.)

**Editor’s Note.—** The Act of 1929 amended the first paragraph of this section by permitting contribution between joint tort-feasors, and the joinder of joint tort-feasors not made parties. The amendment, of course, does not apply to a judgment creditor by payment of a fraction of the amount of the judgment, he is entitled to an assignment of the judgment to a trustee for his benefit under this section, and is entitled to recover from each of his codefendants the proportionate part of such codefendant’s liability in the amount of the compromise settlement, he being entitled to contribution on the basis of the amount actually paid into the compromise fund. (2d) 23.

**Judgment Should Be Transferred to Trustee Not the Debtor.—** A bank holding a note hypothecated by the payee bank obtained judgment thereon against the payee bank and the makers. Thereafter, the paying and insolvent defendant, commissioner of banks, made a payment on the judgment out of the assets of the payee bank and obtained an assignment of the judgment, which it transferred to plain- tiff, who brought suit thereon against the makers. Held: the commissioner of banks in the payment of the judgment and in taking the assignment represented the bank and such acts were taken in the same right and with the effect as though the bank had been the transferee, and therefore the commissioner of banks may not act as a trustee for the transfer of judgment under this section, and the payment of the judgment by the commissioner of banks extinguished such judgment lien and enforce it for his reimbursement, is required on payment to have it assigned to some third person for his benefit, and in case of collateral security, he is in such instances entitled to the full equitable doctrine of subrogation; but if he pays the judgment debt on which he himself is bound, without having it assigned, as indicated, he then becomes the simple contract creditor of his principal. Bank v. Sprinkle, 180 N. C. 580, 104 S. E. 477.

**Subrogation Applicable between Co-Sureties.—** A surety may preserve the lien of judgment against the principal and himself pay the judgment debt and have it assigned to a third person for his own credit, and this also applies to a judgment against his co-sureties and himself in enforcing an equality of obligation between them. Fowle v. Mclean, 168 N. C. 537, 84 S. E. 852.

**What Constitutes a Refusal to Transfer.—** Under a proper interpretation of the relevant parts of this section the refusal of the judgment creditor to transfer the judgment to some person whose personal rights in the judgment are superior to the surety, tendering payment of the same, means his final refusal to do so, and not when the status of the parties remain the same, and the judgment creditor subsequently offers and stands willing to assign judgment to the person requiring it requires. Bank v. Sprinkle, 180 N. C. 580, 104 S. E. 477.

**The entry of transfer of judgment by the attorney of the judgment creditor upon the margin of the judgment as recorded in the office of the clerk of the superior court is prima facie evidence of transfer. Harrington v. Buchanan, 222 N. C. 698, 24 S. E. (2d) 534.

**Surety Cannot Raise Question of Liability after Judgment**
Section Does Not Apply to Insurers of Tort-Feasors.—An insurer of one joint tort-feasor paying the judgment recovered against both joint tort-feasors is not entitled to equitable subrogation as by its express terms it applies only to joint tort-feasors and to joint judgment debtors. Gaffney v. Lumbermen's Mut. Cas. Co. v. United States Fidelity, etc., Co., 211 N. C. 13, 188 S. E. 634.

Defendants May File Cross Action to Join Others as Joint Tort-Feasors.—Defendants in an action to recover for negligence in respect to this section, precluding plaintiff from taking a voluntary nonsuit, alleging that such defendant was entitled to keep the codefendant in the case as a joint tort-feasor, there being no relation between the tort-feasors outside the provision of the statute upon which the doctrine of equitable subrogation can be based, and the insurers of the tort-feasors, which defendants contend with the right of contribution in regard to consideration. Lumbermen's Mut. Cas. Co. v. United States Fidelity, etc., Co., 211 N. C. 13, 188 S. E. 634.

When a defendant in a negligent injury action files answers denying negligence but alleges in effect that the entire tort-feasor there being no relation between the tort-feasors outside the provision of the statute upon which the doctrine of equitable subrogation can be based, and the insurers of the tort-feasors, which defendants contend with the right of contribution in regard to consideration. Lumbermen's Mut. Cas. Co. v. United States Fidelity, etc., Co., 211 N. C. 13, 188 S. E. 634.

Voluntary Nonsuit Not Permitted as to Joint Tort-Feasor Against Whom Other Tort-Feasor Claims Relief.—Defendants in an action to recover for negligence in respect to this section, precluding plaintiff from taking a voluntary nonsuit, alleging that such defendant was entitled to keep the codefendant in the case as a joint tort-feasor, there being no relation between the tort-feasors outside the provision of the statute upon which the doctrine of equitable subrogation can be based, and the insurers of the tort-feasors, which defendants contend with the right of contribution in regard to consideration. Lumbermen's Mut. Cas. Co. v. United States Fidelity, etc., Co., 211 N. C. 13, 188 S. E. 634.

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such is not in the purview of the statute, and not enforceable by him under the statute of frauds. Brown v. Hobbs, 154 N. C. 544, 70 S. E. 906.

Amount Paid Plaintiff on Covenant Not to Sue as Credit.—Where joint tort-feasors, sued as joint tort-feasors, pay plaintiff a sum in consideration of a covenant not to sue, and thereafter the action is prosecuted against the other defendants, and judgment recovered against them, the defendant against whom judgment was rendered is entitled to have the judgment credited with the amounts paid by the other defendants for the covenant not to sue upon the motion made prior to the judgment, and in proper instances the court may decree a resale of the land if the purchaser does not pay within a specified time.—Ten Days' Notice Required.—Any court, which orders a judicial sale, or having possession of bonds taken on such sale, may, on motion, after ten days' notice, enter judgment, directing the clerk to resell the land if the purchaser does not pay within a specified time, and in proper instances the court may decree a resale of the land if the purchaser does not pay within a specified time.—In this case, sixty days. Davis v. Pierce, 167 N. C. 135, 8 S. E. 182.

Constitutionality.—This section is constitutional and does not contravene the right of trial by jury. Ex parte Cotten, 62 N. C. 79, 61.

§ 1-243. Proper Method to Enforce Contract.—An independent action upon an obligation to secure the payment of money given on a purchase under a judicial sale will not be entertained if objection be made in the proper time; the proper course is to affirmatively impeach the judgment on the ground that the sale is decreed. Lackey v. Pearson, 101 N. C. 651, 8 S. E. 121; but this matter is within the control of the court and in proper instances the court may decree a resell of the land if the purchaser does not pay within a specified time.—In this case, sixty days. Davis v. Pierce, 167 N. C. 135, 8 S. E. 182.

Failure of Purchaser to Comply with His Bid.—If a purchaser at a judicial sale fails to comply with his bid, the court may either declare, first, that he specially perform his contract, or, second, that the land be resold and the purchaser released, or third, that without releasing the purchaser the land be resold; but in this case the purchaser must undertake, as a condition precedent to the order of sale, to pay to the clerk of the superior court all the costs and to make good any deficiency in the price. Hudson v. Coble, 97 N. C. 260, 1 S. E. 688.

Ten Days' Notice Required.—Any court, which orders a judicial sale, has the power to make a decree for the money after ten days' notice thereof. Ex parte Cotten, 62 N. C. 79.

Waiver of Right to Jury Trial.—Although the defendant under this section is entitled to have a decree of a judgment, as provided by this section, the plaintiff is not bound in the event of confession which is not in the purview of the statute, and not enforcible by him under the statute of frauds. Brown v. Hobbs, 154 N. C. 544, 70 S. E. 906.

Amount Paid Plaintiff on Covenant Not to Sue as Credit.—Where joint tort-feasors, sued as joint tort-feasors, pay plaintiff a sum in consideration of a covenant not to sue, and thereafter the action is prosecuted against the other defendants, and judgment recovered against them, the defendant against whom judgment was rendered is entitled to have the judgment credited with the amounts paid by the other defendants for the covenant not to sue upon the motion made prior to the judgment, and in proper instances the court may decree a resale of the land if the purchaser does not pay within a specified time.—Ten Days' Notice Required.—Any court, which orders a judicial sale, or having possession of bonds taken on such sale, may, on motion, after ten days' notice, enter judgment, directing the clerk to resell the land if the purchaser does not pay within a specified time, and in proper instances the court may decree a resale of the land if the purchaser does not pay within a specified time.—In this case, sixty days. Davis v. Pierce, 167 N. C. 135, 8 S. E. 182.

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Constitutionality.—This section is constitutional and does not contravene the right of trial by jury. Ex parte Cotten, 62 N. C. 79, 61.

Judgment by Confession.—It is essential that the court have jurisdiction before a judgment on confession can be validly entered. Slocumb v. Shingle Co., 110 N. C. 24, 14 S. E.

Same.—May Be Collaterally Impeached.—Judgment, void if for want of jurisdiction in the court, if such appears upon the record, may be collaterally impeached in any court in which the question arises. Harvey v. Edmunds, 68 N. C. 243.

Now, if a judgment has been obtained by confession, being a final judgment, cannot be collaterally attacked for fraud, this must be done by an independent action proper constituted for that purpose. Sharp v. Danville etc. R. R. Co., 106 N. C. 308, 11 S. E. 537; Uzzle v. Vinson, 111 N. C. 138, 16 S. E. 6.

For What Judgment May Be Confessed.—A judgment by confession is for a present debt or a future debt. Bank v. Higginbottom, 9 Pet. 48, 9 L. Ed. 46.

So also a judgment may, it seems, be confessed for a specific sum claimed, subject to the right of the party confessing to reduce the amount, and in case of failure or omission to do so the whole amount will be collectible. Gear v. Parish, 5 How. 168, 12 L. Ed. 100.

Confession by Partner.—It would seem to be well settled that every partner has the power to confess a judgment so as to bind his copartners. Hall v. Lanning, 91 U. S. 109, 14 L. Ed. 271.

Confession by Guardian.—A judgment confessed by a guardian of a minor or incompetents, under the provisions of this section, if the statement required be verified by the guardian in the absence of fraud, is not irregular. McAden v. Hooker, 74 Ky. 944.

In White v. Albertson, 14 N. C. 241, the process had been served on the guardian above, [alone] and not on the infants also, as it should have been, and the guardian permitted judgment to be entered where the infant by his guardian was not notified of the court action. Even though the judgment was not irregular, although in that case it was said the court had acted unadvisedly in permitting the guardian whose interests were opposed to those of the ward to act in this manner, a judgment for money due to a minor or incompetent, is conclusive as against the minor or incompetents, in the absence of fraud, is not irregular. In re "C,, 264.

A judgment confessed by executors on a debt created after the death of the testator and during the time of administration will bind them in their individual capacity, though they style themselves as executors in making such a confession. Hall v. Craigie, 65 N. C. 51.

Confession May be Made to State.—A person may confess a judgment, or recognize on record, to the state for a sum agreed upon, to represent him in that case. The analogy between infants and wards is, however, a close one. A judgment does indeed create a contract; but it is only on the face of the proceedings. Smith v. Smith, 117 N. C. 348, 18 S. E. 765, the latter case holding that the confession is sufficient when it is for "goods sold and delivered," although omitting the time of sale, quantity, price and value of the goods.

Confession by Corporation.—A corporation, nothing to the contrary appearing, may by the action of its proper officers confess judgments as a natural person, if the essential requirements of the statute are complied with, Sharp v. Danville's real estate as of the date the judgment is docketed. Keel v. Bailey, 214 N. C. 159, 196 S. E. 654.

Parol Evidence Not Admissible.—Where a judgment is confessed by one against himself, and so entered of record, parol evidence is not admissible to show that it was intended to have been entered against another. Davidson v. Alexander, 84 N. C. 630.

Mistake as Ground for Relief.—If a judgment be confessed and a clear mistake, a court of law will set the judgment aside, if application be made, and the mistake shown, while the judgment in its power. Walden v. Skinner, 101 U. S. 577, 25 L. Ed. 963.

If it be clear that the judgment is no longer in the power of a court of law, relief may be obtained in a court of chancery. Id.


§ 1-248. Debtor to make verified statement.—A statement in writing must be made, signed, and verified by the defendant, to the following effect:

1. It must state the amount for which judgment may be confessed, and authorize the entry of judgment therefor.

2. If it is for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed is justly due, or to become due.

3. It is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed does not exceed the same. (Rev., s. 581; Code, s. 571; C. C. P., s. 326; C. S. 624.)

Editor's Note.—This section must be read in connection with Sec. 23-§ 1-248, as compliance with the provisions of this section, if one without the other is not sufficient. As was said in Sharp v. Danville etc. R. R. Co., 106 N. C. 308, 319, 11 S. E. 530, "It is not sufficient simply to confess and enter judgment. It is essential that the confession and entry shall have the additional requisites further prescribed by the statute." (Reference being made to this section.)

Section Statute.—In strict compliance with the provisions of this section is required, and if all the requirements are not met the judgment is void because of a want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings. Smith v. Smith, 117 N. C. 348, 191 S. E. 270.

It is essential to the validity of a judgment by confession that it be confessed and entered of record according to the provisions of this section. These are essential requirements required by the section to confer jurisdiction on the court, and to insure validity of the judgment. Farmers' Bank v. Culler, 196 N. C. 569, 146 S. E. 965.

Where the statutory requirements with respect to the form and contents of the statement have been fully complied with, as in the instant case, the court acquires jurisdiction, and authorizes the entry of judgment by the debtor in the statement, is valid for all purposes. Cline v. Cline, 209 N. C. 531, 535, 183 S. E. 904.

The verified statement is jurisdictional, both as to its filing and as to its contents. Gibbs v. Weston & Co., 221 N. C. 7, 9, 18 S. E. (2d) 698.

Verified Statement of Facts Required.—A judgment confessed under this section must contain a verified statement of the facts and transactions out of which the indebtedness arose. Davenport v. Leary, 25 N. C. 203, 204. And a mere statement that the debts are bona fide due, without embracing the amount and dates, is insufficient. Id. See also, Davidson v. Alexander, 84 N. C. 630, and Merchants Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765, the latter case holding that the confession is sufficient when it is for "goods sold and delivered," although omitting the time of sale, quantity, price and value of the goods.

Debts Evidence by Note or Bond.—A judgment confessed under this section must contain a verified statement of the facts and transactions out of which the indebtedness arose. Davenport v. Leary, 25 N. C. 203, 204. And a mere statement that the debts are bona fide due, without embracing the amount and dates, is insufficient. Id. See also, Davidson v. Alexander, 84 N. C. 630, and Merchants Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765, the latter case holding that the confession is sufficient when it is for "goods sold and delivered," although omitting the time of sale, quantity, price and value of the goods.

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Same.—This Requirement Mandatory.—The filing of the concise statement of the facts out of which the indebtedness arose, required of the party confessing judgment, is mandatory. Davidson v. Alexander, 84 N. C. 623, 625.

Same.—Reason for the Rule.—A confession of judgment being the proceeding in derogation of a common right, the statute requires, as a protection against the perpetration of fraud, that the consideration out of which the debt arose be stated, so as to form a basis for the debt for which the judgment is confessed “is justly due.” Smith v. Smith, 117 N. C. 448, 350, 23 S. E. 270.

Confession of Judgment with Defeasance.—It is a well recognized practice in our statute law to confess a judgment with a defeasance, and the courts will take notice of the condition, and will not permit an execution to issue in violation of it. Hardy v. Reynolds, 69 N. C. 5.

A mere irregularity in the confession of judgment that no execution shall issue thereon within a time specified is not such a reservation for the benefit of the debtor as impairs the rights of other creditors, and does not vitiate the judgment. Merchants Nat. Bank v. Newton Cotton Mills, 115 N. C. 597, 20 S. E. 765.

Where a judgment confessed by a wife in favor of her husband shows only that it was based upon a sum alleged to be due from time to time to take care of obligations due at the banks by the wife, and fails to state the items constituting the advanced and to whom, and that the considerations for the same were not gifts to the wife, the judgment is insufficient to meet the requirements of the statute, and is void. Farmers’ Bank v. McCullers, 201 N. C. 440, 441, 160 S. E. 694.

Showing that Debt is Due Sufficient without Statement.—A confession of judgment which states the amount for which the judgment is confessed, and states that the same is due, is sufficiently to comply with the statute; and that the consideration for the same was an article sold and delivered, sufficiently conforms to the statute provided the statement is true, for then it follows that it is shown that the amount “is justly due.” Bank v. Newton Cotton Mills, 115 N. C. 597, 20 S. E. 765.

Description of the Nature of the Indebtedness Sufficient.—The failure to make in the confession of judgment a description of the nature of the indebtedness does not invalidate the judgment, provided the confession contains a sufficient description of the nature of the indebtedness to enable a party to make inquiry and ascertain the truth of the matter. Bank v. Newton Cotton Mills, 115 N. C. 597, 20 S. E. 765.

Where Judgment Does Not Expressly Authorize Filing.—Although a confession of judgment does not contain words competent to authorize the clerk to file the same upon the records, yet, if the record shows that the confession was sworn to and filed and judgment thereupon entered, the filing is valid, provided the clerk at the time of entering judgment thereon as if an action were pending, in all other respects comports with the requirements of the statute, and sufficiently conforms to the statute. Bank v. Newton Cotton Mills, 115 N. C. 597, 20 S. E. 765.

Mere Filing and Entry of a Verified Statement.—Although a confession of judgment contains a provision for a defeasance, or other evidence of indebtedness does not invalidate the judgment, provided the confession contains a sufficient description of the nature of the indebtedness to enable a party to make inquiry and ascertain the truth of the matter. Bank v. Newton Cotton Mills, 115 N. C. 597, 20 S. E. 765.

Judgment Is a Lien for the Amount Named.—A judgment confessed to provide security against a contingent liability is a lien and must be so treated; and the full amount named till the actual loss is determined at a lesser sum. Darvin v. Blount, 126 N. C. 247, 250, 35 S. E. 479.

Judgment Containing Irregularities.—Ordinarily, a judgment by confession which contains any irregularities, the party confessing the judgment being presumed to have waived them; but where the judgment is void for a cause appearing in the record, or the record omits some essential element, it shall not be set aside or squashed. Nickolls v. Cape Fear Shingle Co., 110 N. C. 20, 22, 14 S. E. 622.

Same.—Judgments by Confession May Be Amended as Other Judgments.—Such irregularities as a confession of judgment which contains any irregularities, the party confessing the judgment being presumed to have waived them; but where the judgment is void for a cause appearing in the record, or the record omits some essential element, it shall not be set aside or squashed, are irregularities they may be cured by amendment. Bank v. Newton Cotton Mills, 115 N. C. 597, 20 S. E. 765.

Same.—Irregularities Only May Be Cured by Amendment.—If the proceedings are defective in form and substance, that it is void upon its face, no amendment can be made to give it life; but if there are irregularities, they may be cured by amendment. Bank v. Newton Cotton Mills, 115 N. C. 597, 20 S. E. 765.

§ 1-249.—Who May Set Aside the Judgment.—A judgment may be set aside for irregularities upon the application of a party thereto. Uzlee v. Vinson, 111 N. C. 138, 16 S. E. 6.

§ 1-250.—Judgment; execution; installment debt. —The statement may be filed with the clerk of the superior court of the county in which the defendant resides, or if he does not reside in the state, of some county in which he has property. The clerk shall indorse upon it and enter on his judgment docket a judgment of the court for the principal confessed, with interest, after costs, and may demand payment, together with disbursements. The statement and affidavit, with the judgment indorsed thereon as if an action were pending, forthwith become the judgment roll. Executions may be issued and enforced thereon in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form; but must have indorsed thereon, by the attorney or person issuing it, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, fell due at the time of the confession, and endorse it as such. The judgment remains as security for the installments thereafter to become due; and whenever any further installment becomes due, execution may, in like manner, be issued for its collection and enforcement. (Rev., s. 582; Code, s. 573; C. C. P., s. 327; C. S. 625.)

Substantial Compliance Required.—The requirements of this section, like those contained in the two preceding sections, must be, at least, substantially complied with. Sharp v. Danville, etc., R. Co., 106 N. C. 398, 211, 11 S. E. 590. The rendition of judgment in a proceeding of this kind is a distinct office of the court, not to be confused with the ministerial acts of filing and docketing: Nickolls v. Western & N.C. Ry., 221 N. C. 7, 10, 18 S. E. (2d) 698.

When and Where Judgment Entered.—The mere fact that the judgments were entered in the night time and in the law office of counsel, which was near to the courthouse and convenient, did not render them void or irregular. Sharp v. Danville, etc., R. Co., 106 N. C. 398, 321, 11 S. E. 530.

Failure to Endorse Judgment on Verified Statement Does Not Affect Validity.—The endorsement on the verified statement was an irregularity which does not affect the validity of the judgment, which the entry on the judgment docket made by the clerk, or under his immediate supervision, shows was rendered by the court. Cline v. Cline, 209 N. C. 531, 535, 183 S. E. 504.


§ 1-255. Submission of Controversy without Action.—Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it is essential that the case contained in the affidavit that the controversy is real, and that the proceedings in good faith to determine the rights of the controversy. The judge shall hear and determine the case, and render judgment thereon as if an action were pending. (Rev., s. 803; Code, s. 567; C. C. P., s. 315; C. S. 626.)

Editor’s Note.—The prime (and practically the only) object
an agreement as to the facts and for the court to rule the law, in a suit to quiet title to lands, differs from a controversy submitted without action under the provisions of § 1-250 CH. 1. CIVIL PROCEDURE—JUDGMENT § 1-250

of this section is to prevent excessive litigation. This true, its provisions are quite limited in their operation. They are applicable only to a case where there are parties to a question of law, and the parties to a question of law are parties to a controversy submitted without action, a judgment might be rendered for one party against the other.

The purpose of this section is to enable parties to a question in difference, which might be the subject of a civil action, where they agree as to the facts involved, to submit the facts to the court, for its decision on the question involved, and to have a judgment rendered, without the expense and formalities required for a civil action. Hicks v. Greene County, 200 N. C. 73, 76, 156 S. E. 54.

Where the parties submit to the court questions of law arising upon facts agreed, without showing that they have rights involved in the questions, upon which they would be entitled to judgment, in a civil action the court is without jurisdiction, under this section, and should decline to consider the questions submitted for its decision. Id.

The jurisdiction to render advisory opinions with respect to, or judgments declaring the rights and liabilities of parties to actions or proceedings on an agreed statement of facts, was not conferred by this section. Wright v. Wilmington & W. R. Co. 119 N. C. 553, 554, 26 S. E. 955.

Court Must Have Jurisdiction.—The submission of a controversy without action under this section must be to a court of competent jurisdiction over the subject matter. Ruffin v. Ruffin, 112 N. C. 779, 16 S. E. 1021. Where the superior court has no jurisdiction over an action to recover a town tax of $5 paid to an incorporated town under written protest, an action therefor in that court should be dismissed. Greene v. Sta dien, 197 N. C. 472, 149 S. E. 685.

Not Applicable to Justice's Court.—This section has no application to a case where justice of the peace. Wilmington v. Atkinson, 88 N. C. 54, 55.

The difference between the operation of the Declaratory Judgment Act, which is to prevent expensive litigation. This being the case, the court must have jurisdiction to render advisory opinions with respect to, or judgments declaring the rights and liabilities of parties to actions or proceedings on an agreed statement of facts. Such jurisdiction was not conferred by this section. Tryon v. Duke Power Co., 222 N. C. 200, 203, 22 S. E. (2d) 450.

Verification by Affidavit Essential.—It is essential that the submission be verified by an affidavit. Millikan v. Fox, 84 N. C. 648.

In contrast with a special judge under such circumstances there is a failure to file an affidavit to the effect that the controversy is real, and the proceedings are in good faith. Where a submission is made to the court on a case agreed interrogatories in respect thereto, there is a failure to file an affidavit that a real case exists, and that the controversy is submitted in good faith to determine the rights involved in the questions. Dowling v. So. Ry. Co., 194 N. C. 488, 140 S. E. 363.

There is no "question of difference" between them, the proceeding being a request for advice of law, not a question in difference, which might be the subject of a civil action. E. C. L. D. & N. R. Co. v. Reidsville, 101 N. C. 404, 8 S. E. 124.

Parties.—All persons having an interest in the controversy must be parties to the case, and that interest must be manifest. Edney v. Mathews, 218 N. C. 171, 10 S. E. (2d) 619.

Record on Appeal.—Upon appeal from judgment entered in a submission of controversy without action, the agreed facts with the required affidavits, are necessary parts of the record proper. Consolidated Realty Corp. v. Koon, 215 N. C. 439, 2 S. E. (2d) 360.

No Prayer for Judgment Necessary.—In an action submitted under this section, a prayer for judgment is not necessary. Williams v. Commissioners, 132 N. C. 300, 43 S. E. 895.

Exhibits Containing Facts Not Attached.—The summary made by the court for the purpose of the section for the submission of an action upon a case agreed, contemplated the court's jurisdiction to render advisory opinions with respect to a determination of the questions submitted shall be fully stated in the case agreed; and where it appeared that the case agreed is not sufficiently identified so that it may be known which exhibits were attached, and that leave was given the parties to add other matters, the cause was remanded to be perfected. Piedmont R. Co. v. Reidsville, 101 N. C. 644, 8 S. E. 124.

Plaintiff's Plea Not Affidavits Attached.—Where, when the case was docketed in the Supreme Court, no affidavit had been filed as required by this section, the plain tiff's plea was allowed with leave to file, but the affidavit was not lodged. Bank v. Trust Co., 119 N. C. 553, 554, 26 S. E. 131.

Parties.—All persons having an interest in the controversy must be parties to the case, and that interest must be manifested by the affidavits to the effect that the controversy is real, and that the parties are parties to the case, and that the controversy is submitted to the court for its decision. Dowling v. So. Ry. Co., 194 N. C. 488, 140 S. E. 363.

Section Contemplates the Rendition of a Judgment.—The true construction of this section is that it does not confer a jurisdiction over an action without showing that they have rights involved in the questions, upon which they would be entitled to judgment, in a civil action the court is without jurisdiction, under this section, and should decline to consider the questions submitted for its decision. Id.

The jurisdiction to render advisory opinions with respect to, or judgments declaring the rights and liabilities of parties to actions or proceedings on an agreed statement of facts, was not conferred by this section. Wright v. Wilmington & W. R. Co. 119 N. C. 553, 554, 26 S. E. 955.

Same— Sufficiency of Facts Stated.—The statement of facts agreed upon should contain sufficient averments to constitute a cause of action. Bank v. Atkinson, 88 N. C. 54, 55, 16 S. E. 1021.

When a case is heard under this summary method authorized by the Code, the judgment should be final and complete, with nothing further to be done except to carry the judgment into effect that the parties are parties to the case, and that the controversy is submitted to the court for its decision. Id.

Same— Where Question of Great Public Concern Involved.—Where, under this section a controversy is submitted which involves matters of great public concern and which is supported by an affidavit that the controversy is real, and the parties agree as to the facts involved, to submit the case to the court for its decision, and thereafter the court shall hear and determine the case and render judgment thereon as if an action were pending. McGhan v. Biggs, 191 N. C. 315, 325, 22 S. E. 2; Little v. Thorne, 100 N. C. 399, 409.

Same— Statement of Facts Should Include Only Pertinent Facts Agree Upon.—In the submission of a controversy without action the statement of facts agreed should include only pertinent facts and matters as to which the parties agree are necessary and the statute must be strictly construed. Consolidated Realty Corp. v. Koon, 216 N. C. 295, 4 S. E. (2d) 450.

Administration Suit Distinguished from Submission of Controversy.—Where, in proceedings to sell lands to make assets, defendants pleaded the statute of limitations as to certain indebtedness alleged in petitioner's bill of particulars and asked for an accounting, and the parties thereto agreed that any controversy should be heard by the judge without a jury upon an affidavit of the facts and that the judge might find such additional facts as he may consider necessary to complete determination of the controversy. The process was not a submission of controversy as defined by the section and is not subject to the provisions of the statute. Ruffin v. Ruffin, 112 N. C. 779, 16 S. E. 1021.

Interests Must Be Antagonistic.—For the courts to pass upon a controversy submitted under the provisions of this section the interest of the parties must be antagonistic, and the case will be dismissed if it appears that the parties are parties to a question of law, but are not parties to a controversy submitted without action. Hicks v. Greene County, 200 N. C. 73, 76, 156 S. E. 54.

Where it appears that an action is instituted solely to obtain a judgment and the controversy be finally adjudicated as in favor of one party against another, the action will be dismissed. Ruffin v. Ruffin, 112 N. C. 779, 16 S. E. 1021.

Parity of Street Assessment with Tax Liens.—The question presented for determination under this section and § 1-252 in the case of Saluda v. Polk County, 207 N. C. 180, 176 S. E. 513, was whether a street assessment constitutes a lien on a parity and of equal dignity with tax lien.


§ 1-251. Judgment roll.—Judgment shall be entered on the judgment docket, as in other cases, but without cost for any proceedings prior to trial. The case, the submission, and a copy of the judgment, constitute the judgment roll. (Rev., s. 804; Code, s. 588; C. C. P., s. 316; C. S. 627.)

Judge May Sign Judgment in Vacation.—A judge of the superior court has a right, with consent of parties, to sign
§ 1-252. Judgment enforced; appeal.—The judgment may be enforced in the same manner as if it had been rendered in an action, and is subject to appeal in like manner. (Rev., s. 805; Code, s. 569; C. C. P., s. 317; C. S. 628.)

No particular assignment of error is necessary, when the appeal is taken from a judgment on an agreed statement of facts. Davenport v. Leary, 95 N. C. 203, 204.

For declaratory judgments, wherein the facts agreed in a controversy without action show no cause of action, an appeal from a judgment thereon will be dismissed in the Supreme Court, as where the plaintiff claims title under a deed, averred that her purchaser was prevented from accepting her deed by the claims of the defendants, without allegation of the facts and circumstances or setting forth sufficiently the terms of the deeds, or making her purchaser and other necessary parties, parties to her action, thus presenting a moot question which the court will not decide. Waters v. Boyd, 179 N. C. 180, 102 S. E. 196.


§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether further relief is or is not forthcoming or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (1931, c. 102, s. 1.)

Editor's Note.—See 12 N. C. Law Rev. 57, for note on this section.

Section 14 of the act from which this article is codified provides that no action or proceeding is excepted except sections one and two, and the same is hereby declared of general application and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the act invalid or inoperative."

This valuable legislation is passed in substantially the form of the Uniform Act recommended by the National Conference of Commissioners on Uniform State Laws, and contains nothing to prevent its application effectively to local procedure. See the explanation and comments in 9 N. C. Law Rev. 20-24.

One has only to look at the state of the law in North Carolina to realize how valuable it is, and how necessary. Edgerton v. Groover, 200 N. C. 73, 156 S. E. 164, by way of contrast to appreciate the improvement which the Declaratory Judgment Act brings to procedure in this state. 9 N. C. Law Rev. 352, 353.

This and subsequent sections applied in Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481, to determine the rights and duties of the parties with respect to the administration of assets of the Rutherford Bank under the provisions of Chapter 344, public local laws of North Carolina, 1931.

In General.—This article does not extend to the submission of the theoretical problem or a mere abstraction, and it is not intended to vest in the courts of the judicial power vested in them by the constitution, to give advisory opinions, or to answer most questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter. Allison v. Sharp, 209 N. C. 477, 481, 184 S. E. 27, citing Poore v. Poore, 201 N. C. 791, 161 S. E. 522; Carolina Power, etc., Co. v. Isleley, 203 N. C. 811, 167 S. E. 56.

This article affords a means of testing the validity of a statute requiring persons presenting themselves for registration or otherwise acquiring the utility of the defendant, without a declaratory judgment or decree brings to procedure in this state. 9 N. C. Law Rev. 20-24.

An ex parte proceeding to determine petitioner's declaratory judgment of rights, status and other legal relations is affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relation affecting the parties, the courts have jurisdiction to determine only the civil matters. Calcutt v. McGee, 231 N. C. 1, 195 S. E. 49.


§ 1-254. Courts given power of construction of all instruments.—Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations affecting the parties, the courts may construe the contract either before or after there has been a breach thereof. (1931, c. 102, s. 2.)

A paper writing in the handwriting of deceased, found among his valuable papers after his death, and bearing upon its face the animus testandi, will be declared his will

1-18
§ 1-255. Who may apply for a declaration.—
Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, orcestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto: (a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or (b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or (c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. (1931, c. 103, s. 3.)

An executor and trustee may institute an action in the superior court to obtain the advice of the court as to whether inheritance taxes should be paid from the corpus of the estate or deducted from annuities provided for in the will, and such action may be maintained under this section. Wachovia Bank, etc., Co. v. Lambeth, 213 N. C. 576, 197 S. E. 129, 117 A. L. R. 117.

§ 1-256. Enumeration of declarations not exclusive.—The enumeration in sections 1-254 and 1-255 does not limit or restrict the exercise of the general powers conferred in section 1-253 in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty. (1931, c. 103, s. 4.)

This section enlarges the specific categories mentioned elsewhere in the statute. Tryon v. Duke Power Co., 222 N. C. 200, 265, 22 S. E. (2d) 450.

§ 1-257. Discretion of court.—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. (1931, c. 103, s. 5.)

§ 1-258. Review.—All orders, judgments and decrees under this article may be reviewed as other orders, judgments and decrees. (1931, c. 102, s. 6.)

§ 1-259. Supplemental relief. — Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. (1931, c. 102, s. 7.)

§ 1-260. Parties.—When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the State shall also be served with a copy of the proceeding and be entitled to be heard. (1931, c. 102, s. 8.)

§ 1-261. Jury trial.—When a proceeding under this article involves the determination of an issue of fact, such issue may be determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. (1931, c. 102, s. 9.)

Cross Reference.—As to how issues are tried, see § 1-172 et seq.

§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.—Proceedings under this article shall stand for trial at a term of court, as in other civil actions. If no issues of fact are raised, or if such issues are raised and the parties waive a jury trial, by agreement of the parties the proceedings may be heard before any judge of the Superior Court. If in such case the parties do not agree upon a judge for the hearing, then upon motion of the plaintiff the proceeding may be heard by the resident judge of the district, or the judge holding the courts of the district, or by any judge holding a term of the Superior Court within the district. Such motion shall be in writing, with ten days notice to the defendant, and the judge so designated shall fix a time and place for the hearing and notify the parties. Upon notice given, the Clerk of the Superior Court in which the action is pending shall forward the papers in the proceeding to the judge designated. The hearing by the judge shall be governed by the practice for hearing in other civil actions before a judge without a jury. The term "Superior Court Judge" used in this section shall include emergency and special judges of the Superior Court. (1931, c. 101, s. 10.)

Cross References.—As to trial generally, see § 1-170 et seq. As to waiver of jury trial and findings of fact by judge, see §§ 1-184, 1-185.

§ 1-263. Costs.—In any proceeding under this article the court may make such award of costs as may seem equitable and just. (1931, c. 102, s. 11.)

§ 1-264. Liberal construction and administration.—This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered. (1931, c. 103, s. 12.)

§ 1-265. Word "person" construed.—The word "person" wherever used in this article, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal corporation or other corporation of any character whatsoever. (1931, c. 109, s. 13.)

§ 1-266. Uniformity of interpretation. — This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with Federal laws and regulations on the subject of declaratory judgments and decrees. (1931, c. 103, s. 15.)

§ 1-267. Short title.—This article may be cited as the Uniform Declaratory Judgment Act. (1931, c. 102, s. 16.)
SUBCHAPTER IX. APPEAL.

Art. 27. Appeal.

§ 1-268. Writs of error abolished.—Writs of error in civil actions are abolished, and the only mode of reviewing a judgment, or order, in a civil action, is that prescribed by this chapter. (Rev. s. 583; Code, s. 544; C. C. P., s. 296; C. S. 629.)

Editor’s Note.—Prior to the adoption of the Code of Civil Procedure writs of error were allowed in proper cases. But in Smith v. Cheek, 50 N. C. 213, it was held that the Supreme Court had no power to issue a writ of error. Section 296 abolishes writs of error and substituted appeals therefor. Lynn v. Lowe, 88 N. C. 478; White v. Morris, 16 S. E. 929. Cited in King v. Wilmington, etc., Ry., 112 N. C. 318, 16 S. E. 929.

§ 1-269. Certiorari, recordari, and supersedeas.—Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed or a deposit made to secure the judgment sought to be vacated, in all cases of appeal where execution is stayed. (Rev. s. 584; Code, s. 545; 1874-5, c. 109; C. S. 630.)

I. Editor’s Note.

II. Certiorari.

A. Editor’s Note.

B. General Consideration.

C. Illustrative Cases.

D. Requirements for Application.

E. Time of Application.

F. Issuance of Writ from Superior Court.

G. When Granted.

H. Discretion of Supreme Court. — The granting or refusing of a writ of certiorari is a matter within the discretion of the Supreme Court. King v. Taylor, 188 N. C. 450, 124 S. E. 751; Walker v. Dudley, 193 N. C. 354, 137 S. E. 140; Peoples Bank, etc., Co. v. Parks, 191 N. C. 263, 131 S. E. 637.

When Certiorari a Matter of Right.—Certiorari will be granted, as a matter of right, where it appears that appellant has been deprived of his appeal by the conduct of the opposing party. Wiley v. Lineberry, 88 N. C. 68; State v. Reid, 18 N. C. 377.

If a party prays an appeal, and the court refuses to allow it, the certiorari is granted as “a matter of course.” White v. Snow, 48 N. C. 100.

Cannot Be Denied by Certiorari.—Certiorari is a discretionary writ, and counsel may not dispense with it by agreement. In re McCade, 183 N. C. 242, 111 S. E. 3; State v. Hooker, 183 N. C. 763, 111 S. E. 352.

Persons Entitled.—To entitle one to a writ of certiorari he must have some interest in the proceeding sought to be reviewed, and sustain injury thereby. Petty v. Jones, 23 N. C. 408. See Shober v. Wheeler, 119 N. C. 471, 26 S. E. 25; Otey v. Rogers, 26 N. C. 534.


Finality of Determination. — Where the judgment against a party is retained for further orders, the judgment is interlocutory and certiorari will not be granted. Smith v. Miller, 155 N. C. 247, 71 S. E. 355.


Negligent Delay. — One who negligently allows the time for bringing his appeal to expire without seeking such remedy is not entitled to the remedy by certiorari. Suiter v. Britt, 92 N. C. 53; In re Britain, 91 N. C. 587.

Necessity of Filing Record. — The appellant must apply file a record proper in the case appealed from as a prerequisite for the Supreme Court to grant his motion for a certiorari to bring up the case for review. Brock v.
Ellis, 193 N. C. 540, 137 S. E. 558; Lindsey v. Knights of Honor, 172 N. C. 618, 90 S. E. 1013.

Certiorari — A writ of certiorari is but a substitute for an appeal, it can only be allowed on the same security, and justification thereof, as in cases of appeal. Chastain v. Chastain, 87 N. C. 286.

But the Supreme Court has the power, in a proper case, to allow the writ to issue without such undertaking. Brittain v. Mull, 93 N. C. 490. The contrary is apparently held in Weber v. Taylor, 66 N. C. 412, but this was in relation to the “appellant’s case.”


Imposition of Terms on Applicant. — When granted the appellant may be laid under terms not to avail himself of a technical advantage. Collins v. Nall, 14 N. C. 224.

Certiorari Denied When Transcript cannot be Docketed. — Under a writ of certiorari, the object of which is only to bring up the record, and where the return of a certiorari, substituted for an appeal, is owing to no fault of the appellant, but to the fault of the clerk, he shall have his cause carried up by a certiorari. Chambers v. Smith, 2 N. C. 365; Graves v. Hines, 106 N. C. 362, 10 S. E. 362.

But not where the clerk fails to send up the transcript. Pittman v. Kimberly, 92 N. C. 562.

Neglect of Counsel. — Where the appellant’s counsel told him that he would do everything necessary toward preparing his appeal, but the counsel failed to file a proper appeal bond it was held, no ground for a certiorari. Warner v. Byrd, 92 N. C. 7.

Sickness of Appellant. — Sickness of appellant is a sufficient excuse for failure to perfect an appeal so as to entitle him to certiorari as a substitute therefor. Howerton v. Henderson, 86 N. C. 836.

Effect of Certiorari. — Where a defendant has lost his appeal, but is granted a writ of certiorari in lieu thereof, the granting of the writ has the effect of an appeal to stay of execution, and if the officer is available, he is entitled to appear and to take the same course of action as if the writ of certiorari had been granted. Walters, 97 N. C. 689, 24 S. E. 592. See Pender v. Mallett, 122 N. C. 163, 30 S. E. 324.

Docketing as a Condition Precedent for Certiorari. — All of the transcript that can be obtained must be docketed at the first term and certiorari asked to complete the transcript. Pittman v. Kimberly, 92 N. C. 562; Scolumb v. Construction Co., 142 N. C. 349, 55 S. E. 196; Walsh v. Burleson, 154 N. C. 174, 69 S. E. 680.

Same—Waiver. — Requirement of Supreme Court that on application for certiorari for case on appeal transcript of the record proper must be docketed cannot be waived byappellee. Murphy v. Carolina Elect. Co., 174 N. C. 785, 93 S. E. 556.

Same—When Transcript Cannot Be Docketed. — Where the papers constituting the record proper have been misplaced without any laches of an appellant, the proper practice is to file the case on appeal settled by the trial judge, and make an order allowing the same. Southern R. Co., 121 N. C. 501, 504, 28 S. E. 347; McMillan v. Young, 142 N. C. 410, 29 S. E. 721.

When certiorari is addressed to boards of assessment or boards of assessment and equalization, where that practice is permitted, it is generally held that the power of review, as in other instances of jurisdiction, extends over questions of valuation, and even to jurisdictional or procedural irregularities or errors of law. Belk’s Dept. Store v. Guilford County, 222 N. C. 441, 445, 23 S. E. (2d) 897, and cases cited therein.


Cited in In re Guerin, 206 N. C. 834, 175 S. E. 181.

C. Illustrative Cases.

Failure to Serve a Case on Appeal. — A petition or a writ of certiorari to bring up the case on appeal will not be granted where the appeal was lost by failure to serve the case on appeal. Zell Guano Co. v. Hicks, 120 N. C. 29, 26 S. E. 362.

Waiver of Statutory Requirements. — When there is an alleged waiver of the statutory requirements in setting case on appeal, a certiorari will issue if the allegations of the petition are not denied. Holmes v. Holmes, 84 N. C. 833, 844.

Delay of Judge. — Where the delay in prosecuting the appeal is owing to no fault of the appellant, but to the fault of the clerk, the clerk may be allowed a writ of certiorari. Sparks v. Sparks, 92 N. C. 359; Haynes v. Coward, 116 N. C. 840, 21 S. E. 690.

Retirement of Judge before Preparing Case. — Where on application for certiorari for case on appeal transcript of the record proper cannot be obtained, a writ of certiorari will be issued. Held in Weber v. Taylor, 66 N. C. 412, but this was in relation to the “appellant’s case.”

Loss Caused by Mistake of Clerk. — After a party has prayed an appeal and offered its sureties, if he be defeated of his prayer, and by the act of the clerk, the clerk, he shall have his cause carried up by a certiorari. Chambers v. Smith, 2 N. C. 365; Graves v. Hines, 106 N. C. 362, 10 S. E. 362.

But not where the clerk fails to send up the transcript. Pittman v. Kimberly, 92 N. C. 562.

Section 1-269
D. Requirements of Application.

Editor's Note. — Under the analysis line “General Considerations,” under this note, will be found many cases pertaining to, though not expressly referring to, the application. These cases considering the subject generally should be consulted with reference to the requisites of the application.

Affidavit Required. — The writ of certiorari or recordari to review the judgment of a lower court will be issued only on a proper showing of merits, on affidavit filed. Taylor v. Superior Court, 135 N. C. 469, 38 S. E. 900; Tate v. N. C., 23 S. E. 290; B. General Consideration.

Mistake Must Be Apparent. — Certiorari to correct a mistake stated on appeal will not be granted unless it is shown by the affidavit of the appellant that there were questions of law which he had a right to have heard, or that there were questions of fact which he had a right to have heard and determined by the superior court. Britt v. Patterson, 31 N. C. 197.

Loss of Papers. — Where an application for recordari states that the papers asked to be sent up were lost, but does not aver that steps have been taken to supply them, the writ will not issue. Sanders v. Thompson, 114 N. C. 382, 19 S. E. 225.

Failure to Show Reason for Neglect. — Where a petition for a writ of recordari did not allege that the adverse party prevented defendants from taking an appeal, and it did not appear that an appeal was ever taken, and no notice was given to the inferior court, the writ was denied, without reference to the merits. Collins v. Nall, 14 N. C. 224; McConnell v. Caldwell, 15 N. C. 554; Taylor v. Superior Court, 125 N. C. 197, 34 S. E. 100.

Case Inaccurately Made. — When it is suggested that the case on appeal is inaccurately made out, the Supreme Court will award a certiorari, if the party, upon a proper showing, may make correcion. State v. Gay, 94 N. C. 821.

Omitted Matter Must Be Relevant. — A certiorari will be denied where it does not appear that the matter omitted was relevant or pertinent to the case presented on appeal. City Nat. Bank v. Bridgers, 114 N. C. 107, 19 S. E. 276; Clark v. Socio-Pettee Mach. Works, 150 N. C. 88, 63 S. E. 15.

Mistake Must Be Apparent. — Certiorari to correct a mistake stated on appeal will not be granted unless it is shown by the affidavit of the appellee, rejecting that of the appellant, that the record shows a written agreement of counsel of which the appellee was not aware, and that the agreement is oral and disputed, and such waiver can be shown by affidavit of the appellee, rejecting that of the appellant.

Tacit Agreement to Waive Delay. — Where there is an unexpressed tacit agreement to waive delay certiorari will issue. Holmes v. Holmes, 84 N. C. 583; Willis v. Atlantic, etc., R. Co., 119 N. C. 718, 23 S. E. 793.

III. RECORDARI.

A. Editor's Note.

The writ of recordari under the former practice, and retained in the new, is used for two purposes; the one in order to have a new trial of the case upon its merits, and this is a substitute for an appeal from a judgment rendered before a justice; the other, for the purpose of making a defense in the county court, which can be made in the superior court as well as in the county court, and this is a substitute for an appeal from a decision of a justice, and the writ of recordari is the substitute for a writ of certiorari. Lyon v. McPherson, 48 N. C. 174.

But a mere suggestion of fraud is insufficient. McLaughlin v. McLaughlin, 47 N. C. 319. See also Haddock v. Stocks, 167 N. C. 70, 83 S. E. 9.

B. General Consideration.

Scope of Recordari. — If a party has merits and desires a new trial in the superior court, upon a matter heard before a justice of the peace, he must, by proper application, obtain a writ of recordari as a substitute for an appeal. Ledbetter v. Interstate, 66 N. C. 379. It is in the nature of an extension of the power of appeal. Webb v. Durham, 29 N. C. 130.
Writ of False Judgment or Substitute for Appeal.—The writ of recordari may be treated as a substitute for an appeal from a justice's judgment to have a new trial on the merits, or as a writ of false judgment. Marler-Dalton-Gilmer Co. v. Wadesboro Clothing, etc., Co., 150 N. C. 519, 64 S. E. 366; Mote v. Rippy, 84 N. C. 611; Caldwell v. Beatty, 69 N. C. 355.

The writ of recordari is authorized by this section and recognized by the decisions of this court, both as a substitute for an appeal from a judgment of a justice of the peace, in order to have a new trial on the merits, and as a writ of "false judgment," to obtain a reversal of an erroneous judgment. King v. Wilmington & Weldon R. R. Co., 112 N. C. 171, 8 S. E. 829.

The writ of recordari may be used as a writ of false judgment. Parker v. Gilreath, 28 N. C. 221; Kearnery v. Jefferson, 58 N. C. 357, 359.

Lies to Inferior Tribunal Whose Proceedings Are Not Recorded.—The writ of recordari lies to an inferior tribunal, whose proceedings are not recorded. Hartsfield v. Taylor, 126 N. C. 129, 56 S. E. 125.

Jurisdiction of Superior Courts.—The writs of certiorari and recordari are to be applied for in orderly procedure to the superior courts of general jurisdiction vested by the state constitution and statutes with appellate and supervisory powers over the judicial action of all the inferior courts of the state. Taylor v. Johnson, 171 N. C. 64, 87 S. E. 747; Sossamon v. Polk, 158 N. C. 145, 76 S. E. 977.

Injunction Without Docket Appeal.—When an appeal from a justice's court has not been docketed within the time prescribed by section 1-300, the appellant should move for a recordari, or an application may be made to the superior court for an appeal from a justice's judgment to have a new trial on the merits, or as a writ of false judgment. Marler-Dalton-Gilmer Co. v. Wadesboro Clothing, etc., Co., 150 N. C. 519, 64 S. E. 366; Rippy v. Mote, 64 N. C. 519; March v. Thomas, 63 N. C. 249; In re Brittain, 91 N. C. 587.

Right to Object to Petition for Recordari Not Waived.—Appellant may object to a petition for recordari as a substitute for an appeal, where there is no showing of a meritorious defense. State v. Seaddy, 117 N. C. 709, 23 S. E. 164. See also, Boing v. Griffith, 117 N. C. 709, 23 S. E. 164.

Effect of Failure to Assign Errors.—Where no error is assigned, or none appears, the proper course is to dismiss the recordari, and award a procedendo. Leatherman v. Moody, 25 N. C. 129; Sossaman v. Hinson, 72 N. C. 578. Superseadae Should Accompany.—An order for a recordari should be accompanied with an order for a supersedeas, and suspension of execution until the hearing. Steadman v. Jones, 65 N. C. 388.

D. When Granted.

Loss of Appeal without Fault of Applicant.—A recordari is a substitute for an appeal, where the party has lost his right to appeal otherwise than by his own default. Marsh v. Bunker, 66 N. C. 283; Pickens v. Whitton, 182 N. C. 779, 109 S. E. 836.

Party Denied Right of Appeal.—If a party has been aggrieved in a trial before a justice of the peace and has been denied the right of appeal, he may obtain relief by a writ of recordari. Birdsey v. Harris, 68 N. C. 92; Ledbetter v. Osborne, 66 N. C. 379.

Loss of Appeal on Ground of Necessity of Recordari.—If an appeal be refused by a magistrate on frivolous ground, the remedy is by a writ of recordari. Bailey v. Bryan, 48 N. C. 357, 67 Am. Dec. 246.

Loss of Appeal by Excusable Neglect.—Where a party has lost his appeal by excusable neglect he may have relief by a writ of recordari as a substitute for an appeal. Navassa Guano Co. v. Bridgers, 53 N. C. 439.

Loss of Appeal by Misfortune.—If a party has lost his appeal by a technical default the superior court judge can have it brought up by recordari. Suttle v. Greene, 78 N. C. 76, 77.

Loss of Appeal by Misfortune.—The writ of recordari is not resorted to as a rule except in cases in which the party aggrieved has by his misfortune lost the opportunity of taking the ordinary statutory appeal. State v. Griffiths, 117 N. C. 709, 23 S. E. 164. See also, Boing v. Raleigh, etc., R. Co., 88 N. C. 62; Davenport v. Grissom, 113 N. C. 38, 41, 18 S. E. 78.

Assignments of Error to Agreement.—A writ of recordari is properly granted, where the defendant has merits, and lost his right to appeal without fault, having erroneously supposed that relief had been arranged with the attorney for the injured party. See also, Boing v. Raleigh, etc., R. Co., 88 N. C. 62; Davenport v. Grissom, 113 N. C. 38, 41, 18 S. E. 78.

Notice of Appeal Not Returned.—On appeal from a justice of the peace to the superior court, where justice did not make a return of the notice of appeal during the term following the hearing, the party's assignee, who had been authorized to file motion for a recordari during such next term to preserve his right to appeal, was without the case tried by the justice of the peace. Barnes v. Saleby, 177 N. C. 256, 98 S. E. 708.

E. When Denied.

When Appeal Vindicated.—When a party has a remedy by appeal which he willfully or negligently fails to exercise, he is not entitled to a writ of recordari. State v.
Supersedeas upon Judgment.—An appeal from an order granting a supersedeas upon a judgment leaves the judgment credit, unless allowed by the court, to the defendant, to prevent the enforcement of the judgment. Rayburn v. Sawyer, 28 N. C. 27; 37 S. E. 413.

When Appellant Has Not Perfected Appeal.—A motion for recordariri made in the superior court several terms after the trial, and before the trial court for failure to send up the transcript, should be denied, when the appellant has not paid the fees required or taken proper steps to perfect the appeal. Helsabe v. Grubb, 171 N. C. 383, 88 S. E. 473.

Review of Clerk's Decision.—A supersedeas is the propriety remedy to stay proceedings in a case, pending the review of the decision of the clerk in regard to the sufficiency of the undertaking for an appeal. Summerlin v. Morrisey, 168 N. C. 90, 81 S. E. 1060.

Injunction.—An appeal from an order granting an injunction does not stay the operation of the injunction pending the appeal. Green v. Griffin, 95 N. C. 59; Fleming v. Patterson, 98 N. C. 404, 6 S. E. 396.

An appeal from an order dismissing a temporary injunction could not stay the effect of continuing the injunction. Rayburn v. Sawyer, 28 N. C. 27; 37 S. E. 413.

It is not proper to allow a supersedeas for the purpose of continuing an injunction pending an appeal from an order depriving James v. Markham, 125 N. C. 145, 34 S. E. 241.

Supersedeas upon Judgment.—An appeal from an order granting a supersedeas upon a judgment leaves the judgment credit, unless allowed by the court, to prevent the enforcement of the judgment. Rayburn v. Sawyer, 28 N. C. 27; 37 S. E. 413.

When Granted—Case of Necessity. —A writ of supersedeas may issue to vacate the order of the court, and prevent the execution of the judgment, and give to the parties the right of appeal. Page v. Page, 166 N. C. 90, 81 S. E. 1060; Peltz v. Bailey, 157 N. C. 709, 23 S. E. 164; Clegg v. Clegg, 186 N. C. 28, 118 S. E. 610.

SECTION 1-270. The Appeal Is Filed in Time. — It is not enough that parties to a suit should engage counsel and leave the matter of taking an appeal entirely in his charge, as they should, in addition to this, give the matter all reasonable consideration. A party usually gives to his important business, and should to that extent see that the appeal was filed in time. Baltimore Bargain House v. Jefferson, 180 N. C. 22, 103 S. E. 922.

When Not Properly Taken. — A party is not entitled to a writ of recordari as a substitute for an appeal from a justice's court which was lost by delay through the negligence of his attorney. Being v. Raleigh, etc., R. Co., 88 N. C. 62.

Appeal Lost through Negligence of Applicant's Attorney. —A party is not entitled to a writ of recordari as a substitute for an appeal from a justice's court which was lost by delay through the negligence of his attorney. Being v. Raleigh, etc., R. Co., 88 N. C. 62.

399

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Editor's Note. — See Supreme Court Rule 34 as to requirements for a writ. An appeal duly taken and regularly prosecuted of itself operates as a stay of all proceedings in the trial court. Section 1-294. Sykes v. Everett, 167 N. C. 600, 83 S. E. 559.

For supersedeas bond, see sec. 1-293 et seq., and annotations thereunder.

Definition and Scope of Writ. — "Supersedeas" is a writ issuing from an appellate court to prevent the status pending exercise of that court's jurisdiction, and issues only to hold the matter in abeyance pending review, and is granted only by court rendering order of cause, and is regulated by statute. Seaboard Air Line R. Co. v. Horton, 176 N. C. 115, 96 S. E. 954.

A writ of supersedeas may issue to vacate the order of the court, and prevent the execution of the judgment, and give to the parties the right of appeal. Page v. Page, 166 N. C. 90, 81 S. E. 1060; Peltz v. Bailey, 157 N. C. 709, 23 S. E. 164; Clegg v. Clegg, 186 N. C. 28, 118 S. E. 610.

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Supersedeas. — A party is not entitled to a writ of recordari as a substitute for an appeal from a justice's court which was lost by delay through the negligence of his attorney. Being v. Raleigh, etc., R. Co., 88 N. C. 62.
propounders were not the "parties aggrieved" by the order setting aside the verdict and could not appeal. In re Hanover Co. Bank, 126 N. C. 360, 17 S. E. 860.

A defendant, who asks for no affirmative relief, is not the "party aggrieved" by a judgment of nonsuit within the meaning of § 1-276, and cannot appeal. Gay v. Aetna Life Ins. Co., 236 N. C. 46, 142 S. E. 885.

But if defendants are not appealing from a nonsuit in their favor, but from a judgment upon the verdict which adversely affects their interest, they are entitled to an appeal under this section. Hargett v. Lee, 205 N. C. 536, 174 S. E. 496.

Application to Be Made by a Party Denied.—If an application to be made by a party defendant is denied, the applicant is "party aggrieved" for all the purposes of an appeal, under this section. Rollins v. Rollins, 76 N. C. 264.

Petition Denying Right to Intervene.—One whose claim to intervene in a suit has been rejected by the court can not appeal from the judgment rendered in the suit. Phelps v. Long, 31 N. C. 226; Evans v. Governor's, etc., Min., Co., 53 N. C. 212; Rollins v. Rollins, 76 N. C. 264.

Intervenors for Purpose of Appeal.—Where a judgment for costs is rendered in a claim and delivery proceeding against a person who is not a party thereto, and who does not appear on the record as a party, such person may appeal on a special appearance made for that purpose. Loven v. Parson, 127 N. C. 301, 37 S. E. 271.

Party Not Served with Process.—One not a party can not appeal from a joint judgment of a court of record. In re Central Bank, etc., Co., 206 N. C. 251, 172 S. E. 881.

Submission of Controversy.—Parties to an equity suit, who agree that the judge should find the facts, are precluded from filing a motion on appeal to review the finding. Runion v. Ramsay, 93 N. C. 410.

Joinder.—All parties against whom a joint judgment or decree is rendered must join in an appeal. Mastin v. Porter, 12 N. C. 1; Kelly v. Muse, 121 N. C. 182.

Appeal from Joint Verdict and Judgment.—One defendant can not sustain an appeal from a joint judgment against two or more, when all had joined in the pleadings, and the other has joined in the verdicts and judgments. Smith v. Cunningham, 30 N. C. 460.

Judgment against One of Two Parties.—Where an action is brought in the county court against two defendants, who plead severally, and a verdict and judgment are rendered in favor of one and against the other, the latter may alone appeal from the judgment rendered against him. Teel v. Settle, 23 N. C. 245.

In assumpsit against two, if the jury find against one and in favor of the other, the former may appeal alone to the Supreme Court. Sharpe v. Jones, 7 N. C. 306.

Appeal of County Court.—In a proceeding against the justices of a county, in their official capacity as justices of the county court, a judgment is rendered against them, they may appeal, although a minority of the court refused to join in the appeal. Kelly v. Justices, 24 N. C. 430.

Appeal by Statutory Receiver.—Objection that the statutory receiver has no right of appeal without the approval of the court is untenable when it appears that the Superior Court judge gave at least implied authority for appeal by approving the agreement of the parties as to what should be done in the case. In re Central Bank, etc., Co., 206 N. C. 251, 173 S. E. 340.


§ 1-272. Appeal from court to judge.—Appeals lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. In case of such transfer or appeal neither party need give an undertaking for costs; and the clerk shall transfer same to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within ten days after the entry of the order or judgment of the clerk upon due notice in writing to be served on the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, or of having the matter shown by affidavit or otherwise proved. (Rev., § 380, 610, 611; Code, ss. 116, 252, 253; C. C. P., ss. 109, 192; 1927, c. 15; 1927, C. S. 633.)

Cross References.—As to powers of clerks, see § 2-16. As to powers of the judge on appeal, see § 1-275.

Editor's Note.—No notice was required by this section prior to 1927. At that time by Public Laws 1927, ch. 15 the portion relating to "due notice in writing" was added.

By this section any party may appeal from any decision of the clerk of the superior court, on an issue of law or legal inference, to the judge, without undertaking; but an appeal can only be taken by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from.


This section and sections 1-274 and 1-275, regulating appeals from orders and judgments made or rendered by the clerk in the exercise of jurisdiction conferred upon him by statute prior to chapter 92, Public Laws 1921, E. S. These sections do not apply to appeals from orders and judgments made or rendered by the court in the exercise of jurisdiction conferred upon him by statute subsequent to such chapter 92.


Action of Clerk Not Conclusive.—The action of the clerk is not conclusive and conclusive against the court. Hargrove, 207 N. C. 280, 176 S. E. 752.

The clerk is not a "lower court" to the superior court with respect to appeals. While he has original jurisdiction in some matters and in the decision thereof may be considered as a "separate tribunal," nevertheless, all his power is delegated by virtue of his office as clerk of the superior court. Windsor v. McVay, 206 N. C. 730, 175 S. E. 83.

Order of Clerk Not in Writing.—In the action of the clerk, although the clerk refused to sign a judgment in writing, he had no authority to refuse to sign it. Farmers Nat. Bank v. Burns, 107 N. C. 465, 12 S. E. 252.

Cross References.—As to powers of clerks, see § 2-16. As to powers of the judge on appeal, see § 1-275.
§ 1-273. Clerk to transfer issues of fact to civil issue docket.—If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court. (Rev., s. 588; Code, s. 256; C. C. P., s. 115; C. S. 545.)

Cross References.—As to issues of fact, see §§ 1-173, 1-174. As to definitions of issues, see §§ 1-196, 1-197, 1-198. As to form and preparation of issues, see § 1-200.

Rule Stated.—Where issues of fact are joined before the clerk, the parties have the right to insist that any of fact, properly determinable by the judge, under this section to transmit the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Sneed v. State Highway Comm., 194 N. C. 46, 138 S. E. 350. The clerk shall be required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Sneed v. State Highway Comm., 194 N. C. 46, 138 S. E. 350.

§ 1-274. Duty of clerk on appeal.—On such appeal the clerk, within three days thereafter, shall prepare and sign a statement of the case, of his decision and of the appeal, and exhibit such statement to the parties or their attorneys on request. If the statement is satisfactory, the parties or their attorneys must sign it. If either party objects to the statement as partial or erroneous, he may put his objections in writing, and the clerk shall attach the writing to his statement, and file it with the court. Within twenty days thereafter he shall send such statement, together with the objections, and copies of all necessary papers, by mail or otherwise, to the judge residing in the district, or, in his absence to the judge holding the courts of the district, for his decision. (Rev., s. 612; Code, s. 254; C. C. P., s. 110; C. S. 635.)

JURISDICTION OF CLERK

§ 1-273. Clerk to transfer issues of fact to civil issue docket.—If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court. (Rev., s. 588; Code, s. 256; C. C. P., s. 115; C. S. 545.)

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See annotations to sections 1-272, 1-273.

Absolute Duty of Clerk.—The clerk is required by this section to allow or disallow the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Sneed v. State Highway Comm., 194 N. C. 46, 138 S. E. 350. But see Hicks v. Wooten, 175 N. C. 597, 95 S. E. 107, where it was held that the clerk of the court resided in the district, or, in his absence to the judge holding the courts of the district, for his decision. (Rev., s. 612; Code, s. 254; C. C. P., s. 110; C. S. 635.)

§ 1-275. Supreme court may order clerk to transfer appeal.—When the clerk has failed to transmit the record to the trial judge within his supervisory power may order that this be done. Sneed v. State Highway Comm., 194 N. C. 46, 138 S. E. 350.

§ 1-276. Clerk may order clerk to transfer appeal.—When the clerk has failed to transmit the record to the trial judge within his supervisory power may order that this be done. Sneed v. State Highway Comm., 194 N. C. 46, 138 S. E. 350.

§ 1-277. Clerk to transfer issues of fact to civil issue docket.—If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court. (Rev., s. 588; Code, s. 256; C. C. P., s. 115; C. S. 545.)

Cross References.—As to issues of fact, see §§ 1-173, 1-174. As to definitions of issues, see §§ 1-196, 1-197, 1-198. As to form and preparation of issues, see § 1-200.

Rule Stated.—Where issues of fact are joined before the clerk, the parties have the right to insist that any of fact, properly determinable by the judge, under this section to transmit the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Sneed v. State Highway Comm., 194 N. C. 46, 138 S. E. 350. The clerk shall be required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Sneed v. State Highway Comm., 194 N. C. 46, 138 S. E. 350.

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See annotations to sections 1-272, 1-273.

Absolute Duty of Clerk.—The clerk is required by this section to allow or disallow the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Sneed v. State Highway Comm., 194 N. C. 46, 138 S. E. 350. But see Hicks v. Wooten, 175 N. C. 597, 95 S. E. 107, where it was held that the clerk of the court resided in the district, or, in his absence to the judge holding the courts of the district, for his decision. (Rev., s. 612; Code, s. 254; C. C. P., s. 110; C. S. 635.)

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§ 1-276. Clerk may order clerk to transfer appeal.—When the clerk has failed to transmit the record to the trial judge within his supervisory power may order that this be done. Sneed v. State Highway Comm., 194 N. C. 46, 138 S. E. 350.

§ 1-277. Clerk to transfer issues of fact to civil issue docket.—If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court. (Rev., s. 588; Code, s. 256; C. C. P., s. 115; C. S. 545.)

Cross References.—As to issues of fact, see §§ 1-173, 1-174. As to definitions of issues, see §§ 1-196, 1-197, 1-198. As to form and preparation of issues, see § 1-200.

Rule Stated.—Where issues of fact are joined before the clerk, the parties have the right to insist that any of fact, properly determinable by the judge, under this section to transmit the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Sneed v. State Highway Comm., 194 N. C. 46, 138 S. E. 350. The clerk shall be required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Sneed v. State Highway Comm., 194 N. C. 46, 138 S. E. 350.
§ 1-275. Duty of judge on appeal.—It is the duty of the judge on receiving a statement of appeal from the clerk, or the copy of the record of an issue of law, to decide the questions presented within ten days. But if he has been informed in writing, by the attorney of either party, that he desires to be heard on the questions, the judge shall fix a time and place for the hearing, and give the attorneys of both parties reasonable notice. He must transmit his decision in writing, endorsed on or attached to the record, to the clerk, of the court, who shall immediately acknowledge its receipt, and deliver it to the clerk, in which case he may do so. The judge shall fix a time and place for the hearing and decide the questions of law present, and then remand the same and the pleadings or papers with the findings of the jury upon them, and the clerk will then proceed with the matter according to law. (Rev., s. 613; Code, s. 255; C. C. P., s. 110; C. S. 636.)

Full Jurisdiction of Case.—Under this section an appeal in partition action from order of the clerk overruuling demurrer carried the entire case into the superior court, and vested it with the full jurisdiction of the cause. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113.

When Issues of Fact Tried.—When issues of fact are tried the court remands the same and the pleadings or papers with the findings of the jury upon them, and the clerk shall then proceed with the matter according to law. This provision has reference to issues of fact. Brittain v. Mull, 91 N. C. 496, 550.

Appeal May Be Heard Outside County.—Appeals from the clerk of the superior court and special proceedings to the judge residing or presiding in the district may be heard and determined by him. When the proceeding is pending, and within the district. Ledbetter v. Pinner, 120 N. C. 455, 27 S. E. 123.

Appeals from the clerk may be heard at chambers at any place in the district. Monroe v. Lewald, 107 N. C. 655, 12 S. E. 267.

When Notice Not Reasonable.—Where notice of appeal from action by the clerk is served on the day before the hearing, the notice is not reasonable within this section. Byrd v. Nivens, 189 N. C. 621, 127 S. E. 673.

Pending Appeal from Clerk.—A motion for a receiver to take possession of a debtor's property, in supplemental proceedings to partition, must be made before a judge, pending an appeal to him from the ruling of the clerk upon other questions. Coates Bros. v. Wilkes, 92 N. C. 375.

Provisions for Partition.—Where nothing in the record indicates that a judge, who rendered a judgment on an appeal from the clerk of the superior court, was requested in writing to fix a time for the hearing and to give him notice that it will be heard, it is presumed that the proceeding was rightly and regularly conducted. Ledbetter v. Pinner, 120 N. C. 455, 27 S. E. 123.

May Hear Any Evidence.—Upon an appeal from an order of the clerk, the judge hearing the proceeding may hear any evidence that would have been competent before the former, although in fact not introduced. McDade v. Banister, 63 N. C. 479.

Securities for Partition.—The controversy involved in a special proceeding for the partition of lands, as to whether there shall be an actual partition or a sale for the purpose, is not an issue of fact which should be settled by the clerk of the court, or by the judge on appeal. Ledbetter v. Pinner, 120 N. C. 455, 27 S. E. 123.

Proceedings to Sell Lands.—A proceeding to sell lands to make assets to pay debts of the deceased is appealable from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and the judge may require such additional evidence as he may deem necessary to aid him to a correct conclusion of the matter. Perry v. Perry, 179 N. C. 445, 102 S. E. 722.

Proceedings Dismissed by Clerk.—When clerk of superior court, pursuant to a judgment, dismisses a proceeding for the appointment of a receiver, upon appeal by some of the parties from the decision of the clerk upon the report of commissioners, alleging inequality and unfairness of the allotment—Involves questions of fact, properly determined by the judge, under this section. Ex parte Beckwith, 124 N. C. 111, 32 S. E. 393.

§ 1-276. Judge determines entire controversy; may remit.—Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so. (Rev., s. 614; 1887, c. 276; C. S. 657.)

Cross Reference.—See note under sec. 1-152.

Editor's Note.—By passing this section in 1887, Acts 1887, ch. 276, the legislature considerably widened the power of judges on appeal. This section was enacted to remedy the inconvenience caused by the decision in Brittain v. Mull, 91 N. C. 498. In that case it was held that where the clerk had taken from the clerk the judge should hear the appeal and decide the questions of law present, and then remand the case, excluding his judgment. Because of its beneficial results this section has always received a liberal interpretation. Williams v. Dunn, 158 N. C. 399, 74 S. E. 9.

It was not contemplated by the legislature that by the provisions of this section a party who should be coram non judice before the clerk could take advantage of his own mistake or purposely make it in order to obviate a well grounded objection to the jurisdiction, and secure by its direction what he could not obtain directly. Nash v. Sutton, 109 N. C. 590, 14 S. E. 77.

Entire Controversy.—Under this section, the judge now has jurisdiction of the whole matter in controversy. Liette v. Chappell, 111 N. C. 347, 353, 16 S. E. 171. Faison v. Williams, 121 N. C. 152, 27 S. E. 261, 145 N. C. 254, 58 S. E. 1091; Hall v. Artis, 186 N. C. 105, 188 S. E. 901.

The clerk is but a part of the superior court, and when a proceeding before the clerk in any manner is brought before the judge, it is intended that the jurisdiction is not derivative, but it has jurisdiction to hear and determine all matters in controversy in the proceeding. Perry v. Bassegour, 129 N. C. 388, 15 S. E. (2d) 365. Finley v. Davis, 129 N. C. 599, 20 S. E. 265. See also, Ex parte Cates Bros., 92 N. C. 375; Coates Bros. v. Wilkes, 92 N. C. 375; Byrd v. Nivens, 189 N. C. 621, 127 S. E. 673.

After a motion is made before the clerk, the judge is not required to remand the cause to the clerk for the determination of the motion made before him. Wynne v. Combs, 129 N. C. 135, 45 S. E. 891.

Court May Remand.—The court has the right in its discretion to remand the cause to the clerk for further proceedings. York v. McCall, 160 N. C. 276, 280, 76 S. E. 84.
Appointment of Administrator.—On appeal from the order of a clerk appointing an administrator the Superior Court has jurisdiction whether the case be before the clerk or therefrom has been taken to the superior court, the judge to refuse to hear the controversy on the ground that the proceedings in condemnation to the superior court on issue joined between the parties, and an appeal therewith has been taken to the superior court, the judge thereof acquires jurisdiction for the bearing and determination of the controversy under the provisions of this section, and may order other proper or necessary parties to be made parties for further determination of the cause. Selma v. Nobles, 183 N. C. 77, 17 S. E. 2d 1112.

Question of Price of Land. — The discretion vested in the superior court judge on appeal from the clerk, by this section, to determine the controversy on the judge to pass upon the reasonableness of the price of land subject to the power of sale in a mortgage, wherein the clerk has no authority under § 45-28 to further pass thereon in the absence of an appeal, as in Mortgage Sale of Ware Property, 187 N. C. 693, 122 S. E. 12.

Where a commissioner, appointed to hold a foreclosure sale, advertises and sells the property in conformity with the order, but a sale below the bid is less than the value of the property and recommended by the court and the clerk orders a resale, the judge of the superior court cannot appoint the appeal of one of the trustees from the order of the clerk, has jurisdiction to hear and determine the matter and order a resale at chambers while holding a criminal term of court in the county. Harris v. Hughes, 230 N. C. 299, 155 S. E. 177.

Proceedings to Sell Land. — A proceeding to sell lands to make assets to pay the debts of the deceased is appealable from the clerk of the superior court, and open to review by the judge of the superior court on any ground the judge has jurisdiction to retain the cause, reverse the order of the clerk and appoint other administrators or a receiver to administrate the estate subject to the orders of the court, the entire matter being before the Superior Court on appeal. Wright v. Byrnes, 220 N. C. 209, 211, 158 S. E. 192.

When Judge Cannot Correct Error of Rulings. — Where special partition proceedings were begun before the clerk and he transferred the case to the judge in term, the judge was required to accept those of it on the merits, and had no power to merely reverse the order and send it back to him, though there may have been irregularities in the proceedings before the clerk. Little v. Duncan, 149 N. C. 84, 67 S. E. 771.

Judge May Make Amendments. — The judge has power to make amendments to give effect to his orders in proceedings to partition lands among tenants in common, nor can jurisdiction be conferred on the superior court on appeal, the latter having no concurrent or original jurisdiction. Southern Bank v. Leverette, 187 N. C. 743, 123 S. E. 68; Johnson v. W. & W. & B. R. R. Co., 180 N. C. 577, 184 S. E. 378. Where the clerk of the superior court ernonously heard a proceeding over which he does not have jurisdiction, an appeal to the superior court confers jurisdiction upon it to hear and determine the matter. Bradshaw v. Warren, 216 N. C. 354, 4 S. E. (2d) 881.


Agreement That Judge Shall Hear Appeal. — Where the parties agree that the judge shall hear an appeal in term, he has no authority to refuse to hear and determine the matter and order a resale at chambers while holding a criminal term of court in the county. Cushing v. Styron, 104 N. C. 338, 10 S. E. 258.

Such agreement cures all irregularities. Foreman v. Forrest, 200 N. C. 473, 17 S. E. (2d) 679.

Motion to Reverse Bill of Costs. — When a motion, to reverse a bill of costs in a case which originated before the clerk, is made after the case is made at the term after judgment is entered, it is a nullity where the judge has no power to entertain it. In re Shutt, 214 N. C. 684, 200 S. E. 372.

Provisions of the Code. — Section 1-277. Appeal from superior court judge.—An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law, decided by the judge, under the provisions of this section. In re Reynolds' Estate, 221 N. C. 449, 20 S. E. (2d) 348.

§ 1-277. Appeal from superior court judge.—An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law, decided by the judge, under the provisions of this section. In re Reynolds' Estate, 221 N. C. 449, 20 S. E. (2d) 348.

Thus the clerk of the superior court has erroneously heard a proceeding over which he does not have jurisdiction, an appeal to the superior court confers jurisdiction upon it to hear and determine the matter. Bradshaw v. Warren, 216 N. C. 354, 4 S. E. (2d) 881.

[283]
Ill. Appeal as to Particular Subjects.

§ 1-271. As to power of supreme court on appeal, see §§ 1-297, 7-11. As to appeals in criminal cases, see §§ 15-179 et seq. As to appeals in criminal cases, see §§ 1-297, 7-11. As to appeals in criminal cases, see §§ 1-297, 7-11.

§ 1-272. Exceptions which are the dismissal of the appeal. Exceptions which are the dismissal of the appeal. Exceptions which are the dismissal of the appeal. Exceptions which are the dismissal of the appeal. Exceptions which are the dismissal of the appeal.

§ 1-273. Appeals were no longer prayed for but were taken, Appeals were no longer prayed for but were taken, Appeals were no longer prayed for but were taken, Appeals were no longer prayed for but were taken, Appeals were no longer prayed for but were taken.

§ 1-274. The penalty for failure to comply with these rules is the dismissal of the appeal. The penalty for failure to comply with these rules is the dismissal of the appeal. The penalty for failure to comply with these rules is the dismissal of the appeal.

§ 1-275. Thus, Under the provisions of our state constitution, Article IV, section 8, the Supreme Court is confined on appeal to alleged errors of law or legal inference arising in the conduct of the trial in the superior court. Thus, Under the provisions of our state constitution, Article IV, section 8, the Supreme Court is confined on appeal to alleged errors of law or legal inference arising in the conduct of the trial in the superior court. Thus, Under the provisions of our state constitution, Article IV, section 8, the Supreme Court is confined on appeal to alleged errors of law or legal inference arising in the conduct of the trial in the superior court.

§ 1-276. Although under this section the right of appeal is very broad, the Supreme Court is inclined to think that much of the practice in appealing from orders, at every stage of the case, on objections which the party aggrieved could avail himself of after issue, as well as at the first steps in the proceedings, is dependent upon his observance of the rules regulating appeals. Although under this section the right of appeal is very broad, the Supreme Court is inclined to think that much of the practice in appealing from orders, at every stage of the case, on objections which the party aggrieved could avail himself of after issue, as well as at the first steps in the proceedings, is dependent upon his observance of the rules regulating appeals. Although under this section the right of appeal is very broad, the Supreme Court is inclined to think that much of the practice in appealing from orders, at every stage of the case, on objections which the party aggrieved could avail himself of after issue, as well as at the first steps in the proceedings, is dependent upon his observance of the rules regulating appeals.

§ 1-277. Purpose of Appeal. — "The purpose of an appeal is to submit to the decision of a superior court a cause which has been tried in an inferior tribunal. Its object is to review the whole case and secure a just judgment upon the merits." Rush v. Halcyon Steamboat Co., 67 N. C. 49, 49. Method of Correcting Errors. — Where an adjudication is based on the erroneous application of legal principles the proper remedy to correct the error is by a proceeding in coram nobis or by a proceeding in habeas corpus. Gilbert v. Waccamaw Shingle Co., 147 N. C. 475, 43 S. E. 935; Rawls v. Mayo, 163 N. C. 177, 180, 79 S. E. 298.

§ 1-278. Jurisdiction Properly Acquired. — As appellate jurisdiction is derived from that previously acquired in the court from which the cause is removed, the record must show the possession of that jurisdiction, and that the cause was then properly constituted. Rawls v. Mayo, 163 N. C. 177, 180, 79 S. E. 298.

§ 1-279. Appeals Not Conferred by Consent.—Jurisdiction of an appeal cannot be given by consent of parties. Cary Co. v. Allegood, 121 N. C. 54, 28 S. E. 61; Rodman v. Davis, 33 N. C. 46, 49.

§ 1-280. Appeal as a Matter of Right.—An appeal is not a matter of absolute right; but appellant must comply with the rules and statutes of court as to the time and manner of taking and perfecting the appeal. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337, 338. See supra, sec. C. 239, 11 S. E. 327. For further consideration of what constitutes an appeal, see 1-238 and the notes thereto. Interlocutory Orders.—In order to present the subject of appeals in a logical manner, an appeal will not be taken, as to the effect of the registration of appeals, in proceedings at nisi prius or nisi prius ad modum. It must be noted, however, that these orders are specifically provided for, in appeals after judgment, by section 1-278. As to what constitutes an interlocutory order, see 1-238 and the notes thereto. Ed. N. 359.

§ 1-281. Appeal as a Matter of Right.—An appeal is not a matter of absolute right; but appellant must comply with the rules and statutes of court as to the time and manner of taking and perfecting the appeal. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337, 338. See supra, sec. C. 239, 11 S. E. 327. For further consideration of what constitutes an appeal, see 1-238 and the notes thereto. Interlocutory Orders.—In order to present the subject of appeals in a logical manner, an appeal will not be taken, as to the effect of the registration of appeals, in proceedings at nisi prius or nisi prius ad modum. It must be noted, however, that these orders are specifically provided for, in appeals after judgment, by section 1-278. As to what constitutes an interlocutory order, see 1-238 and the notes thereto. Ed. N. 359.

§ 1-282. Appeal as a Matter of Right.—An appeal is not a matter of absolute right; but appellant must comply with the rules and statutes of court as to the time and manner of taking and perfecting the appeal. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337, 338. See supra, sec. C. 239, 11 S. E. 327. For further consideration of what constitutes an appeal, see 1-238 and the notes thereto. Interlocutory Orders.—In order to present the subject of appeals in a logical manner, an appeal will not be taken, as to the effect of the registration of appeals, in proceedings at nisi prius or nisi prius ad modum. It must be noted, however, that these orders are specifically provided for, in appeals after judgment, by section 1-278. As to what constitutes an interlocutory order, see 1-238 and the notes thereto. Ed. N. 359.

§ 1-283. Appeal as a Matter of Right.—An appeal is not a matter of absolute right; but appellant must comply with the rules and statutes of court as to the time and manner of taking and perfecting the appeal. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337, 338. See supra, sec. C. 239, 11 S. E. 327. For further consideration of what constitutes an appeal, see 1-238 and the notes thereto. Interlocutory Orders.—In order to present the subject of appeals in a logical manner, an appeal will not be taken, as to the effect of the registration of appeals, in proceedings at nisi prius or nisi prius ad modum. It must be noted, however, that these orders are specifically provided for, in appeals after judgment, by section 1-278. As to what constitutes an interlocutory order, see 1-238 and the notes thereto. Ed. N. 359.
tion or seriously impairs some substantial right of the appeal. Martin v. Flippin, 101 N. C. 452, 8 S. E. 345. By specifically alleging error, the party appellee no longer has a right to appeal from an interlocutory order in a specific proceedings. Norfolk & Southern R. Co. v. Warren, 92 N. C. 620.

A party may appeal from an interlocutory order brings up only such order, and no order in the main case can be made. Perry v. Tupper, 71 N. C. 380.

Where a party appeals from an interlocutory order, and proceedings for a final decision upon the matter appealed from, the appeal will be dismissed with costs. Love v. Johnston, 34 N. C. 367.

Defendant's appeal from an order continuing it in custody pending the issuance of a habeas corpus; and he is under the care of the county jail, the defendant is allowed to appeal from the order. G. E. W. & S. R. Co. v. Terrell, 183 N. C. 749, 10 S. E. (2d) 54.

Judgments of Superior Court Final as to Matters of Fact.—The superior court is the court of final jurisdiction and has power to completely determine a controversy properly before it, and its judgment is final as to all matters of fact established in accordance with procedure and is subject to appeal and review only on matters of law. State v. Carolina Scenic Coach Co., 218 N. C. 233, 10 S. E. (2d) 824.

Amendment of Pleading.—A defendant's appeal is premature. Where an order of court allowing amendments to pleadings does not affect a substantial right, an appeal therefrom is fragmentary and premature, and the appeal will be dismissed. Nissen Company v. Nissen, 196 N. C. 808, 153 S. E. 450.

Judicial Nature of Decision.—An appeal lies in all cases from judgment applying the law to the facts found. Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269; Lamm v. Holloman, 176 N. C. 686, 97 S. E. 161.


Where an order of denying a motion to dismiss a special proceeding is premature. After denying such motion, the judge should proceed with the hearing, and the appeal should be from the final decision. Mitchell v. Kilburn, 193 N. C. 494; Hellvold v. Hubbs, 74 N. C. 484; Mitchell v. West, 74 N. C. 485.

Dismissal of Appeal.—A party who loses on the Supreme Court in a controversy involving its decision by second appeal, but the way only is by petition for rehearing. Holland v. Railroad, 143 N. C. 435, 55 S. E. 835; Carter v. White, 134 N. C. 466, 46 S. E. 983.

Relief for Judgment upon Special Verdict.—An order by the trial court, denying defendants' motions for judgment on the special verdict, setting aside the verdict on one issue, and continuing the cause for the trial of such further issue as may be necessary to determine the rights of the parties, with leave to file amended pleadings, is not a final judgment. Thomas v. Carteret, 180 N. C. 109, 104 S. E. 55.

Application for Citizenship.—Under this section an alien may appeal from decree of superior court denying application for citizenship. United States v. Owens, 13 F. (2d) 376. Morgan v. Donald, where one who confesses judgment has no right of appeal from such judgment, and his application for relief was not allowed, and the plaintiff failed to move to dismiss, the Supreme Court may pass by the irregularities and consider the errors. Rush v. Halsey Steamboat Co., 67 N. C. 47.

Decisions of Intermediate Courts.—An appeal lies from the dismissal of an action, or of an appeal from justice court; but the trial court's denial of motion for judgment upon special verdict should be noted, and an appeal lies from the final judgment. Bargain House v. Jefferson, 180 N. C. 32, 103 S. E. 922.

Decisions and Orders Favorable to Appellant.—See post, this note, "Estoppel to Allege Error," II, D.

Matters in Discretion of the Trial Court.—The discretion of the trial court will not be reviewed, unless it appears that such discretion was abused or that the ruling was based upon a matter of law. Fayetteville Light, etc., Co. v. Lessem Co., 174 N. C. 358, 93 S. E. 836; Gordon v. Fintech Gas Co., 178 N. C. 435, 100 S. E. 878. See 5 N. C. Law Rev. 14.

Appeals to the Supreme Court.—An appeal applies only to "matters of law or legal inference," and not to the order of dismissing an action. Jenkins v. N. C. Ore Dressing Co., 65 N. C. 531.

II, in the trial court, the verdict of the jury is, in the opinion of the judge, not supported by the evidence, he has a discretion to reverse the verdict, which discretion cannot be reviewed in an appellate court. Watts v. Bell, 71 N. C. 405.

When a question on which an order is based is made as a matter of right and is not addressed to the court's discretion, upon its denial the movent may appeal to the supreme court and have his motion decided there on its merits. Eastern Carolina Coast Line R. Co., 221 N. C. 292, 296, 20 S. E. (2d) 299.

Appeals from Subsidiary Proceedings.—Where, after the rendition of an injunction from which an appeal is taken, it appears that the injunction has been complied with, and judgment rendered against appellant, the appeal will be dismissed. Pritchard v. Baxter, 108 N. C. 129, 12 S. E. 396.

Detached Rulings.—The supreme Court will not entertain appeals from detached rulings upon some of the matters in dispute; but all matters necessary to a disposition of the case should be passed on and settled in a single trial, and the whole case brought up on appeal. Arrington v. Arrington, 91 N. C. 301.

Removal of Public Officer.—An appeal from proceedings in superior court to remove a public officer for willful misconduct or maladministration is allowed by this section. State v. Hamme, 180 N. C. 684, 104 S. E. 174.

C. What Supreme Court Will Consider.

See post, this note, "Presumption on Appeal—Burden of Proof," II, E.

Record Discloses no Error.—Where the record discloses no error of law or legal inference made upon the trial, the Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. Rawls v. Jefferson, 179 N. C. 428, 137 S. E. 379.

Exception Not Considered by Trial Court.—An exception which the trial court, through inadvertence, did not consider, can not be reviewed on appeal, but the case will be considered the same as if the exception had been passed on. Sorens v. Stevenson, 100 N. C. 354, 6 S. E. 11.

Points Reviewed Must Have Been Passed on.—In case of an appeal, from the probate court to the judge, if there be further exceptions, the latter tribunal can review no points before the probate court that was not passed upon by the judge. Rowland v. Thompson, 64 N. C. 714.

Error Not Based on Exceptions.—An assignment of error not based on any exception in the record can not be considered. Morse v. Freeman, 137 N. C. 385, 72 S. E. 1056; Thompson v. Seaboard, etc., R. Co., 147 N. C. 412, 61 S. E. 269.

Will Not Go Behind Judge's Finding of Fact.—A finding by the trial judge as a fact that plaintiff moved to set aside a judgment as a matter of fact, and that his probable neglect prevents supreme court from considering any other ground. Shepherd v. Shepherd, 180 N. C. 494, 105 S. E. 4.

Questions Decisive of Appeal.—The supreme court will not consider unless it appears to matter of fact. The Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. Rawls v. Jefferson, 179 N. C. 428, 137 S. E. 379.

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Appellate Court.—Supreme Court, state of New York, 182 N. C. 435, 10 S. E. 371.

Questions Which May Not Arise on New Trial.—Where a new trial must be granted for certain reasons, questions in controversy are not the subject of appeal. The Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. Smith v. Johnson, 65 S. E. 269.

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"Error alone is not sufficient to reverse, but there must be harm to the party who excepts, by reason thereof; not that he must affirmatively show injury, but if it appears that there is error, judgment for plaintiff in action of assumpsit, Carter v. Seaboard, etc., R. Co., 165 N. C. 244, 249, 81 S. E. 321.

Errors Not Affecting Result.—The finding for defendant upon issue renders harmless any error in regard to the matter which formed the ground for plaintiff's appeal. Vickers v. Leigh, 104 N. C. 248, 10 S. E. 308; Perry v. Insurance Co., 137 N. C. 402, 49 S. E. 889.

Error to be Prejudicial.—Where the trial of a cause is not sufficient grounds for reversal but it should be made to appear that the ruling was material and prejudicial to appellant's rights. Shaw Cotton Mills v. Acme Hosiery Mfg. Co., 180 N. C. 293, 127 S. E. 246; Equitable Life Assur. Soc., 170 N. C. 430, 78 S. E. 222.

Trivial Errors.— Courts do not lightly grant reversals or set aside verdicts, and a motion for such to be meritorious should be made manifestly without prejudice. Rierson v. Carolina Steel, etc., Co., 184 N. C. 363, 114 S. E. 467.

Technical Errors.—Verdicts and judgments will not be set aside for errors of form, though such errors may be prejudicial. Where the trial was a long drawn out and vigorous contest. On appeal, where the testimony objected to was stricken on the record, the portion of a charge on an issue which was immaterial under the controlling instructions, and which were expressly confined to other issues than the one involved in an appeal not properly before it where the matter in issue was whether the ruling was material and prejudicial to the appellant's rights. Carter v. Seaboard, etc., R. Co., 165 N. C. 244, 249, 81 S. E. 321.

Error Cured by Withdrawal.—An exception has no point on appeal, where the testimony objected to was stricken on the appellant's motion. In re Will of Staub, 172 N. C. 138, 90 S. E. 119; Raulf v. Elizabeth City Light, etc., Co., 176 N. C. 696, 197 S. E. 97.

Error Not Involved on Appeal.—Any error in instructions, which were expressly confined to other issues than the one involved on appeal, is harmless. In re Rawlings' Will, 179 N. C. 270, 158 S. E. 566.

Opinion in Case Not Properly Before Court.—The supreme court will sometimes express its opinion on a question involved in an appeal not properly before it where the matter in issue was whether the ruling was material and prejudicial to the appellant's rights. Carter v. Seaboard, etc., R. Co., 165 N. C. 244, 249, 81 S. E. 321.

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Error Not Involved on Appeal.—Any error in instructions, which were expressly confined to other issues than the one involved on appeal, is harmless. In re Rawlings' Will, 179 N. C. 270, 158 S. E. 566.

Premature Appeal.—The supreme court will not entertain premature or fragmentary appeals. Thomas v. Carteret, etc., 182 N. C. 725, 109 S. E. 833; Joyner v. Reflector Co., 176 N. C. 274, 97 S. E. 44. 45.


Fragmentary appeals will not be entertained when no substantial right is put in jeopardy by such refusal. Brown v. McWhinck, 126 N. C. 588, 36 S. E. 420.

Where no final judgment was given, nor was there any interlocutory order or determination that put an end to the proceeding, or that could destroy or seriously impair some substantial right of the party appealed from, the appeal will be delayed until the final judgment, an appeal will not lie. Fragmentary appeals are not allowed. Leak v. Covington, 95 N. C. 193, and cases there cited; Martin v. Flippen, 111 N. C. 552, 47 S. E. 145.

When Appeal Is Premature.—Where the pleadings present issues of fact that have not been tried below, an appeal is premature. Goode v. Rogers, 120 N. C. 63, 35 S. E. 185.

Though exceptions are noted, an appeal before a final judgment is rendered is premature, and will be dismissed. Graded School Trustees v. Hinton, 156 N. C. 586, 71 S. E. 1067.

Same.—Effect of Dismissal.—Though an appeal is dismissed as premature, its entry is equivalent to "noting an exception." Gray v. James, 117 N. C. 139, 60 S. E. 906; Alexander v. Allene, 122 N. C. 421, 38 S. E. 121; Kerr v. Hicks, 154 N. C. 265, 70 S. E. 468; Bernard v. Shenwell, 139 N. C. 446, 52 S. E. 64.

Fictitious Action.—The supreme court will not hear an appeal in fictitious actions. Cameron v. Cameron, 170 N. C. 432, 35 S. E. 771.

Admission Rendering Question Academic.—That in a reference election, to amend city charter pursuant to a legislative enactment, no booth was provided, etc., becomes irrelevant and improvident through a decision of the court, which was given by the trial court at his request. Washburn v. Greensboro, 173 N. C. 423, 98 S. E. 771.

Case Not before Appellate Court.—An agreement that an appeal becomes irrelevant and improvident through a decision of the material questions in another appeal taken in the same case, it will be dismissed. Page v. Page, 167 N. C. 350, 83 S. E. 627; Cannon v. Commissioners, 170 N. C. 677, 87 S. E. 31.

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D. Estoppel to Allegé Error. In General.—A defendant cannot ask that a party be brought in, and when it is so ordered object because he is surprised. Armstrong Co. v. Saleeby, 178 N. C. 298, 180 S. E. 611.

A party to an action cannot except to an instruction which was given by the trial court at his request. Washington Horse Exch. Co. v. Bonner, 180 N. C. 20, 103 S. E. 907; Bell v. Harrison, 179 N. C. 190, 102 S. E. 200.

The defendant cannot object on appeal to evidence to the same effect as that elicited by his cross-examination of the witness Jenkins v. Long, 170 N. C. 269, 87 S. E. 47.

Prevailing Parties.—A plaintiff has no right to appeal or bring error from a judgment in his own favor, particularly if he is not injured by it. Hoxe v. Carter, 34 N. C. 372; Lacy v. McFarland, 33 N. C. 265.

If a judgment is only partly in favor of a party, or is less favorable than he thinks it should be, he may appeal to the court which gave it judgment, as a favorable verdict and judgment on a new trial; but where the judgment is entirely in his favor, so that he does not desire a new trial his appeal must be dismissed. McCulloch v. North Carolina, etc., Co., 176 N. C. 256, 45 S. E. 657.


Favorable Instructions.—A party can not complain of
CH. 1. CIVIL PROCEDURE—APPEAL

A. Costs.

As to costs on appeal, see §§ 6-23 et seq., and the notes thereon.

B. Demurrer.

Demurrer to Whole Cause.—An appeal lies from an order sustaining or overruling a demurrer to a whole cause of action or defense. Shelby v. Charlotte Elect. R., etc., Co., 147 N. C. 537, 118 S. E. 770; Fender v. Magens, 122 N. C. 163, 50 S. E. 324; Abbott v. Hancock, 123 N. C. 89, 51 S. E. 374.

Demurrer Sustained but No Verdict Rendered.—The supreme court will not entertain an appeal from an order sustaining a demurrer to a counterclaim where no verdict or judgment was rendered. Teal v. Liles, 138 N. C. 678, 111 S. E. 617; Bazemore v. Bridges, 105 N. C. 191, 10 S. E. 888.

Overruling Demurrer.—On an overruling of its demurrer a party may be declared entitled to appeal, unless the demurrer has been held frivolous. Joyner v. Champion Fibre Co., 178 N. C. 634, 101 S. E. 372.

An appeal lies to the Supreme Court from an order below overruling a demurrer. Commissioners v. Maggin, 78 N. C. 181.

An order overruling demurrer to part of answer with leave to reply is not a final order and an appeal therefrom will be dismissed. Charlotte v. Seaboard Air Line R. Co., 172 N. C. 555, 90 S. E. 590.

Court, on appeal having considered those grounds of demurrer to complaint which may finally dispose of action, will not review the overruling of demurrer to allegation embracing only part of cause of action, and which, if sustained, will not dismiss it. Headman v. Board, 177 N. C. 261, 98 S. E. 770.

Refusal to Hold Demurrer or Answer Frivolous.—The refusal to hold a demurrer or answer frivolous, and to render judgment thereon is not appealable. Walters v. Weeks, 118 N. C. 842, 24 S. E. 713; Morgan v. Harris, 141 N. C. 358, 50 S. E. 381.

Withdrawal of Matter Demurred to.—An appeal cannot be taken from a refusal of the court to proceed on the action on the demurrer, after the withdrawal of the subject-matter to which it relates and the consequent order of continuance. Gay v. Brookshire, 82 N. C. 499, 411.

C. Granting or Denying New Trial.

In General.—An appeal from an order granting or refusing a new trial, originating from some order or judgment involving a matter of law or legal inference; that is, the order or judgment must be one that involves the question, whether or not the defendant's claim is entitled to a new trial as of right, and as a matter of law. Braid v. Lukins, 95 N. C. 123.

An application for a new trial, except for error of law in its conduct, is addressed solely to the discretion of the presiding judge, whose decision is not reviewable on appeal.
Carson v. Dellingler, 90 N. C. 226; Thomas v. Myers, 87 N. C. 446.

The Supreme Court has jurisdiction to review, upon appeal, the decision of the court below, granting or refusing to grant, a new trial, where a matter of law or legal inference is involved.

Johnson v. Bell, 74 N. C. 355.

Setting Aside Verdict and Granting New Trial.—The determination of a motion to set aside the verdict and grant a new trial is a matter within the sound discretion of the trial judge. Where there is no abuse of discretion, the court will not set aside a verdict. Coats v. Norris, 180 N. C. 77, 104 S. E. 71; Harrill v. Seaboard Air Line R. Co., 181 N. C. 315, 107 S. E. 136.

An order setting aside the award of damages as excessive is premature. Grove v. Baker, 174 N. C. 745, 94 S. E. 128.

Contents of Record when New Trial Granted or Refused. — To give parties the benefit of the provision of this section allowing an appeal from an order granting or refusing a new trial, it must be proved the order is one determined as to matters inducing the order, so that the appellate court can see whether the order presents a matter of law which is a subject of review, or matter of discretion which is not.


D. Injunction.

Order Refusing Injunction.—A plaintiff may appeal from a decision of a judge at chambers refusing an injunction. First National Bank v. Jenkins, 64 N. C. 719.

Interlocutory Injunction. — An appeal from an injunction pendente lite against counting and certifying the result of a special election granted on the ground that women, infants, and nonresidents, though freeholders, were not counted in determining the necessary number of the signers, is a subject of review, and not for fragmentary and premature. Gill v. Board, 160 N. C. 176, 76 S. E. 293.

Order Continuing Injunction.—Overruling a motion to dismiss is not ordinarily an appealable order, as no substantial right of the litigant is thereby affected. But, when an injunction has been issued, an order continuing the same affects a substantial right, and an appeal may be taken from an order entered on a motion to dismiss. Warlick v. Reynolds & Co., 131 N. C. 636, 66 S. E. 657.

Finding of Fact Reviewable in Injunction Cases. — While the Supreme Court may review findings of fact in an action for injunction, it will not disturb the findings of the trial court, unless it is seen that the court has not set forth the facts from which it deduced the conclusion. As to the correctness of a ruling delivering a restraining order will not be considered on appeal, when it is made to appear that the order is properly granted. Munick v. Durham, 181 N. C. 188, 106 S. E. 665; Allen v. Gardner, 182 N. C. 425, 109 S. E. 260.

overruling a demurrer to complaint for injunction. — An appeal taken from a judgment overruling demurrers to the complaint and allowing defendants to answer for the purposes of a motion to restrain one of defendants from suing plaintiff in the federal court, remains in the court below, and he must obtain relief there and not by appeal. Worth v. Knickerbocker Trust Co., 152 N. C. 242, 67 S. E. 590.

Seeking to Restrain Act Already Committed.—The correctness of a ruling dissolving a restraining order will not be considered on appeal, when it is made to appear that the order sought to be restrained has been committed. Kilpatrick v. Monument Co., 166 N. C. 211, 81 S. E. 170; Wallace v. North Wilkesboro, 151 N. C. 614, 66 S. E. 657; Galloway v. Board, 184 N. C. 245, 114 S. E. 165.

E. Nonsuit.

In General. — If, as a matter of law, plaintiff was not entitled to a verdict, he could not take a voluntary nonsuit, and the judgment taken must be reversed. But whether the nonsuit was voluntary or not is not an issue under consideration.


An appeal will lie from the judgment of the superior court reverting the clerk's order permitting the plaintiff to take a voluntary nonsuit. kaldew v. kaldew, 189 N. C. 385, 128 S. E. 327; Goldsboro v. Holmes, 183 N. C. 203, 111 S. E. 1.

An appeal cannot be taken from a nonsuit to test an adverse ruling of the judge, leaving issuable matter pending. Girouard v. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337.

Where Court Intimates Opinion. — Where the court on the trial intimates an opinion that such action should not be taken by defendant, he may take a judgment of nonsuit and appeal; and the appeal will not be dismissed on the ground that plaintiff voluntarily took a nonsuit. Morton v. Blades Lumber Co., 144 N. C. 416, 56 S. E. 511; Wharton v. Missioners, 82 N. C. 12; hirdred v. Pratt, 94 N. C. 101, 103; Midgett v. Manufacturing Co., 140 N. C. 361, 364, 53 S. E. 174.

A plaintiff may, in deference to an intimation from the court that he can not maintain his action, submit to a nonsuit and have the questions of law reviewed upon appeal. hirdred v. Pratt, 94 N. C. 101; Warner v. Western, etc. R. Co., 220.

Where court intimated that he would charge jury that certain deed did not convey land described in complaint, which was vital to plaintiff's recovery, plaintiff had the right to take the jury and appeal. Quech v. Futch, 172 N. C. 316, 90 S. E. 299.

But where the court intimated that the complaint stated a cause of action for rescission, and when rescission was not for the purpose of removing plaintiff, judgment was not appealable by defendant. Farr v. Babcock Lumber Co., 182 N. C. 425, 109 S. E. 260.

Construction of Evidence in Nonsuit Cases. — Where the Supreme Court passes on a motion to nonsuit, the plaintiff is entitled to have the evidence considered as true and correct, and on appeal is entitled to review its sufficiency most favorably for him, and he must also have the benefit of every inference that may reasonably be drawn therefrom. Munick v. Durham, 181 N. C. 188, 106 S. E. 665; Allen v. Gardner, 182 N. C. 425, 109 S. E. 260.

The court is not limited to a consideration of the evidence of defendant, but must examine all the evidence. Ridge v. Norfolk Southern R. Co., 167 N. C. 510, 83 S. E. 762.

F. Order of Reference and Referee's Report.

As to reference generally, see §§ 1-188 et seq., and the notes thereon.

Motion to Refer. — Where the answer in a proceeding to compel an accounting did not constitute a valid plea in bar, the denial of a motion to refer on the ground that such answer did not set up a valid plea in bar affected a substantial right, and was appealable. Jones v. Sugg, 136 N. C. 143, 48 S. E. 575.

Appointing Referee. — An appeal from a judgment adjudging plaintiff entitled to recover damages and appointing a referee to hear evidence as to the amount. Richardson v. Allen, 140 N. C. 416, 53 S. E. 657.

An appeal will not lie from an interlocutory judgment adjudging plaintiff entitled to recover damages and appointing a referee to hear evidence as to the amount. Richardson v. Allen, 140 N. C. 416, 53 S. E. 657.

Relating to Reference of Cause. — Where the court ordered a reference to take an account of partnership receipts and expenses, an appeal from such order before judgment on the account was premature. Leroy v. Saliba, 182 N. C. 757, 108 S. E. 333.

Plea in Bar. — When there is a plea in bar, a party to the action may except to an order of reference made by the trial judge and appeal at once, or wait until there is a final judgment on the reference appeal. Butcher v. Greensboro Supply Co., 153 N. C. 65, 69 S. E. 416.

An appeal lies from a judgment sustaining or overruling a plea in bar, and no reference should be ordered until the party pre empting the right to reference determined the same. Royster v. Wright, 152, 24 S. E. 746; Jones v. Beaman, 117 N. C. 239, 23 S. E. 248. Where a matter pleaded in bar is an estoppel was dis considered, other matters v. Ritterberger, 165 N. C. 269.


Submitting Issue on Plea in Bar. — An action on the part of the court submitting to the jury an issue on a plea in bar before ordering a reference decides no substantial right.
Interlocutory orders reviewed on appeal—Appeal by serving notice—Within the time prescribed in § 1-279, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which is sufficient to charge the appellee with notice, he having failed to designate a person to receive notices in the case. Brantley v. Jordan, 90 N. C. 25.

Appellee Entitled to Notice.—In all cases the appellee is entitled to notice of an appeal as provided by statute. Marler-Dalton-Gilmer Co. v. Farmers Bank, 115 N. C. 650, 72 S. E. 632. Brantley v. Jordan, 90 N. C. 25.

No Presumption of Notice.—Notice must be given in case of appeal; it will not be presumed, merely because the appellee was sufficiently charged with notice, he having failed to designate a person to receive notices in the case. Campbell v. Allison, 63 N. C. 568; Bryan v. Hubbs, 69 N. C. 423; Applewhite v. Fort, 85 N. C. 596; Brantley v. Jordan, 90 N. C. 25.

Record Must Show Notice.—The appeal will be dismissed, where the record does not show service of notice of appeal. Houston v. Iumber Co., 136 N. C. 135.

When Record Need Not Show Notice.—The record need not show service of notice of appeal, where the findings of fact and the judgment thereon, constituting the case on appeal, state that appeal was taken. Delozier v. Bird, 123 N. C. 659, 31 S. E. 834.


$ 1-280. Entry and notice of appeal.—Within the time prescribed in § 1-279, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which is sufficient to charge the appellee with notice, he having failed to designate a person to receive notices in the case. Brantley v. Jordan, 90 N. C. 25.

Appellee Entitled to Notice.—In all cases the appellee is entitled to notice of an appeal as provided by statute. Marler-Dalton-Gilmer Co. v. Farmers Bank, 115 N. C. 650, 72 S. E. 632. Brantley v. Jordan, 90 N. C. 25.

No Presumption of Notice.—Notice must be given in case of appeal; it will not be presumed, merely because the appellee was sufficiently charged with notice, he having failed to designate a person to receive notices in the case. Campbell v. Allison, 63 N. C. 568; Bryan v. Hubbs, 69 N. C. 423; Applewhite v. Fort, 85 N. C. 596; Brantley v. Jordan, 90 N. C. 25.

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When Record Need Not Show Notice.—The record need not show service of notice of appeal, where the findings of fact and the judgment thereon, constituting the case on appeal state that appeal was taken. Delozier v. Bird, 123 N. C. 659, 31 S. E. 834.


$ 1-280. Entry and notice of appeal.—Within the time prescribed in § 1-279, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which is sufficient to charge the appellee with notice, he having failed to designate a person to receive notices in the case. Brantley v. Jordan, 90 N. C. 25.

Appellee Entitled to Notice.—In all cases the appellee is entitled to notice of an appeal as provided by statute. Marler-Dalton-Gilmer Co. v. Farmers Bank, 115 N. C. 650, 72 S. E. 632. Brantley v. Jordan, 90 N. C. 25.

No Presumption of Notice.—Notice must be given in case of appeal; it will not be presumed, merely because the appellee was sufficiently charged with notice, he having failed to designate a person to receive notices in the case. Campbell v. Allison, 63 N. C. 568; Bryan v. Hubbs, 69 N. C. 423; Applewhite v. Fort, 85 N. C. 596; Brantley v. Jordan, 90 N. C. 25.

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given, and the other denies such statement. Pipkin v. Mc-
Artan. 122 N. C. 194, 29 S. E. 334.
A statement in the case on appeal, that notice of appeal was
waived, can not be contradicted for the first time on
argument in the appellate court. Atkinson v. Asheville St.
R. Co., 113 N. C. 581, 18 S. E. 254.
Notice as a Waiver of Objection.—The fact that a notice
of appeal was taken, at the expiration of the term at which
judgment was rendered, stated only that the appeal was
"on account of the erroneous rulings of the judge on motion
for a new trial," did not constitute a waiver of an exception
to the judgment. Ferrell v. Thompson, 107 N. C. 430, 12 S.
E. 109.
Entry of Appeal Not Absolutely Necessary.—That an ap-
peal was not entered of record as required, where the fact of the appeal having been taken was not
 denied, and notice had been served. Barden v. Stickney,
130 N. C. 62, 40 S. E. 842.
The record need not show that an appeal was duly en-
tered, when it affirmatively appears from the case on appeal,
which bears date within the time within which an appeal
could be taken, that the appeal was taken, and notice thereof
waived. Atkinson v. Asheville St. R. Co., 111 N. C. 581, 18
S. E. 254.
Effect of Failure to Enter.—Failure of the clerk to enter
the appeal is not ground for dismissal. Simmons v. Allison,
490, 8 S. E. 338. But see Moore v. Vanderbilt, 90 N. C. 10
and Bryan v. Hubbis, 69 N. C. 422.
Cited in Seaboard Air Line R. Co. v. Brunswick County,
198 N. C. 540, 152 S. E. 627.
§ 1-281. Appeals from judgments not in term
time.—When appeals are taken from judgments of the clerk or judge not made in term time, the
clerk is authorized to make an and all necessary orders for the perfecting of such appeals. (Ex.
Sess. 1921, c. 92, s. 19a; C. S. 642(a).)
§ 1-282. Case on appeal; statement, service, and
return.—The appellant shall cause to be prepared
a concise statement of the case, embodying the
articles numbered, the errors alleged. A copy of
within fifteen days from the entry of the appeal
this statement shall be served on the respondent
or specific amendments indorsed or attached; if
respondent shall return the copy with his approval
the case be approved by the respondent, it shall
become the case and a
notice thereof.
A statement in the case on appeal, that notice of appeal was
waived, can not be contradicted for the first time on
argument in the appellate court. Atkinson v. Asheville St.
R. Co., 113 N. C. 581, 18 S. E. 254.
Strict Observance Required.—The statutory requirements
as to making up cases on appeal to the Supreme Court and
docketing them are conditions precedent which must be
complied with, or the appeal will be dismissed. Lindsey v. Knott,
191 N. C. 514, 133 S. E. 800.
Record Imports Verity.—The record on appeal imports
verity and the Supreme Court is bound thereby. State v.
Brown, 207 N. C. 156, 176 S. E. 260; Abernethy v. Burns,
210 N. C. 636, 188 S. E. 97; State v. Swiuster, 211 N. C.
278, 193 S. E. 868.
Distinction between Record and Case on Appeal.— The
record on appeal consists of the "record proper," i. e.,
by the respondent or appellee, it becomes the case and a
part of the record on appeal, and in connection with the
for the proper presentation of exceptions. (Rev., s. 591; Code, s. 550; C.
§ 1-205; 1905, c. 156, s. 260. Abernethy v. Burns,
210 N. C. 636, 188 S. E. 97; State v. Swiuster, 211 N. C.
278, 193 S. E. 868.
No Presumption of Regularity.—An appeal being now the act of the appellant alone, no presumption of regularity arises because of its having been taken during a term of the Court from which it comes. Campbell v. Allison, 61 N. C.
509.
Necessity for Taking Appeal.—An appeal will be dismissed
if the record fails to show affirmatively that an appeal was
taken. Randleman Mfg. Co. v. Simmons, 97 N. C. 89, 1 S. E.
When Grouping of Exceptions Unnecessary.—Where exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the
appellee to affirm will be denied, if the error intended to be
also provided in the document. The text continues with a discussion of the necessity of
appeals, the role of the Clerk and the judge in the appeals process, and the
requirements for preparing
a proper case on appeal. The text also mentions the Supreme Court's
role in the appeals process, including its
strict observance of the statutory requirements and the
importance of the record's verity.

I. EDITOR'S NOTE.
Prior to the adoption of the Reformed Procedure in 1868, all cases on appeal were settled by the judges, whose prac-
tice was to perform this duty before leaving the court at which the case was tried. It was thought that their duty in this respect might be lighter by changing the statute, so as to terminate the appeal on counsel to agree upon settlement of
the case on appeal and to call in the aid of the judge only where counsel failed to agree. The time originally allowed for this was five days for the case on appeal and three days for the appellee to serve a counter
case. This was lengthened from time to time until in this section it is now fifteen days to serve case on appeal and ten
days to serve a counter case, except where the parties con-
sent to extend the time. The result has not been beneficial. There has been an increasing tendency to postpone and put
off the settlement of cases on appeal by lengthening the
time in which to serve a case on appeal and counter case. The
portion of the section which permitted the judges to extend
the time even when counsel do not agree. But the Supreme Court has never changed its rule, of which it is sole judge,
that in an instance when the case on appeal is not
docketed in the time required, at the term, the appellant
must docket the record proper and ask for a certiorari. Whenever this is not done, the case is treated as if the next
following term will be dismissed. See State v. Johnson, 183 N. C. 730, 110 S. E. 782.
This section and Supreme Court Rule 19(3) require the assignment of errors relating to the trial and inserted in the case on appeal or record, preferably at the end.
Formerly when two or more appeals were taken in the same case separate transcripts were required but the Sup-
reme Court has now adopted Rules at this changed to the
one transcript is required but it shall contain separate
statements of the cases on appeal. See Supreme Court Rule
19 (2).
II. GENERAL CONSIDERATIONS—COUNTER-
Case.
Strict Observance Required.—The statutory requirements
as to making up cases on appeal to the Supreme Court and
docketing them are conditions precedent which must be
complied with, or the appeal will be dismissed. Lindsey v. Knott,
191 N. C. 514, 133 S. E. 800.
Record Imports Verity.—The record on appeal imports
verity and the Supreme Court is bound thereby. State v.
Brown, 207 N. C. 156, 176 S. E. 260; Abernethy v. Burns,
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record on appeal consists of the "record proper," i. e.,
by the respondent or appellee, it becomes the case and a
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for the proper presentation of exceptions. (Rev., s. 591; Code, s. 550; C.
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appellee to affirm will be denied, if the error intended to be
§ 1-282
CH. 1. CIVIL PROCEDURE—APPEAL
§ 1-282


Same—Appeal from Judgment.—An appeal from a judgment of a district court, based on an order granting or refusing an injunction, no case on appeal is necessary, as the pleadings and affidavits constitute the record proper. Wallace v. Salisbury, 147 N. C. 58, 60 S. E. 282, 155 S. E. 519.


Same—Grant of Injunction.—On appeal from an order granting or refusing an injunction, no case on appeal is necessary, as the pleadings and affidavits constitute the record proper. Wallace v. Salisbury, 147 N. C. 58, 60 S. E. 282, 155 S. E. 519.

Same—Order of Reference.—It is not necessary to make a statement of the case on appeal from an order of reference, where the appeal itself and the exception noted in the record sufficiently raises the question of the validity of the order. Duckworth v. Duckworth, 144 N. C. 630, 57 S. E. 395; Cape Fear, etc., R. Co. v. Stewart, 132 N. C. 248, 43 S. E. 638.

Same—Appeal from Judgment.—An appeal from a judgment of a district court, based on an order granting or refusing an injunction, no case on appeal is necessary, as the pleadings and affidavits constitute the record proper. Wallace v. Salisbury, 147 N. C. 58, 60 S. E. 282, 155 S. E. 519.

Appeal from Construction of Will.—On an appeal involving the construction of a will in which it is essential, for a determination, to know whether or not a certain person died without issue, a statement in the case made up by counsel, that “plaintiffs claim that he died without issue,” is not sufficient. Arnold v. Hardy, 131 N. C. 113, 42 S. E. 553.

Rule as to Case on Appeal.—Where the exceptions to appellant's case on appeal are served within the required time, appellant can not complain that the statement of his case on appeal was not returned to him by appellee within the required time. Stevens v. Smathers, 123 N. C. 497, 31 S. E. 721.

Appeal May Be Based on Case Made.—Appellant may appeal to the Supreme Court from the action of the clerk in making full assignments of error. McMahan v. Southern R. Co., 203 N. C. 803, 167 S. E. 5.

Appellee May Make Specific Objections.—Upon the appeal of the Supreme Court from the action of the clerk in making full assignments of error, it is a sufficient compliance with the section. Horne v. Byerly, 115 N. C. 187, 20 S. E. 452; McDaniel v. Scurlock, 115 N. C. 295, 20 S. E. 451.

Effect of Failure to Serve Countercase.—Where the appellant's case on appeal is not properly constituted; and this, with the sum- mons, pleadings, verdict and judgment and the case on appeal, setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. Sigman v. Southern R. Co., 135 N. C. 181, 47 S. E. 420.

Rule as to Case on Appeal.—Where the exceptions to appellant's case on appeal are not a concise statement of the case on appeal, the case on appeal is not properly constituted. Brewer v. Mineola Mfg., 108 N. C. 69, 12 S. E. 836.

Testimony Should Be in Narrative Form.—Testimony reported by the stenographer should be transmitted to this Court as part of the record, for the presentation of the evidence and the correction of the record. State v. Nelson, 157 N. C. 444, 73 S. E. 192. Although case on appeal was not a concise statement of the case it was held that the appeal would be allowed as a mis- take was shown by the counsel of justice. Messick v. Hickory, 211 N. C. 531, 191 S. E. 43.

Necessity of Setting Forth Evidence Excluded.—A judgment of the lower court, based on an order granting or refusing an injunction, no case on appeal is necessary, as the pleadings and affidavits constitute the record proper. Wallace v. Salisbury, 147 N. C. 58, 60 S. E. 282, 155 S. E. 519.

EXCEPTIONS. See Supreme Court Rule 19(1) and (3), 24.

Concise Statement of Case.—One of the essential requisites of an appeal from a judgment of the Supreme Court is that a "concise statement of the case" shall be made, and that it shall be served within the required time, nor any countercase served, it stands as the case is properly constituted; and this, with the sum- mons, pleadings, verdict and judgment and the case on appeal, setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. Sigma v. Southern R. Co., 135 N. C. 181, 47 S. E. 420.

Appellant's case on appeal is not a concise statement of the case it was held that the appeal would be allowed as a mis- take was shown by the counsel of justice. Messick v. Hickory, 211 N. C. 531, 191 S. E. 43.

Necessity of Setting Forth Evidence Excluded.—The judgment should not be reversed because of the exclusion of evidence, where such evidence is not set out in the record. See State v. City Lumber Co. v. Childress, 167 N. C. 34, 83 S. E. 22.

The exclusion of evidence cannot be reviewed where the record does not disclose what the witness would have testi-
§ 1-222
CH. 1. CIVIL PROCEDURE—APPEAL § 1-282

fied to, or what was proposed to be proven. In re Will of Scott, 19 N. C. 791, 7 S. E. 92.

Omission of Matter Not Pertinent to Issue.—Matter not pertinent to the points raised should be omitted. Hiton v. McDowell, 87 N. C. 364; Sampson v. Atlantic, etc., R. Co., 70 N. C. 739.

Exhibits Should Accompany Case.—Where deeds, records etc., are referred to, and make a necessary part of the case transmitted to the supreme court, it is the duty of the appellant to accompany the case. Waugh v. Andrews, 24 N. C. 75.

Surveys.—In an action for the diversion of surface water by the construction of a railway, surveys of the locality, made or obtained subsequent to the court's order, must accompany the record on appeal, or showing be made by appellant that he was prevented by the court or the opposite party from so doing. Walker v. Wilmington, etc., R. Co., 117 N. C. 614, 23 S. E. 437.

Exhibits.—Case Must Show Exceptions.—If the case on appeal does not show that exceptions were taken to the rulings of the court, the record on appeal will not show the same on appeal. Power v. Wilmington, 177 N. C. 361, 99 S. E. 804.

The presentation of matters for the first time in the assignments of error on appeal is too late. Bloxham v. Scott, 223 N. C. 377, 26 S. E. 1013.

Assignments of error must be based upon exceptions duly taken in apt time during the trial and preserved as required by this section and the rules of the supreme court. State v. Campbell, 184 N. C. 765, 114 S. E. 927.

Same.—Broadside Exceptions.—As a general rule a broadside exception to the judge's charge is inadmissible. In favorom vitae, in a capital case, the attorney-general will receive an assignment of error but will not consider broadside exceptions, nunc pro tunc. State v. Kinsauls, 120 N. C. 1055, 36 S. E. 31.

An "unpointed" broadside exception to the court's instructions to the jury will not be considered. Exceptions to the charge of the court in general terms, not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous, cannot be considered by an appellate court. Clay v. Carolina, etc., R. Co., 173 S. E. 303; Arnold v. State Bank, etc., Co., 218 N. C. 433, 11 S. E. (2d) 241.

Same.—Must Point Out Error.—The Supreme Court will not consider exceptions, unless they point out in specific terms, by reasonable implication, the error intended to be reviewed. Singer Mfg. Co. v. Barrett, 95 N. C. 36.

What Need Not Be Set Out.—The Court will not consider any exceptions not set out in the "case on appeal," other than to the jurisdiction or because complaint does not state a cause of action, or to the sufficiency of an indictment. Walker v. Scott, 106 N. C. 56, 11 S. E. 364; Taylor v. Plummer, 105 N. C. 56, 11 S. E. 266.

The object of the "case on appeal" is to set forth the alleged errors appealed from, and, if it sufficiently discloses the nature of the error, its alleged cause, and what was done to correct it, it does not show formal exceptions. Singer Mfg. Co. v. Barrett, 95 N. C. 36.

Same.—Judge May Pass on Exceptions.—When exceptions are filed the recitals contained therein are not conclusive, but it is open to the appellee to controvert them, and to have the Judge pass upon their correctness in "settling the case on appeal." Walker v. Scott, 106 N. C. 56, 11 S. E. 364.

The object of an assignment of error is not to create a new exception, which was not taken at the hearing, but to state an exception, which was taken at the hearing, and then rely on after he has given more deliberate consideration to them than may have been possible during the progress of the trial or hearing. State v. Bittings, 206 N. C. 777, 173 S. E. 299.

Assignment of Error Considered.—The Supreme Court will not consider any assignments of error except those appearing on the record proper and in the case settled by appeal. Rodman v. Harvey, 102 N. C. 1, 8 S. E. 888; State v. Campbell, 184 N. C. 765, 114 S. E. 927.

The assignment of error must be based upon the exceptions taken at the proper time in the ordinary course of procedure, and should coincide with and be not more extensive than the exception itself. In other words, no assignment of error will be entertained which has not for its basis an exception taken in apt time. State v. Bittings, 206 N. C. 798, 801, 173 S. E. 299.

Requirements Mandatory.—The requirements that assignments of error be based upon exceptions duly taken during the trial to be considered on appeal are statutory, as well as mandatory under numerous decisions of the court. The supreme court on appeal exercises only appellate jurisdiction and it is necessary that the error alleged be presented as the law directs. State v. Bittings, 206 N. C. 798, 801, 173 S. E. 299.

§ 1-283

Omission of Error Unnecessary.—No assignment of error is necessary where there is but a single exception and this is presented by the record, nor where the case is heard below on an agreed statement of facts, nor when the record shows that the judgment is the only one taken and the appeal itself is an exception thereto. North Carolina Bessemer Co. v. Piedmont Hdw. Co., 171 N. C. 728, 88 S. E. 807; Wallace v. Salisbury, 147 N. C. 58, 60 S. E. 712.

Assignment of Error Unnecessary.—No assignment of error is necessary where the record shows that counsel for both sides had agreed that all the papers in the case should constitute the case on appeal in which the judgment was rendered, in which case no error might be properly assigned. Holly v. Holly, 94 N. C. 639.

Affirmance.—On appeal from conviction of a capital crime, the "case on appeal" was served on the solicitor and then filed in the supreme court without agreement of the attorney-general or settlement by the judge, before expiration of the time allowed for filing exceptions or countercause under this section, and before the lapse of sufficient time for it to have been deemed approved under this section. Assignments of error were attached to the "case on appeal" but were not supported by exceptions. The supreme court considered the case on appeal and "deemed approved" the judgment appealed from, and considered the assignments of error, since the life of defendant is involved. Held: The assignments of error being without merit, and the case approved under § 1-283, the case was remanded, in order that error might be properly assigned. Holly v. Holly, 94 N. C. 639.

§ 1-284

Exception Taken after Trial.—Exceptions to the judge's charge at the trial were not set out in the "case on appeal" and the evidence should be sent up to throw light thereon, and what propositions of law the appellee should be prepared to discuss. Cooke v. Stateville, 121 N. C. 301, 315, 28 S. E. 482.

Exception Taken on Appeal.—Exceptions to the judge's charge at the trial were not set out in the "case on appeal" and the evidence should be sent up to throw light thereon, and what propositions of law the appellee should be prepared to discuss. Cooke v. Stateville, 121 N. C. 301, 315, 28 S. E. 482.

Error in Instructions Must Be Assigned.—The refusal to give instructions, if asked in writing and in apt time, like the charge as given, is deemed excepted to but none the less is it the duty of the appellee to assign such error as he finds in his statement of case on appeal and if this was not done, the exception is deemed waived. Taylor v. Plummer, 105 N. C. 56, 11 S. E. 266.

Assignment of Error Must Be Fully Presented.—Exceptions to the charge of the court must specifically relate to the complete portions upon which the appellant bases his exceptions, with each separately numbered in relation to the distinct principle upon which exception is taken, and it must appear from the record that the point is fully presented by the exception, or it will be ineffectual as being a broadside exception. Rawls v. Lupton, 193 N. C. 428, 137 S. E. 175.

Necessity of Case on Appeal.—The instructions cannot be hearing to the charge of the court must specifically relate to the complete portions upon which the appellant bases his exceptions, with each separately numbered in relation to the distinct principle upon which exception is taken, and it must appear from the record that the point is fully presented by the exception, or it will be ineffectual as being a broadside exception. Rawls v. Lupton, 193 N. C. 428, 137 S. E. 175.

Instruction Not in Record. — Where the instructions are not in the record, the supreme court has no jurisdiction. Oak Hall Clothing Co. v. Bagley, 147 N. C. 37, 60 S. E. 648.

Where the case settled does not state that the judge charged as recited in the exceptions, the matter is not before the court on appeal. Hart v. Cannon, 123 N. C. 45, 45 S. E. 351.

Instruction Not in Record. — Where the instructions are not in the record, the supreme court has no jurisdiction. Oak Hall Clothing Co. v. Bagley, 147 N. C. 37, 60 S. E. 648.

Where the settled "case" does not show the giving of instructions requested by a party, exceptions to the giving
A statement in the case on appeal that appellant's requests to charge were given "in substance" is insufficient to show what was given, and hence, where the requests are in writing, the judgment will not be disturbed.

Service of Original Instead of Copy.—This section is complied with by a service of the original instead of a copy. McDaniell v. Sculluck, 115 N. C. 285, 20 S. E. 451.

Service of Original in Lieu of Copy.—A statement in the case on appeal that appellant's requests to charge were given "in substance" is insufficient to show what was given, and hence, where the requests are in writing, the judgment will not be disturbed.

Service by Counsel.—A service of the case on appeal by counsel is a sufficient service, even though counsel was not present in court at the time the judgment was rendered, or at the time the case was docketed in the superior court, and was not sworn to serve as counsel if they appear upon the record. If such agreement does not so appear, the supreme court will adhere to and follow the rules prescribed in the Code. Wade v. New Bern, 72 N. C. 496.

Service by Mail.—Where service of case on appeal is made by mail, on the last day on which service could have been made, instead of by officer, the failure to promptly return the case does not bar the right of the officer to serve the appellate case in due time. Watkins v. Raleigh, etc., R. Co., 116 N. C. 901, 21 S. E. 499.

Service Counsel.—A service of the case on appeal by counsel is a nullity unless accepted by the counsel as required by statute. Roberts v. Partridge, 119 N. C. 353, 20 S. E. 15.

Service by Imposition of False Date.—When a case on appeal cannot be cured by the judge, the new trial will be granted.

Service by Constable.—A constable is not such an officer as can serve on appellee's appellant's case on appeal. Fort v. Boone, 114 N. C. 176, 19 S. E. 632.

Service by Officer May Be Waived.—The improper service of a case on appeal is cured by the appellee's acceptance of the case and filing exceptions thereto, without objection to the mode of service, Asheville Woodworking Co. v. Southwestern Furniture Co., 120 N. C. 163, 27 S. E. 268, 197 S. E. 777.

Service of a Case on Appeal.—A new trial shall be granted if the judge has charged the jury in any case on appeal, except cases which are not appealable to the supreme court, with instructions which do not conflict with the general charge, or if the judge has set out what he charged in lieu of the general charge, he must serve on such codefendant his statement of case on appeal. Texas Co. v. Beaufort Oil & Fuel Co., 199 N. C. 492, 154 S. E. 859.

Negligence of Counsel.—That an attorney's failure to serve his client in time was the result of negligence of his counsel was no excuse for the attorney's failure to serve the case for damages sustained. Coart v. Assurance Co., 142 N. C. 522, 51 S. E. 411.

Stenographer Too Busy to Transcribe Note.—When coun-

V. SERVICE OF CASE AND COUNTERCASE.

As to requests for instructions generally, see section 1-181 of the General Statutes. Wilson v. Winston-Salem R., etc., Co., 120 N. C. 531, 27 S. E. 46.

Negligence of Counsel.—That an attorney's failure to serve his client in time was the result of negligence of his counsel was no excuse for the attorney's failure to serve the case for damages sustained. Coart v. Assurance Co., 142 N. C. 522, 51 S. E. 411.

B. Time of Service.

1. In General.

Strict Compliance Required.—The statutory requirements as to making up cases on appeal must be strictly complied with except when there is an agreement to extend the time within which the case must be served.

Failure of Sheriff to Take Copy from Post Office.—Where service of notice of appeal, mailed by the sheriff to the appellee's attorney, was returned, it would have been too late for legal service. Smith v. Smith, 119 N. C. 311, 25 S. E. 877.

Re Co., 120 N. C. 504, 28 S. E. 829.

The pollution of the service, as, if the case had been promptly returned, it would have been too late for legal service. Smith v. Smith, 119 N. C. 311, 25 S. E. 877.

Failure of Sheriff to Take Copy from Post Office.—Where service of notice of appeal, mailed by the sheriff to the appellee's attorney, was returned, it would have been too late for legal service. Smith v. Smith, 119 N. C. 311, 25 S. E. 877.

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§ 1-282

CH. 1. CIVIL PROCEDURE—APPEAL § 1-282

III. RELIEF GRANTED.

Service a Nullity.—Service after the expiration of the time granted is a nullity. Rogers v. Jarrell, 180 N. C. 479, 105 S. E. 9. See Barber v. Justice, 138 N. C. 20, 75 S. E. 799; Rosenthal v. Roberson, 114 N. C. 594, 19 S. E. 667. See also the appellate court's power to call the roll of cases on appeal. Se. 594, 19 S. E. 667.

Same—Trial Court May Strike Case.—When a dispute arises in a trial as to whether there has been service of process, the trial judge in his discretion may make an order dismissing the appeal. Tripp v. Somersett, 182 N. C. 767, 108 S. E. 643. See also the power of the Supreme Court to quash a writ of certiorari, if upon the record it finds that there has not been service of such writ, nor that the case is pending in the Supreme Court. State v. Ray, 206 N. C. 736, 715 S. E. 109.

Agreement to Waive Time.—When the judgment was entered in the superior court, and the appellant had thirty days thereafter, entitled defendant to thirty days after service of appellant's case. Mitchell v. Hagard, 105 N. C. 173, 10 S. E. 856. See also the time of serving a counter case to an appeal will not be considered by the Supreme Court if denied. Board v. Orr, 113 N. C. 218, 76 S. E. 693.

Failure to Serve Objections in Time.—An appellant has a right to disregard an objection to the case on appeal, not served on him within ten days. Cummings v. Hoff- man, 113 N. C. 267, 18 S. E. 170.

VI. RELIEF GRANTED.

When no Case on Appeal.—An appeal will not be dismissed simply because there is no case on appeal before the Supreme Court, but the judgment will be affirmed, unless error appears on the face of the record proper. Boyer v. Jarrell, 180 N. C. 479, 105 S. E. 9. See Barber v. Justice, 138 N. C. 20, 75 S. E. 799; Rosenthal v. Roberson, 114 N. C. 594, 19 S. E. 667.

When Judgment Affirmed.—Where there is no case on appeal, and no error on the face of the record proper, the judgment will be affirmed. Young v. Wescott, 114 N. C. 354, 137 S. E. 507. State v. Westbrooks, 121 N. C. 552, 75 S. E. 799; Rosenthal v. Roberson, 114 N. C. 594, 19 S. E. 667.

Bryson v. Burwell, 90 N. C. 24, where it was held that an appeal will be dismissed where there is no statement of the case and no bond with proper justification filed within the time allowed by law.

Appeal Dismissed in Absence of Exception.—In the absence of exceptions in the record as a basis for the assignments of error, appellee's motion to affirm must be allowed. Boyer v. Jarrell, 180 N. C. 479, 105 S. E. 9.

Absence of Motion to Affirm.—When a case on appeal is pending, and no motion to affirm is made, the court may, in the absence of error, give judgment for the party in error. Hicks v. Westbrooks, 121 N. C. 552, 75 S. E. 799; Rosenthal v. Roberson, 114 N. C. 594, 19 S. E. 667.

Appeal Not Dismissed for Absence of Statement of Facts.
—An appeal will not be dismissed for failure to furnish a statement of facts signed by the judge or by both counsel, as the case may be, upon the filing necessary to consider the case appears from the record. Clark v. Peebles, 120 N. C. 31, 26 S. E. 924.

Oath of Counsel.—A motion to dismiss an appeal because there is no case on appeal is a nullity; but if the appeal will not be dismissed on that ground, since there may be errors on the face of the record proper. Ritter v. Grimm, 114 N. C. 373, 19 S. E. 239.

Appeal a Nullity.—Where a case on appeal is signed only by appellant's counsel, and it does not appear that it was served as prescribed by the code will not be granted when an opposing counsel states on oath, in this court, that all the requirements of the code were complied with in the court below. Kirk v. Barnhart, 74 N. C. 633.

When New Trial Granted.—Where appellant has been guilty of no laches or fraud and the trial judge certifies, after an appeal, that his notes of the trial have been lost, that he is unwilling or in error to memory to set forth the evidence in detail, as should be done in fairness to both parties, and requests that a new trial be ordered, a new trial will be granted. McGowan v. Harris, 120 N. C. 139, 26 S. E. 690. Ritter v. Grimm, 114 N. C. 373, 19 S. E. 239.

A new trial will be granted, when, from no default of the appellant, no assignment of errors accompanies the record, and it does not appear that it was served as prescribed by the code will not be granted when an opposing counsel states on oath, in this court, that all the requirements of the code were complied with in the court below. Kirk v. Barnhart, 74 N. C. 633.

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after notice that counsel of both parties may appear before him. He then "settles" the case. In so doing he does not decide the points of law, but may disregard both cases, and should do so, if he finds that the facts of the trial were different. Slocumb v. Con-
stuction Co., 142 N. C. 349, 55 S. E. 196; State v. Gooch, 94 N. C. 102.

Upon exception, when the appellant has set out the evi-
dence in narrative form, it is the duty of the trial judge to supervise and correct it. The exception is required.

Thompson v. Williams, 175 N. C. 696, 95 S. E. 100.

Where appellant serves his statement of case on appeal and appellee returns same with objections and appellant re-
quests the judge to settle case, within the time allowed by the court or by stat-
ute, it is the duty of the judge to settle the case on ap-
peal and the judge may not strike appellant's statement of case on appeal. The appellee returns such objections on the ground that appellant's statement of case was in-
sufficient to meet the requirements of this section and the rules of practice of the court. Chozen Confections v. John-
son, 220 N. C. 432, 25 S. E. 2d 555.

Judge's Action Conclusive.—The action of the Judge in settling the case on appeal, when the parties cannot agree, is final, and cannot be reviewed by the Supreme Court. State v. Gooch, 24 N. C. 922.

Where the trial judge has certified that the parties have been unable to agree upon the case on appeal, and that he has settled the case on appeal, and the record has been sent up to the Supreme Court and it will not be dismissed on the ground that no case on appeal had been stated and settled, Thompson v. Williams, 175 N. C. 696, 95 S. E. 100.

Supplemental Statement.—The appellate court will not con-
side assignments of error filed as a "supplemental state-
ment," which the court below declined to make a part of the case settled for appeal. Rodman v. Harvey, 102 N. C. 1, 8 S. E. 888.

Case Not Signed by Judge.—Where the case as settled by the trial judge is not signed by him, and there is no agreed statement of the case, the record contains no proper statement of the case on appeal. Ingram v. Yadkin River Power Co., 189 N. C. 379, 177 S. E. 209.

Right of Judge to Make Stenographer's Notes Part of Record.—While a stenographer's notes are material for the con-
sultation of the trial judge in making up the case, he may not make a statement of the record or a motion. Green v. Dunn, 162 N. C. 340, 78 S. E. 211.

Failure of Judge to Settle Case.—Where appellate's timely request, for settlement of his case on appeal is denied, he is entitled to certiorari to procure settlement. Chauncey v. Chauncey, 153 N. C. 12, 68 S. E. 906.

The remedy for a refusal to settle a case on appeal, when judgment has been entered by consent, is a motion to set aside the judgment. King v. Taylor, 189 N. C. 459, 124 S. E. 751.

Where the trial court at the time and place fixed for settle-
tment of case on appeal fails to settle the case and er-
ronously grants appellee's motion that appellant's case should be struck from the record, the supreme court will grant appellant's motion for certiorari to the end that the judge, after notice, may settle the case as provided in this section. Where appellee's failure to perfect the appeal is due to error of the court and not to any fault or neg-
lect of appellee or his agent. Chozen Confections v. Johnson, 141 N. C. 350, 55 S. E. 2d 505.

Failure to Send up Correct Statement.—The failure of a judge to send up a correct statement is not sufficient ground for mandamus, but the mistake may be corrected by cor-

Prerequisites for Application for Certiorari.—If for any rea-
son no appeal is taken from the case on which the appeal is for the appeal to be docketed in the supreme court, the appellant must bring up the record in its imperfect state and have it docketed, and then move for the proper orders to get the case on appeal before the Supreme Court. Way-

Laches of Appellant.—An application for a certiorari to a judge to settle a case on appeal, made seven months after
the appeal was taken, will be denied in the absence of an affirmative showing of prejudice. State v. Dinh, 136 N. C. 112, 12 S. E. 44. A delay of two months, without excuse, is too long. Stroud v. Western, U. Tel. Co., 133 N. C. 234, 45 S. E. 928.

Disregard of Appellee's Counsel.—Where appellant in a pt time submitted the case on appeal to appellee, who declined to sign it, but suggested that he would prepare another, and get the judge to settle the case, and promised that no advantage would be taken if the judge was not bound by his promise. Mott v. Ramsay, 91 N. C. 249.

Authority of Judge after Settling Case.—Having "set-
tled" the case, at the time of the settlement, the judge is functus officio unless, by agreement of parties, or by certiorari from supreme court upon proof of his readiness to make correction, opportunity is given him to correct such errors as may result from prejudice, mistake, misapprehension and the like. Slocumb v. Con-
struction Co., 142 N. C. 349, 55 S. E. 196.

Authority of Supreme Court Over Settled Case.—The su-
preme court has no power to amend a settled case. Walker v. Scott, 102 N. C. 487, 9 S. E. 488.

Authority of Clerk.—The clerk has no authority to find the fact of such delay as provided by this section, nor to enter the same upon the record of his own know-
ledge. He can only enter the same upon the admission of facts, if it be required that the case on appeal in such instance be settled in an approved manner by agreement of counsel 

by the judge. Weaver v. Hampton, 206 N. C. 741, 171 S. E. 177.

Modification of Settled Case.—Where it is made to ap-
pear to the supreme court by proper evidence, that the Judge has committed an omission or mistake in the case on appeal, the Supreme Court will give him an op-
portunity to correct it, or to modify an inaccurate state-

When the trial judge has settled the case on ap-
peal, in the exercise of his proper jurisdiction, that the Su-
preme Court, upon affidavit of error therein, and a letter |
from the judge that he wishes to make the correction, will give him an opportunity. Barber v. Justice, 138 N. C. 20, 50 S. E. 445.

A judge cannot resettle a case on appeal; he can only correct such errors as have resulted from inadvertence, mis-
apprehension, or the like. Buyer v. Teague, 136 N. C. 571, 11 S. E. 330.

Judge's Duty in Modifying Case.—Where a certiorari is ordered to correct a case on appeal, the trial judge should be given an opportunity to consider the case with refer-
ence to the corrections, and counsel should be present at the settlement thereof. Cameron v. Power Co., 137 N. C. 99, 49 S. E. 76.

Place of Settlement.—The requirement that the place ap-
pointed for the settlement of the case on appeal shall be within the district, if the judge has not left, is mandatory. State v. Humphrey, 160 N. C. 909, 154 S. E. 525.

An appeal will not be dismissed because the statement of the Judge below was made out of the district in which the suit was tried, unless the record shows that the appellee demanded to be present and that he reason of his absence was "prejudiced, especially when the error consis-
t in the rejection of material and competent evidence. Whitesides v. Williams, 66 N. C. 141.

The trial judge has no absolute authority to settle a case on appeal outside of the county or district in which it was tried, except by agreement of the parties, or when the coun-
tercase or exception had been served, respectively, within the time prescribed by the statute. State v. Humphrey, 186 N. C. 533, 120 S. E. 85.

Effect of Absence of Judge from District.—The absence of the judge from the district in which the suit was tried, except by agreement of the parties, or when the coun-
tercase or exception had been served, respectively, within the time prescribed by the statute.

While it is provided by this section that when the judge from whose ruling appeal is taken to supreme court, has left the district before notice of disagreement as to case set for appeal, he may settle the case on appeal without re-
turning to the district, he has no authority to do more, except by consent. White Way Laundry v. Underwood, 92 N. C. 561, 16 E. 2d 555.

Case May Be Settled After Expiration of Sixty Days.—
Although the failure of the Judge to settle a case on appeal within sixty days after the courts of the district closed subject him to a civil action for the penalty prescribed.
in the statute, he may, after that time, make up the case. State v. Williams, 109 N. C. 846, 13 S. E. 880.

Retirement of Judge.—The mere fact that a judge who tried a case has gone out of office will not prevent his settling the case on appeal. Ritter v. Grimm, 114 N. C. 371, 19 S. E. 230.

Where the Judge who presided at a trial goes out of the office without making up a case of appeal, and the appellant is in default, a new trial will be awarded. Simons v. Simonton, 80 N. C. 7.

Illness of Judge.—Where the judge is unable to settle the case on appeal on account of sickness and appellee, to expel matters, agrees to a new trial, and it appears that the judge will not be able to settle the case within a reasonable time, a new trial will be granted even though appellee opposes one. Turner v. Southern Gas Improv. Co., 171 N. C. 750, 1889, c. 135; C. C. P., s. 302; C. S. 645.

Impossible to Settle Case on Appeal.—Where it appeared by affidavit that the statement of a case upon appeal had been lost by no fault of the attorneys for appellant, and that, by reason of lapse of time, the judge had forgotten the exceptions, and a new case could not be prepared, a new trial will be granted. Board v. Old Dominion Steamship Co., 98 N. C. 163, 3 S. E. 955; Isler v. Haddock, 72 N. C. 119; Adams v. Reeves, 74 N. C. 106.

Affirmance.—On appeal from conviction of a capital crime, the "case on appeal" was served on the solicitor and then filed in the supreme court without agreement of the solicitor, matters, agrees to a new trial, and it appears that the time allowed for filing exceptions or counter-case, under this § 1-282, and before the lapse of sufficient time for it to have been deemed approved under § 1-282. Assignments of error being without merit, the case appeal was not prosecuted according to law, the appellee has the right to have a transcript of the record sent up, or a new trial, according to the state of the case, before expiration of the time allowed. Ritter v. Grimm, 114 N. C. 371, 19 S. E. 230.

CH. 1. CIVIL PROCEDURE—APPEAL

§ 1-284. Clerk to prepare transcript.—The clerk on receiving a copy of the case: settled, as required in the preceding sections, shall make a copy of the judgment roll and of the case, and within twenty days transmit the same, duly certified, to the clerk of said court, and become a part of the records, at which time the required fees and is otherwise free from laches. Critz v. Springer, 121 N. C. 283, 28 S. E. 365.

Failure to Tender Required Fees.—Failure of the clerk of said court to transmit the record may be reviewed though there is no bill of exceptions. Cape Fear, etc., R. Co. v. Stewart, 132 N. C. 248, 172 N. C. 818, 90 S. E. 1013. Emmons v. McKeon, 58 N. C. 92, 846, 13 S. E. 638.

Section is Directory.—This section is directory merely, providing that the stenographer's notes shall be typewritten, and filed with the clerk of said court, and become a part of the record, does not make those notes a part of the record, and no bill of exceptions or case on appeal docketed, whether the statement of the case on appeal is settled or not, Owens v. Phelps, 91 N. C. 261.

When Appeal Not Properly Constituted.—Where an appeal is not prosecuted according to law, the appellee has the right to have a transcript of the record sent up, or a new trial, according to the state of the case, before expiration of the time allowed. Ritter v. Grimm, 114 N. C. 371, 19 S. E. 230.

Comission of Evidence and Charge.—The evidence and the charge of the court are properly omitted from the appeal record where there is no exception involving the same. Parker v. Southern Exp. Co., 132 N. C. 128, 43 S. E. 603.

Construed by the Court.—When two transcripts are sent, contrary to each other, and the parties do not agree which is correct, the court will direct the proper officer to transmit to the court in error the original papers from the court below. Lindsey v. Knights of Honor, 172 N. C. 818, 90 S. E. 1013. Emmons v. McKeon, 58 N. C. 92.

Duty to Transmit.—On the taking of an appeal, the record shall be transmitted to the appellate court, and the appeal docketed, whether the statement of the case on appeal is settled or not. Clayton v. Johnson, 132 N. C. 248, 172 N. C. 818, 90 S. E. 1013.

Bill of Exceptions Unnecessary.—Errors apparent on the record may be reviewed though there is no bill of exceptions. Cape Fear, etc., R. Co. v. Stewart, 132 N. C. 248, 172 N. C. 818, 90 S. E. 1013.

Demurrer.—A demurrer and the action of the court thereon are part of the record, and no bill of exceptions or case on appeal, or of the case on appeal. Cressler v. Asheville, 138 N. C. 482, 51 S. E. 53.

Terrorist's Notes.—A statute authorizing the employment of an official stenographer and providing that the stenographer's notes shall be typewritten, and filed with the clerk of said court, and become a part of the record, does not make those notes a part of the record, and no bill of exceptions or case on appeal, or of the case on appeal. Cressler v. Asheville, 138 N. C. 482, 51 S. E. 53.

Holding Effect of Record.—The Supreme Court is bound by the record, even though it seems improbable that it can be done. Davis v. Southern R. Co., 115 N. C. 578, 72 S. E. 622; McDaniel v. King, 89 N. C. 29, 30.

Amendment of Record.—The appellate court has no authority to make amendments of the record. Neal v. Coward, 71 N. C. 266.

Showing Additional Facts.—Where the findings of fact made the basis of a judgment denying a motion for vacation of a judgment, the evidence in the record, the record can be amended so as to show the facts on the request of a single party. Smith v. Whitten, 117 N. C. 389, 390, 23 S. E. 350.

Error in Record Corrected.—Errors in the record should be corrected by means of certiorari, and not by having the amendment made by the clerk below while the

[297]
transcript is on file in the appellate court. State v. Jackson, 112 N. C. 849, 16 S. E. 906.

Response to an Appeal.—An appeal will not be dismissed because the response to the issue was omitted in printing the record, where the omission was palpably a printer's error; the response being recited and printed in the judgment. Bier v. Bier, 119 N. C. 553, 23 S. E. 120.

Failure of Judge to Return Papers.—Where the trial judge takes the papers and does not return them in time for the seasonable preparation of appellant’s transcript, a dismissal for failure to file will be vacated, and a certiorari may be issued to bring up the appeal. Sea v. Yarbrough, 94 N. C. 291; Rouhac v. Miller, 89 N. C. 390.

Proper Transcript Obtainable.—A transcript will not be dismissed because the record of the lower court fails to transmit a proper transcript, especially when a proper transcript is obtainable before the case will stand for argument. Bryan v. Moore, 5 S. E. 551.


III. CONTENTS OF TRANSCRIPT.

Transcript.—Essential.—Before the Supreme Court will entertain an appeal the appellant must cause to be properly filed and docketed therein a duly certified transcript of the record of the action in the court where the judgment was rendered. And, in the absence of proof to the contrary, the record as filed will be held to be the record as filed. State v. Preston, 104 N. C. 733, 734, 10 S. E. 84.

In General.—It must appear in the record, with reasonable certainty, that a superior court was opened and held for the county from which an appeal could be taken, and at the place and time prescribed by law. In all cases, it must appear that the court had jurisdiction of the parties and of the subject matter; and so much, not more, of the record as will properly present the exceptions taken, that is, as will show that they were taken, the rulings of the court to which they apply, and how they were taken. And, in any case, ought to appear in every record that the court was held and that the action was properly constituted before it. This requirement is not a mere matter of form that may be dispensed with. It is an essential part of the record, and is necessary in every action. And however informal a record may be, these essential requisites must appear in it, else the court cannot proceed to examine the alleged errors, and decide the questions of law sought to be presented.

A. When Appeal Remanded.

Imperfect Transcript.—Where the transcript of the record sent to the supreme court is imperfect, the appeal will not be dismissed, but the papers will be remanded, in order that a proper transcript may be sent up. Spence v. Tapsco, 92 N. C. 576, 577.

Essential Part of Record.—The transcript or record on appeal consists of the record proper (that is, summons, pleadings, and judgment) and the case on appeal, which is the exceptions taken, the rulings of the court, the evidence, prayers for instructions, and charge of the court. When the transcript does not show that any court was opened, held, and shows no process or pleading, the cause will be remanded. Rowland Bros. v. Mitchell, & Son, 99 N. C. 144, 12 S. E. 266.

Jurisdiction of Action.—It is the appeal that puts the Supreme Court to acquire jurisdiction, it must appear in the transcript that the record was taken, that the record was had, and that the Supreme Court must be able to see, from the record, the relation thus established. Moore v. Vanderburg, 90 N. C. 460.

Jurisdiction of Parties.—The transcript is imperfect if it does not contain so much of the case below as is necessary to present the matters excepted to for review. Cressler v. Asheville, 138 N. C. 482, 51 S. E. 53.

Proper Transcript.—A transcript which fails to show any process, or waiver thereof, or any pleading, by which defendant was brought into court, or any agreement between the parties, is insufficient, and the cause will be remanded for a proper transcript. Jones v. Hoggard, 107 N. C. 349, 12 S. E. 266.

Proper Proceedings below.—An appeal will be remanded where the transcript does not show that the action was properly constituted in the court below. Markham v. Hicks & Co., 90 N. C. 54.

B. When Appeal Certified.

Failure to Show Process and Pleading.—Where the transcript on appeal contains only the judgment of the court below, and no process or pleading leading to the cause will be remanded. Rowland Bros. v. Mitchell, & Son, 90 N. C. 649; Bethca v. Bayrd, 93 N. C. 141.

Failure to Show Contention of Parties.—Where the transcript on appeal contains no judgment of the court below, and no process or pleading leading to the cause will be remanded. Wyatt v. Lynchburg, 93 N. C. 150, 57 S. E. 895.

Failure to Show Entry of Judgment.—Where the record on appeal contains no judgment entry, the appeal or writ of error cannot be considered. Logan v. Harris, 90 N. C. 7; High v. Rich (N. C.), 1 S. E. 647; See Vann v. Winders, 184 N. C. 639, 113 S. E. 927.
§ 1-285. Undertaking on appeal; filing; waiver.

To render an appeal effective for any purpose in civil cases, or in special proceedings, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not exceeding two hundred and fifty dollars, to the effect that the appellant will pay all costs awarded against him on the appeal, and this undertaking must be filed with the clerk by whom the judgment or order was entered, or such sum as is ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal. The undertaking or deposit may be waived by a party having executed it, or by the clerk of the court where the undertaking or deposit was made. See Oakley v. Van Noppen, 100 N. C. 287, 5 S. E. 1.

Effect of Failure to Give Undertaking.—In the absence of an affidavit for leave to appeal without bond, an appeal must be dismissed where a party neither gives the appeal bond nor makes a deposit in lieu thereof. Lunsford v. Alexander, 162 N. C. 326, 123 S. E. 2d 92; McCannelly v. Reynolds, 90 N. C. 648; Applewhite v. Fort, 85 N. C. 596.

II. TIME OF FILING.

Presumption of Timely Filing.—Where an appeal bond

§ 1-285
has no date it will be presumed to have been filed on the day it is justified. Boyden v. Williams, 92 N. C. 546.

Computation of Time.—The ten days within which the undertaking must be filed begins from the day on which the judgment is rendered, but from that on which the court adjourned. Chamblee v. Baker, 95 N. C. 3.

Ten Days after Rendition of Judgment.—The undertaking on appeal must be filed within ten days after the rendition of the judgment. Boyden v. Williams, 92 N. C. 546; Wade v. New Bern, 72 N. C. 498; Sever v. McLaughlin, 82 N. C. 332.

Ten Days after Trial.—Where an undertaking on appeal recited that the judgment appealed from was rendered on the last day of the term (presumably the first day, since all the business of a term is done on its first day), but it appeared that the trial took place during the second week, and the justification was filed within ten days after the trial, the court held that the bond was filed in time. Worthy v. Brady, 91 N. C. 265.

Day Facts Were Found.—Where the record does not show on what day the judgment appealed from was rendered, it having been rendered out of term by consent, an appeal bond filed on the same day that the facts were found, the case on appeal filed, and the amount of the bond fixed, is given in time. Gwathney v. Savage, 101 N. C. 103, 7 S. E. 661.

Delay in Filing Caused by Clerk.—An undertaking filed within a few days after the time agreed on will be treated as timely filed if the undertaking affirms that the appeal was in good faith that appellant made diligent effort from time to time to give the undertaking, but was prevented by the absence of the clerk, who was in the city, from delivering the undertaking within the time prescribed by the statute. Harrison v. Hoff, 102 N. C. 25, 8 S. E. 887; Jones v. Wilson, 103 N. C. 13, 9 S. E. 380.

Before Transmission of Record to Appellate Court.—An appeal bond signed and sent up with the record, is in time, provided it should be given before the record of the case is transmitted to the Supreme Court. In re Snow's Will, 128 N. C. 100, 38 S. E. 295; Howerton v. Sexton, 104 N. C. 633, 8 S. E. 631.

Reasonable Excuse Must Be Shown.—While the Supreme Court may allow an undertaking on appeal to be filed in time, the power thus conferred will not be exercised unless a reasonable excuse for a failure to give the undertaking within the time prescribed by this section. Harrison v. Hoff, 102 N. C. 25, 8 S. E. 887; Jones v. Asheville, 114 N. C. 630, 19 S. E. 631.

The same or excusable failure to file the appeal excuses the failure to file appeal bond. Graves v. Hinck, 106 N. C. 331, 11 S. E. 362.

Before or after Motion to Dismiss.—The Supreme Court may allow an undertaking on appeal within ten days after the appeal was filed, and the necessity of filing the appeal bond within the prescribed time may be waived by agreement. Wade v. New Bern, 72 N. C. 498.

Same—Must Appear of Record.—No agreement of parties waiving the necessity of timely filing of appeal bond will be respected by the appellate court unless it appears on the record. Wade v. New Bern, 72 N. C. 498.

Same—Verbal Agreements Disregarded.—Verbal agreements to waive the statutory requirements will not be respected by the appellate court unless they or other sureties justify the same, that is, unless a substantial compliance with all the requirements of the statute be shown. McCannless v. Reynolds, 91 N. C. 244; see also Skinner v. Bland, 91 N. C. 1.

Same—Delay in Making Objection.—Where the absence of a bond on appeal is not objected to for two years, and in the meantime the cause has been continued, and without objection to the defect, will be deemed to have waived objection to the defect. Arrington v. Smith, 96 N. C. 59.

Same—By Failure to Object.—Where the appellant is in continued possession of the judgment rendered without objection, and this is noted in the record, the court is convinced that it be a sufficient waiver in writing under the statute. Harshaw v. McDowell, 89 N. C. 18, 183; Howerton v. Henley, 76 N. C. 527.

Same—By Proceeding with Trial.—If the appellee let the case go to the jury in the appellate court, he thereby waives objections to defects in the appeal bond, but the court, in its discretion, may require further security. Ferguson v. McCarter, 114 N. C. 544.

IV. PARTIES.

Obligee.—An undertaking on appeal, though not so expressed, is, by implication, taken to be made with the appellee. City of Charlotte v. Riddle, 93 N. C. 198.

Omission of Obligor's Name.—The omission of the name of an obligor in the body of an appeal bond or undertaking is no substantial objection to it. Chamblee v. Baker, 95 N. C. 98.

Operates Favorably to Respondent.—The undertaking for costs and damages on appeal, operates in favor of the respondent, although he is not required to be named in it. Cooper v. Clerk's Office v. Huffsteller, 67 N. C. 467.

Made Payable to State.—An appeal bond made payable to the state is void. The state will not become a trustee for the satisfaction of the judgment, or of the rights, claims, or liabilities of the parties, in cases specially provided by law—as guardian bonds, etc. Dorsey v. Raleigh, etc., R. Co., 91 N. C. 201.

Necessity for Obligor's Signature.—The signature of the obligor is essential to the validity of the appeal or error. Cohoon v. Morton, 49 N. C. 256; Walker v. Williams, 88 N. C. 7.

Party Acting as Surety.—An undertaking on appeal may be good although signed by one of the parties defendant as surety, if the record shows that he is not affected by the appeal. Syne v. Badger, 91 N. C. 272.

Opposite Party.—A plaintiff cannot be principal obligor on an appeal bond, where an appeal is taken by defendant. Speed v. Harris, 4 N. C. 317.

Signature by Mark.—An appeal bond may be executed by a surety making his mark. State v. Byrd, 93 N. C. 624.

Name Signed by Magistrate.—A magistrate, who has rendered a judgment on a warrant, is not a fit person to sign the name of another as surety on an appeal bond. Weaver v. Parish, 8 N. C. 319.

§ 1-286. Justification of sureties.—The undertaking on appeal must be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. The requisite affidavit by every surety must be filed within ten days after the notice of appeal; and unless they or other sureties justify within ten days thereafter, the appeal shall be regarded as if no undertaking had been given.

The justification must be upon a notice of not less than five days. (Rev., s. 594; Code, s. 560; C. C. P., s. 310; 1887, c. 121; C. S. 647.)

Editor's Note.—The purpose of this section is to protect the appellee in respect to costs. He has a substantial interest in the undertaking, upon appeal, and it cannot be disregarded without his consent in writing, unless a sum of money be deposited by the clerk by order of the court in lieu of the undertaking. The statute is careful to provide, in strong, peremptory and exacting terms, that the bond shall be made in the name of another as surety unless perfected in the way prescribed in it. The language is plain and mandatory, and very little is left to construction. The appellee has the substantial right under the statute to insist upon a substantial compliance with it in all respects.

Necessity of Justification.—An appeal bond is of no effect unless it be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. Singer Mfg. Co. v. Barrett, 94 N. C. 219; Greenlee v. McCelvey, 92 N. C. 530.

Dismissal of Appeal.—An appeal will be dismissed when the surety on the undertaking dies, or becomes incapable of giving security for the amount thereof. McCannless v. Reynolds, 91 N. C. 244; State v. Roger, 94 N. C. 839.

Necessity of Excuse.—The justification of a surety to an undertaking on appeal, must be made by the surety himself. The affidavit of another as to the pecuniary reputation of the surety will not answer the demands of the law. McPherson v. ||

Failure to Show Proper Amount.—A justification of two sureties that each is worth the amount of the bond, is not a sufficient compliance with this section. Anthony v. McCole, 91 N. C. 295.

Need Not Mention Liabilities.—The justification of a surety on an appeal bond is sufficient under this section where it states that the surety is worth double the amount therein specified, without stating that it is justified in double liabilities and homestead and exemption allowed by law. Witt v. Long, 93 N. C. 388.

Justification Held Insufficient.—Where the appraisal of an
unjustified bond is the act of the clerk, there is no waiver, unless the appellee is present, or afterwards assents. Gruber v. Dunn, 137 N. C. 579.

**Indorsement of Clerk Not a Substitute for Justification.**—An indorsement on the back of an appeal bond by the clerk, "The within bond is good," is not a sufficient compliance with the statutory requirement that the bond must be accompanied by an affidavit of the sureties showing their justification. Bryson v. Lucas, 85 N. C. 397.

**Justification May Be Waived.**—While this section seems to require that bond shall be justified in the first instance by at least one of the sureties swearing that he is worth double the amount therein specified, a failure to do this does not necessarily avoid a bond. It is a defect which may be cured by waiver. Becton v. Dunn, 137 N. C. 559, 563, 50 S. E. 289. McMillan v. Baker, 92 N. C. 111. McMillan v. Pruett, 92 N. C. 117.

**Necessity of Written Waiver.**—An acceptance by the appellee of the surety tendered on an appeal bond, constitutes a waiver of the justification required by statute. Greenlee v. McElvey, 92 N. C. 530.

**Same—Appelee Present When Bond Taken.**—When it appears by the record, or by affidavit of the appellee before the taking of the appeal bond, that the appellee was present when the appeal bond was taken, and made no objection to the sufficiency of the sureties, such objection will be deemed waived. Gruber v. Washington, etc., R. Co., 92 N. C. 607, 116 S. E. 565.

**Same—Acceptance in Open Court.**—The acceptance in court of an appeal bond not justified is a waiver of justification, and a subsequent motion to dismiss the appeal on the ground that the bond is not justifiable can not be sustained. Jones v. Potter, 89 N. C. 220.

**Same—Signing Case on Appeal.**—An objection to an appeal bond on the ground that the sureties failed to justify it is not waived when the counsel for the adverse party agrees to and signs the statement of the case on appeal. McMillan v. Nye, 90 N. C. 12, distinguishing Howerton v. Henderson, 86 N. C. 718, distinguished in Gruber v. Washington, etc., R. Co., 92 N. C. 1.

**Same—Entry on Record.**—An entry on the record, "bond fixed at $25; filed and approved," was held a sufficient written notice of the entry of a new bond. *Lytte v. Lytle, 90 N. C. 647.

**When Waiver Not Required.**—Where the record stated, "Plaintiff appealed. Notice waived. Bond filed," which was signed by the judge, it is a sufficient waiver in writing of a formal justification of the bond, and the appeal will not be dismissed because the sureties do not justify in double the amount. Singer Mfg. Co. v. Barrett, 94 N. C. 219.

An acceptance by the appellee of the surety tendered on an appeal bond, constitutes a waiver of the justification required by statute. Lytle v. Lytle, 90 N. C. 647.

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See also State v. Wagner, 91 N. C. 521.

§ 1-287. Notice of motion to dismiss; new bond or deposit.—Before the appellee is permitted to move to dismiss an appeal, either for any irregularity in the undertaking on appeal or for failure of sureties to justify, he must give notice in writing of the motion at least twenty days before the district from which the cause is sent up is called, and this notice must state the grounds upon which the motion is based. At least five days before the district from which the cause is sent up is called, the appellee may file with the clerk of the supreme court a new bond justified according to law and containing a penalty the same in amount as the penalty in the original bond, or he may deposit with the said clerk a sum of money equal to the penalty in the original bond. When a new bond has been thus filed or deposit made the cause stands as if the bond had been duly given or deposit duly made in the court below. (Rev., s. 596; 1867, c. 121; C. S. 648.)

As to the time of the motion to dismiss, see *Supreme Court Rule 122.*

**Section is Mandatory.**—A motion to dismiss because of imperfections in the undertaking on appeal, will not be entertained, unless the provisions of this section are complied with. Jones v. Slaughter, 96 N. C. 541, 2 S. E. 681.

**Notice of Motion to Dismiss.**—A notice is required to be given of a motion to dismiss an appeal when no appeal bond has been filed; the twenty days required for a motion to dismiss by the section applies only when there is an irregularity in the bond or in the justification of the sureties. Jones v. Asheville, 114 N. C. 638, 59 S. E. 683.

**Nor When Not Filed in Time.**—A failure to execute and file an undertaking on appeal within the time prescribed by law is not a mere "irregularity," and hence a motion to dismiss the appeal for such failure does not require the twenty days notice, as provided by this section. Bowen v. Bowers, 98 N. C. 56.

**Necessity of Written Notice.**—A motion to dismiss appeal for insufficient bond will not be entertained, unless after written notice, as required by this section. Mc Gee v. Fox, 107 N. C. 766, 12 S. E. 565.

**At Hearing of Motion.**—Though a void bond has been given on appeal from the county to the Superior Court, the court or the clerk of the superior court has made an order allowing the appellant to appeal as a pauper, and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said superior court to make an order allowing said party to appeal from the judgment to the supreme court as in other cases of appeal, without giving security therefor. The party desiring to appeal from said judgment shall within five days make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court in said action. The affidavit must be accompanied by a written statement from a practitioner that the party offers to appeal to the supreme court, and is of opinion that the decision of the superior court, in said action, is contrary to law. The appeal when passed upon and granted by the clerk shall be within ten days from the expiration by law of said term of court. The clerk of the superior court cannot demand his fees for the transcript of the record for the supreme court of a party appealing in forma pauperis, in case such appellant furnishes to the clerk two true and correctly typewritten copies of such record on appeal. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases. Provided, that where the judge of the superior court or the clerk of the superior court has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the supreme court, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or
omission. (Rev., s. 597; Code, s. 553; 1889, c. 161; 1873-4, c. 60; 1907, c. 878; 1937, c. 89; C. S. 649.)

Cross Reference.—As to appeal in forma pauperis in criminal actions, see § 15-181.

Editor's Note.—Appeals in forma pauperis were not originally allowed in civil cases at all, but were first provided for in ch. 60, Laws 1873-74, under which they could only be allowed, as in criminal cases, by the judge, and during the term. But in 1889, Laws 1889, ch. 161, this section was amended to permit an appeal in forma pauperis in any case by the clerk either at term or on affidavit filed within five days after court, or the clerk might pass upon and allow such application during term, or within ten days after its expiration. Formerly the clerk of the Superior Court was not bound to render his services gratuitously but in 1907, Acts 1907, ch. 587, this section was again amended and the clerk of the Superior Court was now allowed to demand bond for filing the transcript in appeals in forma pauperis. The 1937 amendment added the proviso at the end of this section. As to effect of amendment, see 15 N. C. Law Rev. 312.

Supreme Court Rule 22 offers appellants in forma pauperis the option of filing nine typewritten copies of the record, not required by this section.

Section Mandatory.—Where a party to a civil action which has been tried in the Superior Court, desires to appeal from a judgment rendered at such trial to this court, where such appeal is as required by this section, he must comply strictly with the provisions of this section, which are mandatory. McEntire v. McEntire, 203 N. C. 674, 160 S. E. 421.

Necessity of Affidavit.—In appeal pauper it is required by this section that appellant file the statutory affidavit in order to confer jurisdiction on the supreme court, and a party appealing in forma pauperis alleging to be pauper does not relieve plaintiff of the necessity of filing the jurisdictional affidavit or the twenty-five printed or mimeographed copies of the brief required by rule 22 of the supreme court. Brown v. Kress & Co., 207 N. C. 722, 188 S. E. 110.


The amendment permitting corrections of errors or omissions in the affidavit or certificate of counsel at any time allowing an appeal in forma pauperis without proper, supporting affidavit, and an affidavit made after the expiration of the statutory time is beyond the clerk's authority and the Supreme Court is without jurisdiction to entertain the appeal and it will be dismissed, the provisions of this section being mandatory and not directory. Alger v. Pullen, 204 N. C. 671, 168 S. E. 281; Franklin v. Gentry, 222 N. C. 41, 21 S. E. (2d) 528.

Applies to Administrators, etc.—Administrators and all civil actions from the payment of cost of transcript in advance. Speller v. Speller, 119 N. C. 356, 26 S. E. 160; Martin v. Chasten, 75 N. C. 96.

§ 1-289. Undertaking to stay execution on money judgment.—If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless an undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the sureties will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have been incapable of payment, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court. (Rev., s. 598; Code, s. 554; C. C. P., ss. 304, 311; C. S. 650.)

Undertaking Not Necessary to Appeal.—But security for payment of the judgment, in addition to the security for costs, is not necessary for a defendant appealed from, and the statute being sufficient indication of his desire at the time of trial. Russell v. Hearne, 113 N. C. 356, 18 S. E. 711.

Other Proceedings Not Stayed.—An order allowing a party to appeal in forma pauperis, or making a deposit, does not relieve the appellant in civil actions from the payment of cost of transcript in advance. Speller v. Speller, 119 N. C. 356, 26 S. E. 160; Martin v. Chasten, 75 N. C. 96.

No Particular Form Required.—No particular form is required for an undertaking to stay execution upon appeal; and if words are inserted in such undertaking repugnant to
its intent, they will be rejected as surplusage. Oakley v. Van Noppen, 100 N. C. 267, § 5 S. E. 1.

II. Giving an Undertaking to Stay.—Where the judgment appealed from directs, to the effect that the appellant will obey the order of the court by which judgment was rendered and which must be specified in the undertaking, the execution of the judgment is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of this deficiency. (Rev., s. 601; Code, s. 557; C. C. P., s. 307; C. S. 653.)

III. Effect of Stay on Judgment.—Where an appeal is taken from the order of confirmation of a sale under decree of a foreclosure of a deed of trust and an appeal bond is filed to stay execution, under this section and sections 1-293, 1-294, and the judgment of the lower court is reversed on appeal, the purchaser at the sale may be held liable to the mortgagor for the former's taking of immediate possession of the property after the confirmation appealed from. Dixon v. Smith, 204 N. C. 480, 168 S. E. 825.

IV. Scope of Stay; Security limited for fiduciaries.—When an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon other matters included in the action and not affected by the judgment appealed from. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars, where it would otherwise exceed that sum. (Rev., s. 602; Code, s. 558; C. C. P., s. 308; C. S. 655.)

Cross Reference.—As to effect of stay on judgment, see § 1-251.

§ 1-297. Entire Cause Transferred to Appellate Court.—Under the North Carolina practice, an appeal carries the whole cause up to the Supreme Court, equally whether security is given

Authority to hear motion.—An appeal does not take the case beyond the control of the superior court, until it is perfected. Coates Bros. v. Wilkes, 94 N. C. 174.

Authority of Lower Court Terminated.—The perfection of an appeal is a bar to further proceedings in the inferior court. Bank State v. Twitty, 13 N. C. 386.

An appeal duly taken and regularly prosecuted operates as a stay of all proceedings in the trial court, relating to the issues included therein, until the matters are determined in the Supreme Court. Pruet v. Charlotte Power Co., 167 N. C. 598, 63 S. E. 830.

Upon appeal from an interlocutory order the lower court has no power to proceed further with the case, and a motion to set aside a restraining order because of newly-discovered evidence cannot be entertained. Combes v. Adams, 150 N. C. 203, 60 S. E. 585.

An appeal, docketed within the time and regularly prosecuted, relates back to the time of trial; that is, it operates as a stay of proceedings within the meaning of the statute, and brings the cause within the principle of the cases which hold that the court below is without power to hear and determine questions involved in an appeal pending in the Supreme Court. Combes v. Adams, 150 N. C. 64, 70, 63 S. E. 186; Sykes v. Everett, 167 N. C. 600, 63 S. E. 585.

Where after appeal from a formal judgment overruling a demurrer the trial court proceeds to hear exceptions to the report of the referee, the superior court, upon affirming the judgment, has no power to overrule the judgment confirming the report of the referee stricken out because the parties were entitled to have the appeal from the judgment considered on that appeal, overruling the demurrer determined. Combes v. Adams, 150 N. C. 203, 60 S. E. 585.

Appeal Must Be Perfected.—An appeal does not take the case beyond the control of the court whose order is appealed from, and an order can not subsequently be made by that court discharging the attachment. Pasour v. Lineberger, 90 N. C. 139.

Appeal Does Not Carry up Fund.—An appeal from a final judgment does not bring up the fund, the court below retaining charge of its safe-keeping and investment pending the appeal. Hinson v. Adrian, 91 N. C. 230, 53 S. E. 407.


§ 1-295. Undertaking in one or more instruments; served on appellee.—The undertakings may be in one instrument or several, at the option of the appellant; and a copy, including the names and residences of the sureties, must be served on the adverse party, with the notice of appeal, unless the required deposit is made and notice thereof given. (Rev., s. 603; Code, s. 559; C. C. P., s. 309; C. S. 656.)

Cross References.—As to undertaking for costs, see § 1-285. As to undertaking to stay executions, see § 1-289 et seq.

Surety Insolvent.—Where the undertaking on appeal for the costs and the undertaking to stay execution are in one instrument, the appellee, upon filing the proper proofs of the insolvency of the surety, is entitled to have the appeal dismissed, but where the two undertakings are separate and distinct, the appellant has a right to have his appeal heard, although the surety to the undertaking to stay execution is insolvent. Alderman v. Rivenbark, 96 N. C. 134, 1 S. E. 644.


§ 1-296. Judgment not vacated by stay.—The stay of proceedings provided for in this article shall not be construed to vacate the judgment appealed from, but in all cases such judgment remains in full force and effect, and its lien remains unimpaired, notwithstanding the giving of the undertaking or making the deposit required in this chapter, until such judgment is reversed or modified by the supreme court. (Rev., s. 604; 1887, c. 192; C. S. 657.)

Cross Reference.—As to effect of appeal on proceedings in lower court generally, see § 1-294 and annotations thereunder.

Editor’s Note.—This section was added to the code in 1887, Laws 1887, c. 192.

In Black v. Black, 111 N. C. 300, 16 S. E. 412, it was held that this section required that a motion for a new trial upon newly discovered evidence, made after appeal and final decree in Supreme Court, should be made in the superior court. Failing the appeal the practice remains the same as if the appeal had been taken. A new trial is necessary in such a case, and the appeal has no power to reverse the judgment of the lower court on this subject. Black v. Black, 111 N. C. 300, 16 S. E. 412.

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§ 1-297. Judgment on appeal and on undertakings; restitution.—Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, as the case may require, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make-
plete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the supreme court on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in order to restrict a new trial to the issues affected by the erroneous ruling, and shall be entered against the appellant or person prosecuting the writ.

(Rcv., s. 602; Code, s. 563; C. C. P., s. 314; R. C., c. 4, s. 10; 1785, c. 233, s. 2; 1810, c. 793; 1831, c. 46, s. 2; C. S. 658.)

Cross References.—As to jurisdiction of supreme court to review issues of fact, see § 7-11. As to jurisdiction of supreme court on appeal, see §§ 7-10 and Const. Art. IV, sec. 8.

Whole Case Taken Up.—Under the provisions of this section an appeal on the trial and determination of the cause in the inferior court carries the whole case to the Supreme Court for review, and such court has plenary jurisdiction to reverse, affirm, or modify the judgment. Hudson v. Charleston, etc., R. Co., 84 N. C. 192, 84 S. E. 692.

Power to Direct Judgment in Lower Court.—A party litigant has a substantial right in a verdict obtained in his favor and where one has been rendered on issues which are determinative, and in so far as such verdict is to be considered as part of the judgment of the court, and where no appeal has been taken from such part of the judgment, the court, on its own motion, may remand the cause, with proper instructions, to the inferior court for the purpose of determining the cause of action. Davis v. Southern R. Co., 176 N. C. 707, 97 S. E. 468.

Separate Judgments for Separate Parties.—Where two parties have been joined as parties defendant in an action, and issues have been submitted to the court, not inconsistent with the pleadings and the facts proved, Voorhees v. Porter, 134 N. C. 591, 47 S. E. 31.

Any Relief Consistent with Pleadings.—On appeal a case is heard on the facts alleged in the pleadings, and where the parties have set forth such facts as entitled them to a verdict for their respective parties, and the court, in its discretion, may grant a new trial for newly-discovered evidence, or may modify the judgment, as the case may require. Brown v. Wilson, 174 N. C. 122, 93 S. E. 471.

The court in its discretion may order a new trial for newly-discovered evidence, or modify the judgment, as the case may require. Brown v. Wilson, 174 N. C. 122, 93 S. E. 471.

Where the parties respective counsel on appeal agreed to the rendition and amendment of the judgment, the cause will be remanded to the trial court, with directions to carry out the agreement. Stokes-Grimes Grocery Co. v. Hillyard, etc., R. Co., 160 N. C. 156, 76 S. E. 238.

Setting Aside of Erroneous Part Only.—Where a judgment has been rendered on issues which are determinative of the cause of action, the erroneous part thereof can be segregated, the court will only set aside the erroneous part. Newberry v. Seaboard, etc., R. Co., 160 N. C. 156, 76 S. E. 238.

Power.—Appropriation of a number of judgment defendants appeal from the judgment of the superior court, the Supreme Court, in affirming the judgment, will remand the case, that the judgment of affirmance may be enforced against all such defendants. Baxter v. Wilson, 95 N. C. 137.

But the Supreme Court will not determine the rights of persons represented in the trial, who do not appeal. Van Dyke v. Aetna Life Ins. Co., 173 N. C. 700, 91 S. E. 600.

Same.—Determining Interest in Land.—In this action the defendant the land, and in its discretion may order a new trial and direct further proceedings in lower court. Williams v. Kearney, 177 N. C. 591, 98 S. E. 705.

Same.—For Newly Discovered Evidence.—The Supreme Court may, in its discretion order a new trial for newly-discovered evidence, or modify the judgment, as the case may require. Clark v. Riddle, 118 N. C. 692, 24 S. E. 492.


Same.—To Introduce New Evidence.—After appeal, the court on appeal may permit further proceedings, upon petition of the plaintiff, to enable him to take further proofs, upon terms. Springs v. Wilson, 17 N. C. 385.

Same.—When Necessary Party Absent.—Where it appears that a necessary party is missing from the case, or that an issue is not determinative of the cause of action, the court, on its own motion, may remand the cause, with orders for a new trial. Vaughan v. Davenport, 159 N. C. 199, 74 S. E. 927, modifying opinion on rehearing s. c., 159 N. C. 150, 72 S. E. 842.

When New Trial Granted.—When the judgment is not supported by the record (as where the record shows that there was no verdict), or is erroneous in holding the verdict unsatisfactory, or unsatisfactory verdict, a new trial must be granted. McCanless v. Fitchurch, 98 N. C. 358, 363, 4 S. E. 359. Where an appeal on a former judgment has been allowed, the Supreme Court may, in its discretion order a new trial and direct further proceedings in lower court. Williams v. Kearney, 177 N. C. 591, 98 S. E. 705.

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§ 1-298

CH. 1. CIVIL PROCEDURE—APPEAL

§ 1-298

Technical, Formal, or Trivial Defects.—The Supreme Court will not grant a new trial except to subserve the real ends of substantial justice, and unless there is a probability of benefit to the complainant. Cauble v. Southern Exp. Co., 182 N. C. 448, 100 S. E. 267.

To Amend Verdict, Findings or Judgment.—The Supreme Court will not render a case, so that there may be a fuller finding of facts by the trial judge, in order that the appeal may be more intelligently considered. Gulf Refin. Co. v. McKernan, 178 N. C. 83, 100 S. E. 121.

Emoluments.—On appeal an emolument in a cause may be remanded for a special finding as to the right to costs. Smith v. Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

To Find Additional Facts.—Where the pleadings and affidavits are sufficient to enable the lower court to sustain the judgment in a cause, so that there may be a fuller finding of facts by the trial judge, the cause may be remanded for a special finding as to the right to costs. Smith v. Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

In a proceeding before a township board of supervisors to lay out a cartway, where an appeal was taken to the county board of supervisors on the ground of no legal right to make a final assessment against the plaintiff, and amended the petition to one for the laying out of a public road, the Supreme Court on appeal will not dismiss the case, but will direct the superior court to strike out the void order and proceed therunder and to proceed according to law. Holmes v. Bullock, 178 N. C. 376, 100 S. E. 530.

A necessary finding in an action to recover money from an express company, alleged to have been lost from a valise which had been intrusted to the defendant for shipment, that the money was taken while the valise was in the defendant's care or control, and such finding being omitted from an agreed case submitted to the superior court, it is remanded so that the omission may be supplied. Selby v. Southern Exp. Co., 184 N. C. 363, 79 S. E. 261.

Plaintiff Entitled to Judgment against Sureties on Undertaking.—Upon the affirmation by the Supreme Court of a judgment of the superior court, in favor of the plaintiff, he is entitled, upon motion, to judgment against the sureties upon an undertaking to stay execution pending the appeal, and such affirmation is conclusive of the liability of the sureties. Oakley v. Van Noorden, 100 N. C. 287, 5 S. E. 1.

§ 1-298. Procedure after determination of appeal.—In civil cases, at the first term of the superior court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause shall be tendered against the party cast, and remain in the case to the court below, is without jurisdiction to make any orders therein. Seaboard Air Line R. Co. v. Horton, 176 N. C. 115, 96 S. E. 954; Davis v. Southern R. Co., 176 N. C. 185, 96 S. E. 5.

Jurisdiction of Appellate Court after Remand.—The Supreme Court, having affirmed or reversed a cause, so that there may be a case to the court below, is without jurisdiction to make any orders therein. Seaboard Air Line R. Co. v. Horton, 176 N. C. 115, 96 S. E. 954; Davis v. Southern R. Co., 176 N. C. 185, 96 S. E. 5.

Jurisdiction of Lower Court after Affirmation.—After a judgment of a subordinate court imposing a punishment for contempt for disobedience of its order has been affirmed by the Supreme Court it becomes final, and the court below in conformity with the certificate from the Supreme Court, shall direct the execution to proceed and not by motion in the cause at a subsequent term of the trial court. Phillips v. Ray, 190 N. C. 132, 129 S. E. 177.

Pro Forma Order.—An order "that execution of said judgment do proceed" was pro forma under this section. North Carolina R. Co. v. Story, 193 N. C. 362, 366, 137 S. E. 166.


§ 1-298. Appeal from justice heard de novo; judgment by default; appeal dismissed.—When an appeal is taken from the judgment of a justice of the peace to a superior court, it shall be therein reheard, on the original papers, and no new trial shall be granted, unless the judgment is by exception and appeal, and not by motion in the cause at a subsequent term of the trial court. Phillips v. Ray, 190 N. C. 132, 129 S. E. 177.

Pro Forma Order.—An order "that execution of said judgment do proceed" was pro forma under this section. North Carolina R. Co. v. Story, 193 N. C. 362, 366, 137 S. E. 166.


§ 1-298. As to manner of taking appeal, see § 7-179. As to effect of appeal, see § 7-178.

I. EDITOR'S NOTE.

The plain purpose of the legislature, as manifested in this section, was to expedite the disposition of appeals from the courts of justices of the peace by providing that in such cases they should stand for trial de novo on the dockets of the superior courts at the first term after the appeal should be taken; that if both parties should appear, judgment should be rendered on the issues raised in the trial before the justice, and that where the defendants should make default the judgment in cases of convictions of offenses against the public peace should be by default and inquired "to be executed forthwith." This section was subsequently amended (Laws of 1889, ch. 443) so that where the party appealing should fail to cause
his appeal to be docketed before the next term of the superior court, the judgment appealed from may be vacated, and a trial de novo had in the superior court. But, in case an appeal is taken before the justice has reached the decision of the action, the superior court acquires no jurisdiction over the same by virtue of the appeal. Lower Creek Drainage Com'ts v. Sparks, 179 N. C. 526, 16 S. E. 161.

Derivative Jurisdiction.—The jurisdiction of the superior court on appeals from a justice of the peace is entirely derivative, so that, if the justice had no jurisdiction in an action as it was before him, the superior court can derive no jurisdiction from it. Chas. v. Fich, 137 N. C. 594, 71 S. E. 442; McMaurin v. McIntyre, 167 N. C. 350, 83 S. E. 657. Where a justice did not have jurisdiction of a party, the superior court cannot obtain it on an appeal from the justice, by ordering a summons to issue to bring the party before it. Durham Fertilizer Co. v. Marshburn, 125 N. C. 506, 34 S. E. 672.

Jurisdiction Can Not Be Conferred by Consent.—Where the superior court acquired no jurisdiction of a case on appeal from a justice's court without jurisdiction, the parties cannot confer jurisdiction upon the superior court by consent. Love v. Hufines, 151 N. C. 378, 66 S. E. 304.

Plaintiff Must Prove Case.—As on appeal from a justice on the whole case must be tried de novo in the superior court, the plaintiff, who has answered, and raised a material issue, does not relieve plaintiff from the necessity of establishing his cause of action, and it is error, where the action is upon a bond, to give the appeal the effect of a dismissal. Barnes v. Southern R. Co., 133 N. C. 130, 45 S. E. 531.

Appeal Waives Objections to Proceedings before Justice. —Where a party appealed from the judgment of a magistrate to the superior court, and a trial was had by jury, the matter being gone through with de novo, the defects in the proceedings before the magistrate are not material, as they are vacated by the appeal. Kearnv v. Jeffreys, 30 N. C. 56.

Where it did not appear in the summons, and there was no complaint that the amount sued for was over the jurisdictional amount limited to justice courts, the objection as to jurisdiction was not waived by the appeal. Cramer v. Marsha, 122 N. C. 563, 29 S. E. 836.

Trial De Novo.—On appeal from a judgment of a justice the court of a justice does not proceed according to the course of common law, and reviewable. McDonald v. Ingram, 124 N. C. 216, 29 S. E. 671. Where a Justice did not have jurisdiction of an action in his court, the judgment can not be reviewed; but, where a justice does not have jurisdiction of an action in his court, the superior court should only have dismissed the appeal. Phelps v. Worthington, 92 N. C. 270, 271.

Power to Allow New or Amended Pleadings.—Upon an appeal from a justice to the superior court, the superior court can not allow or deny improperly, the complaining party may appeal to the superior court. White v. American Acci. Co., 155 N. C. 581, 103 S. E. 142.

IV. POWER OF SUPERIOR COURT ON APPEAL.

Limiting Trial to Particular Issues.—The Superior Court may limit the trial on appeal to particular issues, where there is no evidence to support those excluded. Smith v. Newberry, 136 N. C. 435, 48 S. E. 839.

Incidental Questions.—An appeal from a court of a justice of the peace comprehend in its scope a new trial of the whole subject matter of the action, and any determination by the justice of facts not raised therein, though not directly appealed from, is, when relevant and necessary, to be considered and determined by the superior court. White v. American Peanut Co., 165 N. C. 132, 51 S. E. 134.

Amount Claimed Limited to Jurisdictional Amount of Justice's Court.—Where the Superior Court acquires jurisdiction on appeal from justice's court upon law and fact, the trial proceed in the superior court on the complaint, and not on the increased amount, and the Superior Court should only have dismissed the appeal. Meeneley v. Craven, 86 N. C. 564. See, as to applicability of section, Cowles v. Hayes, 67 N. C. 128.

May Disregard Finding of Facts.—On appeal to the Superior Court from an order of a justice denying a motion to open a default judgment the court may disregard the justice's finding of fact, and proceed to hear the matter anew. Turner v. Thrashing Mach. Co., 133 N. C. 381, 45 S. E. 781.

Same.—But Not in Summary Proceedings.—Where on a trial in summary proceedings before a justice, there is evidence to support the judgment of a justice, the Superior Court may disregard the justice's finding of fact, and proceed to hear the matter anew. Mason v. American Acci. Co., 109 N. C. 196, 13 S. E. 739.

Power to Allow New or Amended Pleadings.—Upon an appeal in a civil action from the court of a justice of the peace to the Superior Court, the matter has power to amend the pleadings and allow new pleas or matters of de-
§ 1-200

CH. 1. CIVIL PROCEDURE—APPEAL

§ 1-300


Same—Discretion of Court.—The trial on appeal in the superior court from a justice's judgment is de novo, and the judge may, in his discretion, allow pleadings to be filed. Teal v. Templeton, 149 N. C. 32, 63 S. E. 737.

Same—Plea of Statute of Limitations.—The plea of the statute of limitations in an appeal before a justice cannot be set up on appeal in the superior court without leave. Amendment of pleadings in such case is matter of discretion. Foston v. Rewis, 107 N. C. 297, 18 S. E. 16.

Same—Error in Amount of Summons.—Where a summons issued by a justice failed to show the amount claimed, the insertion of such amount was properly permitted upon appeal to the superior court, and such amendment was retrospective. McPhail Bros. v. Johnson, 115 N. C. 298, 20 S. E. 373.

Same—Error in Initials of Party.—Error in one of the initials of defendant's name in a justice's summons, if the right man is served, and is not misled, does not vitiate judgment by default, and may be amended on an appeal. Clawson v. Wolfe, 77 N. C. 4.

May Allow Counterclaim.—The superior court may on appeal from a justice's court allow the defendant to set up a counterclaim not urged in justice court. Norfolk, etc., R. Co. v. Johnson, 171 N. C. 176, 88 S. E. 144. See, also, Thomas v. Simpson, 80 N. C. 4.

Same—Refusal to Allow Counterclaim.—Where it appeared that a defendant made no defense to the action, but suffered judgment by default, and may be amended on an appeal. Poston v. Rose, 87 N. C. 279.

Court Cannot Set Aside Judgment and Docket Case.—Where a judgment was obtained before a justice of the peace and docketed in the office of the Superior Court Clerk, the court has no power to set aside such a judgment and docket the cause upon the civil issue docket. Ledbetter v. Osborne, 66 N. C. 979.

May Allow Counterclaim.—Under this section the justice's court, on appeal from justice's judgment is authorized to bring in an additional defendant, though less than $200 might be recoverable against such defendant. Selph v. Southern R. Co., 174 N. C. 449, 93 S. E. 160.

Privilege of Appellee Only.—The power given by this section to the appellee to docket a case at the first term of the superior court, if the appellant does not, and to have the judgment entered, is independent of the rule, and the appellee can draw no argument against an appeal from his failure to use it. Davenport v. Grissom, 113 N. C. 38, 39, 18 S. E. 78.

Dismissal for Failure to Docket.—Effect of Failure to Docket in Time.—An appeal from justice court not docketed at the first term to which it was returnable is properly dismissed. Tedder v. Deston, 169 N. C. 479, 83 S. E. 466; Pelzl v. Bailey, 157 N. C. 164, 72 S. E. 978.

If appellant fails to docket his appeal by the next succeeding term of the superior court, the appellee may have the case placed on docket, and have the judgment affirmed. Simonds v.有限责任 Co., 55 N. C. 35, 83 S. E. 353.

Under this section the judgment of affirmation is, in substance, equivalent to a judgment dismissing the action, and the appellate court is not required to look into the record for the purpose of passing upon the merits of the exceptions. Blair v. Coskley, 156 N. C. 405, 84 S. E. 804.

Failure to Pay Clerk's Fees.—When the justice of the peace was paid for transcript of appeal, made it out the day of the trial and handed it to the clerk of the superior court, but the appellant neither tendered nor paid the clerk his fees nor requested that it be docketed, a motion to dismiss must be granted. Lentz v. Hinson, 166 N. C. 31, 59 S. E. 144; Ballard v. Gay, 108 N. C. 544, 13 S. E. 207.

Dismissal for Failure to Docket Not Reviewable.—The action of the superior court is not reviewable in allowing the motion of the appellee, from a judgment rendered in a court of the Justice of the Peace, to docket and dismiss an appeal when the appellant had neither paid the Clerk's fees nor tendered to docket the appeal. McClintock v. Life Ins. Co., 149 N. C. 35, 32 S. E. 775.

When Appeal Not Dismissed.—Where an appellant pays the fees for the return and docketing of an appeal from a justice's court, he may not be dismissed for the failure of the clerk of the superior court to docket the same. Johnson v. Andrews, 132 N. C. 376, 43 S. E. 926.

When, on appeal from a justice of the peace, the cause was remanded to the lower court to cause the fees for the service of process to be tendered or paid to the clerk, but the clerk did not demand his fees or notify the appellant that the appeal would not be docketed unless they were paid, it was no error for the judge to allow the appeal to be docketed two terms after the regular time, and as soon as the appellant was notified that this had not been done. West v. Reynolds, 94 N. C. 543.

Waiver of Right to Object to Docket in Time.—Where defendant failed to see that his appeal from justice's court was docketed in the office of the Superior Court Clerk, but appeal was on docket 15 years without notice from plaintiff that he intended to take advantage of irregularity, it was held that plaintiff waived his right to such objection. Poston v. Rose, 87 N. C. 279.

§ 1-300. Appeal from justice docketed for trial de novo.—When the return is made from the justice's court the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court. (Rev., s. 608; Code, s. 880; C. C. P., s. 539; 1870-7, c. 251, s. 8; C. S. 661.)

§ 1-300. Appeal from justice docketed for trial de novo.—When the return is made from the justice's court the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court. (Rev., s. 608; Code, s. 880; C. C. P., s. 539; 1870-7, c. 251, s. 8; C. S. 661.)
Docketed at Next Ensuing Term.—An appeal from the court of a justice of the peace should be docketed at the next ensuing term of the superior court if the judgment appealed from has been rendered more than ten days before the expiration of the ten days allowed for service of notice of appeal. Peltz v. Bailey, 157 N. C. 166, 72 S. E. 978; Southern Pants Co. v. Smith, 125 N. C. 388, 34 S. E. 595.

Same.—Judge Cannot Allow Docketing Later.—Under this section an appeal from justice court must be docketed at that term of the superior court which begins more than ten days after judgment in justice court, and the superior court has no right to dispense with such requirement. Helsabeck v. Grubbs, 171 N. C. 37, 88 S. E. 473; Barnes v. Saleby, 177 N. C. 256, 98 S. E. 708. Formerly the rule was different. See State v. Edwards, 110 N. C. 511, 14 S. E. 741.

Same.—Whether Civil or Criminal.—The phrase "next term," within rule requiring appeals from justice's court taken after that time, in the absence of indulgence or extension of time. Peltz v. Bailey, 157 N. C. 166, 72 S. E. 978; Southern Pants Co. v. Smith, 125 N. C. 388, 34 S. E. 595.

An appeal from the action of the county commissioners in altering a public road should be taken to the next term of the superior court, though it was a criminal term. Blair v. N. C. State Hwy. Bd., 186 N. C. 50, 166 S. E. 884.

Same.—Judge Cannot Allow Docketing Later.—Under this section an appeal from justice court must be tried at that term of the superior court which begins more than ten days after judgment in justice court, and the superior court has no right to dispense with such requirement. Helsabeck v. Grubbs, 171 N. C. 37, 88 S. E. 473; Barnes v. Saleby, 177 N. C. 256, 98 S. E. 708. Formerly the rule was different. See West v. Reynolds, 94 N. C. 333.

When Judge Does Not Attend Next Term.—When the judge does not attend the next term of court at which an appeal from a judgment of a justice of the peace should have been docketed, the appellant should see that the appeal is docketed at the next term, and if the appeal is admitted, has the same effect as an affirmation of a judgment thereof under section 1-299. McClintock v. Lile Jr., 149 N. C. 33, 62 S. E. 729.

V. Equity Proceedings.

Docketed at Next Ensuing Term.—An appeal from an order granting or denying a motion to dismiss de novo in the Superior Court, under this section, and when the account sued on is admitted in the former court, it is discretionary with the trial judge to permit the plea of the statute of limitations which is necessary to defendant's right to set it up. Fochtman v. Greer, 194 N. C. 674, 140 S. E. 442.

Effect of Dismissal.—The dismissal of an appeal from a court of a justice of the peace may result in the judgment of the justice court being docketed by the appellant at the term of the superior court prescribed by this section, has the same effect as an affirmation of a judgment thereof under section 1-299. McClintock v. Lile Jr., 149 N. C. 33, 62 S. E. 729.

§ 1-301. Plaintiff's cost bond on appeal from justice.—When a defendant appeals from the judgment of a justice of the peace to the superior court, or when the judgment of the justice is removed by the defendant, by recordarri or otherwise, to a superior court, the court having cognizance of the appeal or recordarri may, upon sufficient cause shown by affidavit, compel the plaintiff to give an undertaking, with sufficient surety, for payment of the costs of the suit, in the event of his failing to prosecute the same with effect. (Rev., s. 606; Code, s. 564; R. C. c. 31, s. 104; 1831, c. 29; C. S. 662.)

Cross References.—As to costs on appeal, see § 6-33 and annotations thereunder. As to undertaking to stay execution, see § 6-33.


Discretion of Judge as to Requiring of Security.—In an appeal by a defendant to the superior court from a judgment of a justice of the peace, it lies within the discretion of the presiding judge there to require the plaintiff to give security for the further prosecution of the suit, or not. Smith v. Richmond, etc., R. Co., 72 N. C. 62.

SUBCHAPTER X. EXECUTION.

Art. 28. Execution.

§ 1-302. Judgment enforced by execution.—Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt. (Rev., s. 615; Code, s. 444; C. C. P., s. 247; C. S. 603.)

Cross Reference.—As to provisions for punishment for contempt generally, see § 1-301.

In General.—An execution is a writ, issuing from a court, and is an authority to the sheriff or other officer to do what it commands. Wayman v. Southard, 10 Wheat. 1, 33 L. Ed. 251.

Every execution presupposes a judgment, and the right to issue the one implies the existence of the other. Sheppard v. Bland, 87 N. C. 163. The general rule is that the power to issue an execution is a necessary consequence to the power to render judgment. Bank v. Halstead, 10 Wheat. 51, 64, 6 L. Ed. 264.

A judgment creditor is entitled to have his judgment satisfied, if need be, by a sale of his debtor's property, except such parts thereof as may be exempt from execution. The ordinary process to enforce such a judgment is of execution against the property of the debtor, and this process the creditor may have from time to time while the judgment continues in force, until it shall be discharged. Vogelahn v. Smith, 102 N. C. 264, 13 S. E. 552.

Where the judgment of a judgment debtor is subjected to a specific lien for its payment, the judgment creditor may...
proceed against the debtor in personam, may compel pay-
ment by proceeding in rem, or pursue both remedies at the

§ 1-303. Kinds of; signed by clerk; when

Sealing Execution Issued to Another County.—Sealing is
necessary to the validity of all executions issued to
other counties, and a sealing under an unsealed writ, does not render it valid. Seawell v. Bank, 14 N. C. 279; Finley v. Smith, 15 N. C. 95; Shackelford v. McRea, 10 N. C. 226; Freeman v. Lewis, 27 N. C. 91; Taylor v. Taylor, 81 N. C. 116. Without a seal it confers no power on the sheriff, and his acting under it can not give it validity. Shackelford v. McRea, 30 N. C. 226; Shepherd v. Lane, 13 N. C. 148.

§ 1-304. Against married woman.—An execution
may issue against a married woman, and it must direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise. (Rev., s. 618; Code, s. 442; C. C. P., s. 258; C. S. 664.)

Effect of the Restriction.—The provision of this section that the execution shall be levied upon her separate property can give no effect other than to exempt what she holds ex jure mariti, i. e., her contingent right of dower. There is nothing else to which the restriction could possibly apply. Harvey v. Johnson, 133 N. C. 155, 45 S. E. 644. See McLeod v. Williams, 122 N. C. 451, 30 S. E. 129.

Execution on All Separate Property Except Exemptions.—Liability in the case of personal property is determined by the law of the state where the property actually is, regardless of the domicile of the owner. Hervey v. R. I. Loan. & Trust Co., 17 R. I. 283, 28 L. Ed. 1003.

Debtor's Funds in Hands of Third Person.—When it appears, in proceedings supplementary to execution, that a third person has funds of the defendant available for the judgment, in order to prevent the same from being disposed of by making an execution against those third persons to dispose of the fund, Boseman v. McGill, 184 N. C. 215, 114 S. E. 10. As to garnishment, see §§ 1-440 et seq., and the notes thereto.

Application of Restriction as to Property Charged with Debt.—This section does not restrict the issue of execution against "the property she had charged with the debt." The words, "her separate property," evidently mean that an execution against her cannot be collected, as formerly, out of the husband, though he is still a necessary party to the execution. Harvey v. Johnson, 133 N. C. 155, 45 S. E. 644. See also, Spencer v. Hawkins, 39 N. C. 288.

此基础上的句子是："The execution, as to personal property, is determined by the law of the state where the property actually is, regardless of the domicile of the owner. Hervey v. R. I. Loan. & Trust Co., 17 R. I. 283, 28 L. Ed. 1003."
A deputy clerk has power to issue execution in the name of the clerk. Miller v. Miller, 89 N. C. 638. Section 1-305 by Ordinance Section 305—In 1866 a temporary ordinance entitled "an ordinance to change the jurisdiction of the courts" forbade any execution to be issued within the term of 1867 without the permission of the court. This for the time being repealed the requirement making it a duty of the clerk to issue execution of his own motion within six weeks. And consequently under this the decisions of the Supreme Court that a writ of execution is not issued, within the meaning of this section, by the clerk of his own motion within six weeks. And consequently under this section a writ of execution issued prior to March 15, 1867, should not be affected.

§ 1-306. Enforcement as of course.—The party in whose favor judgment is given, and in case of his death, his personal representatives duly appointed, may at any time after the entry of judgment proceed to enforce it by execution, as provided in this article; Provided, however, that no execution upon any judgment which requires the payment of money or the recovery of personal property may be issued at any time after ten years from the date of the rendition thereof; but this proviso shall not apply to any execution issued solely for the purpose of enforcing the lien of a judgment upon any homestead, which has or shall hereafter be allotted within the ten years from the date of rendition of judgment, or any judgment directed to the satisfaction of almory. (Rev., s. 619; Code, s. 437; C. C. P., s. 255; 1927, c. 24; 1935, c. 98; C. S. 667.)

Editor's Note.—The amendment of 1935 added the proviso relating to time for issuing execution on judgments, and also provided that the validity or force of any execution issued prior to March 15, 1935, should not be affected. Preserving validity of judgment by successive executions. Where under this section the vitality of the judgment has been preserved by the issuance of executions in each successive period of three years (that being the limitation prior to 1935 amendment) after its rendition, the statutory bar of ten years which is the time prescribed for bringing actions on judgments, does not prevent an execution issued, out of time, under the limitation of this section, from changing the character of a personal property thereunder, after the expiration of the limited period. Williams v. Mullis, 87 N. C. 159. 160.

Sec. 1-307. Issued from and returned to court of rendition.—Executions and other process for the enforcement of judgments may issue only from the court in which the judgment for the enforcement of the execution or other final process was rendered; and the returns of executions or other final process shall be made to the court of the county from which it issued. (Rev., s. 623; Code, s. 444; 1871-5, c. 74; 1881, c. 75; C. S. 669.)

Cross Reference.—As to penalty for false return by sheriff, see section 162-14.

Return to Another County not Authorized. Since the passage of the act of 1870-71, ch. 42, the clerk of the superior court of any county may not render the execution or other process issued by him returnable in the superior court of another. Howerton v. Tate, 66 N. C. 431.

Sec. 1-308. To what counties issued.—When the execution is against the property of the judgment debtor it may be issued to the sheriff of any county where the judgment is docketed. No execution may issue from the superior court of any county upon a judgment until it is docketed in that county. When it requires the delivery of real or personal property it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties. (Rev., s. 622; Code, s. 443; C. C. P., s. 259; 1871-2, c. 74; 1881, c. 75; 1903, c. 412; C. S. 670.)

Editor's Note.—Formerly this section did not require as a condition that the issuance of the execution that the judgment be already docketed in such other county at the time the execution was issued. The execution and the
transcript of judgment for docketing were allowed to be be
§ 1-309
apply to executions issued prior to its passage.

Several Defendants.—A writ was issued against three de-

§ 1-309. Sale of land under execution.—Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed by the court for that purpose; and upon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold. (Rev., s. 629; Code, s. 443; C. C. P., s. 259; C. S. 671.)

Cross Reference.—As to provisions requiring the sheriff to execute a deed, see section 1-339.

Foreclosure Sales Not Affected.—The provisions of this section regarding judicial sales are intended to apply to proceedings in the nature of execution sales of property in the hands of others charged with the payment of the judgment, and have no application to foreclosure proceedings, which are left to be governed by the old equity practice.

Where a sheriff has levied on lands and goods, and gone out of office, a general venditioni may issue to the new sheriff, where the goods have been delivered over to him. Tarkin v. Alexander, 19 N.C. 87, explaining and reciting the cases of Holland v. Eastwood, 12 N.C. 157, and Sanderson v. Rogers, 14 N.C. 38, with those of Barden v. McKinne, 11 N.C. 279, and Seawell v. Bank, 14 N.C. 250, where they are considered.

Upset Bid—Setting Aside Sale.—An execution sale, when closed, is not subject to an upset bid—§ 1-326, 45-26 and 46-32 not being applicable—and, when regularly made, an execution sale is not to be set aside, except for some trick, artifice, fraud, oppression or undue advantage, which must be alleged and proved, with each case to be judged by its own facts. Weir v. Weir, 196 N.C. 265, 269, 145 S. E. 281.

§ 1-310. When dated and returnable.—Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not less than forty nor more than ninety days from said date, and no executions against property shall issue until the end of the term during which judgment was rendered. (Rev., s. 624; Code, s. 449; 1903, c. 544; 1870-1, c. 42, s. 7; 1873-4, c. 7; 1897, c. 110; 1931, c. 172; C. S. 672.)

Editor's Note.—The amendment of 1927, (Pub. Laws, ch. 110) materially changed the provisions of this section. Formerly, in lieu of the present provision relative to the dating of the execution, the section had provided for the attestation thereof as of the day of the return of the day on which it was issued. Then the execution was returnable to the next term of the court beginning not less than forty days after the issuance thereof.

The Act substituted ninety days for sixty days in this section as formerly amended, and inserted the words “to the court from which they were issued” in the third and fourth lines.

Computation of First and Last Day.—In computing the number of days within which the writ of execution must be returned, the day of the issuance of execution must be included and the day of its return must be excluded. This is by analogy to the rule applied to the return of a process. Taylor v. Harris, 32 N.C. 25.

Necessity of Recovery of Judgment.—No execution can issue against the person of the defendant, even though the
complaint alleges facts to justify an arrest, unless the plaintiff had been released from arrest upon his own recognizance. Thus in Stewart v. Bryan, 121 N. C. 46, 50, 28 S. E. 18, the court enjoining this doctrine, said: "It will not do to carry the doctrine of State ex rel. Peck v. Foote, under this section, to its extreme conclusion, and to hold that the complaint plaintiff— that, because there is an allegation in the com- plaint, this fact entitles the plaintiff to an execution against the body of the defendant, whether the plaintiff recovered a judgment or not. The position would be in effect to nullify the constitution.

Two Alternative Conditions Prerequisite.—There are two alternative conditions which, to entitle the plaintiff to the issuance of an execution against the defendant. They are: (a) a lawful arrest before judgment, or (b) a complaint averring such facts as would have justified an order for arrest.

Facts Must Enter into Judgment.—An execution against the person can issue only when the facts alleged entitling the plaintiff thereto have been passed upon and entered into the judgment. Doyle v. Bush, 171 N. C. 10, 66 S. E. 165.

Facts Pleading and Proved and Issue Determined.—In or- der to issue an execution against the person of the defendant in cases where, when it is permissible, the cause of arrest must be pleaded and proved, the issue affirmatively de- termined by the jury and rendered. Turlington v. Aman, 183 N. C. 555, 79 S. E. 1102.

In the Absence of Order for Arrest, or Complaint.—Where there is no order of arrest before judgment nor any complaint filed alleging such facts as would have justified such order, a defendant cannot be arrested after judgment unless an order of arrest against the person of defendant is passed upon under this section. Houston v. Walsh, 79 N. C. 36.

Motion before the Clerk—Appeal to Superior Court.—Where a defendant has not been arrested before judgment, if, after the death of the person so taken and execution. (Rev., s. 626; Code, s. 469; R. C., c. 1. Against property—no lien on_ personal


Liability in Damages for Malicious Prosecution.—Where a trial court of competent jurisdiction has regularly de- termined that the plaintiff in the action had the right to arrest the defendant on personal execution, and accordingly caused the defendant to be taken into custody under this sec- tion, the plaintiff in said action is not liable in damages in defendant's subsequent action for malicious prosecu- tion, even though the verdict and finding of the jury or findings for plaintiff in the former suit is thereafter set aside or re- vered on appeal or other ruling in the orderly progress of the case. Overton v. Combs, 182 N. C. 4, 108 S. E. 357.

Alienation of Malice.—In an action to recover for mal- practice of defendant, execution against the person of the defendant may not issue in the absence of allegation and evi- dence of actual malice. Glinger v. Camp, 215 N. C. 340, 1 S. E. (2d) 870.

Discharge of Person Under Execution.—The person ar-rested may be discharged, after judgment and without pay- ment, only when the facts alleged entitling the plaintiff to an execution of $50. Foster v. Hyman, 197 N. C. 189, 148 S. E. 36.

Order for execution against the person of defendant upon return of the execution against his property, and that the plaintiff was injured thereby: Held, sufficient to sustain the jury's verdict that the injury was inflicted wilfully and wantonly, and an order for execution against the person of defendant which was secured is proper under this section and § 1-410. Foster v. Aman, 197 N. C. 189, 148 S. E. 36.

Liability in Damages for Malicious Prosecution.—Where a trial court of competent jurisdiction has regularly de- termined that the plaintiff in the action had the right to arrest the defendant on personal execution, and accordingly caused the defendant to be taken into custody under this sec- tion, the plaintiff in said action is not liable in damages in defendant's subsequent action for malicious prosecu- tion, even though the verdict and finding of the jury or findings for plaintiff in the former suit is thereafter set aside or re- vered on appeal or other ruling in the orderly progress of the case. Overton v. Combs, 182 N. C. 4, 108 S. E. 357.

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ment first out of the personality, is solely for the debtor's benefit, and is designed to produce his personality his lands may be sold. McCoy v. Beard, 9 N. C. 377, 379.

Lien as of What Time against Pachers.—Under this section the lien of execution against the personal property of the defendant, if it be bona fide purchasers, does not date from the date of such execution, but from the time of levy thereunder. Weinsfeld v. McLean, 96 N. C. 248, 22 E. R. 55.

The lien of an execution against the realty dates from the time of the rendition of judgment, provided it is docketed. See section 1-214.

Satisfaction Without Levy.—A sale of real estate under an execution issued on a judgment, which is a lien thereon, is valid without a levy. All that is essential to a valid sale of real estate under execution is that the requirements of the statues be observed and that it be fully made known at the sale what property is being sold. Farror v. Houston, 100 N. C. 369, 6 S. E. 72.


2. Against property in hands of personal representative.—If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.

3. Against the person.—If it is against the person of the judgment debtor, it shall require the officer to arrest him, and commit him to the jail of the county until he pays the judgment or is discharged according to law.

When Irregular.—An execution is irregular if it does not run in the name of the state and convey its authority to the officers to arrest the defendant. Houston v. Walsh, 79 N. C. 371.

Should Command the Sheriff.—Executions issued under this section should command the sheriff to arrest the defendant and commit him to the jail of the county from which it issued, until he shall pay the judgment or be discharged according to law. Kinney v. Laughenour, 97 N. C. 325, 2 S. E. 43.

4. For delivery of specific property.—If it is for delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy the judgment, if the judgment is recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and in that respect is deemed an execution against property.

5. For purchase money of land.—If the answer in an action for recovery of a debt contracted for the purchase of land does not deny, or if the jury finds, that the debt was so contracted, it is the duty of the court to have embodied in the judgment that the debt sued on was contracted for the purchase money of the land, describing it briefly; and it is also the duty of the clerk to set forth in the execution that the said debt was contracted for the purchase of the land, the description of which must be set out briefly as in the complaint. (Rev., s. 627; Code, ss. 234-236, 448; C. C. P., s. 261; 1863-9, c. 348; 1870, c. 217; 1875, § 1-315.)

Recital in Judgment Conclusive.—If the judgment of the court recites the fact that the debt was contracted for the purchase of land, as prescribed by this clause of the section, such recital is conclusive as between the parties to the record. Durham v. Wilson, 104 N. C. 595, 10 S. E. 681.

Reason of Recital as to Homestead Interest.—The homestead interest of the defendant is subject to execution upon a judgment recovered for the purchase money of such land sold. Toms v. Fite, 93 N. C. 274. Hence the requirement that it shall be set forth in the judgment and executed on, and claimed by the sheriff for the purchase money of such land, so that the sheriff may sell the land without regard to the homestead. Id.

Same.—Sale Not Void.—Land purchased but not yet paid for may not be exempt from the execution for the purchase money of such land. And the execution sale under which it is sold is valid even though there was no evidence of record that the judgment was for the purchase money of the land. Durham v. Bostick, 22 N. C. 333.

§ 1-314. Variance between judgment and execution.—When property has been sold by an officer by virtue of an execution or other process commanding sale, no variance from the judgment for the purchase money of such land. And the execution sale under which it is sold is valid even though there was no evidence of record that the judgment was for the purchase money of the land. Durham v. Bostick, 22 N. C. 333.

§ 1-315. Property liable to sale under execution. —The property of the judgment debtor, not exempted from sale under the constitution and laws of this state, may be levied on and sold under execution as hereinafter prescribed:

1. Goods, chattels, and real property belonging to him.

Common Law, and Historical Legislation.—For an excellent exposition of the historical development of legislation by which the lands of debtors became subject to execution, and changing the common law rule, see Jones v. Edmonds, 7 N. C. 415.

Public Property and Institutions.—Property held for necessary public uses and purposes, such as court-houses, jails, schoolhouses, etc., cannot be sold under execution. Montrose v. Roach, 95 N. C. 106, 110, the docket showed a judgment in favor of Hinton against a bond for $28; while the execution recited also other judgments and called for a larger sum than $28. It was held that the irregularity was cured by this section.

Technical Variance Immaterial.—Where a judgment was rendered against H for $112.20 and against other defendants, separately mentioned, for various amounts and an execution issued and issued recorded on the 16th of June for $112.20, and commanding the sheriff to satisfy it out of H's property, it was held, that the execution sufficiently informed to the judgment and the variance was technical and immaterial. Marshall v. Lashlie, 122 N. C. 227, 29 S. E. 371.

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Life Estate.—Where a life estate is devised to the testator or to another, he descends to the title of the life tenant in the event a creditor should bring action against him for a debt: Held, the condition upon which the title is to be held is void and his title: Id.

Reason of Recital as to Homestead Interest.—The homestead interest of the defendant is subject to execution upon a judgment recovered for the purchase money of such land sold. Toms v. Fite, 93 N. C. 274. Hence the requirement that it shall be set forth in the judgment and executed on, and claimed by the sheriff for the purchase money of such land, so that the sheriff may sell the land without regard to the homestead. Id.

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§ 1-316. Sale of trust estates; purchaser's title.

Upon the sale under execution of trust estates whereof the judgment debtor is beneficiary the sheriff shall execute a deed to the purchaser, and the purchaser thereunder shall hold and enjoy the same freed and discharged from all encumbrances of the trustee. (Rev., s. 1-317.)

§ 1-317. Sheriff's deed on sale of equity of redemption.—The sheriff selling equitable and legal rights of redemption shall set forth in the forthcoming bond given to secure possession of property the whole beneficial estate in the debtor, and noth-
as a substitute for the property, as a condition requires its return to the sheriff. Amis v. Smith, 16 Pet. 303, 313, 10 L. Ed. 299, 310. 10 L. Ed. 308.

On the giving of a forthcoming bond, the property is placed in the possession of the claimant; his custody is substituted for the custody of the sheriff, but the property is not withdrawn from the custody of the law. The property in the hands of the claimant, under the bond for its delivery, is as free from the reach of other process as it would be in the hands of the sheriff. Hagan v. Lucas, 10 Pet. 471, 476, 9 L. Ed. 151.

According to the law of Indiana, the giving of the bond does not release the lien upon the property; the property, in contemplation of law, remains in possession of the officer. Krippendorf v. Hyde, 110 U. S. 276, 4 S. Ct. 27. The property held under a forthcoming bond, on being recovered, is to be put into the possession of the new claimant. Id.

Failure to Deliver Property.—On failure to deliver property held under a forthcoming bond, the bond, on being returned into the clerk's office, will have the effect of a judgment. Gwin v. Breedlove, 2 How. 29, 36, 11 L. Ed. 167.

Estopped to Deny.—A person by executing a forthcoming bond thereby recognizes and is estopped to deny a claim and the validity of a judgment against him rendered upon such claim; the execution of the bond is tantamount to a confession of judgment for the demand. Sample v. Barnes, 14 How. 70, 75, 14 L. Ed. 330. Miller v. Cribb, 14 How. 75, 14 L. Ed. 330.

Judgment Reversed.—If the original judgment be reversed, by the superior court, the forthcoming bond follows of course. Bartow v. Petit, 7 Cranch 288, 3 L. Ed. 468.

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be satisfied. Gray v. Bowlus, 18 N. C. 437.

§ 1-321. Entry of returns on judgment docket; penalty.—When an execution is returned, the return of the sheriff or other officer must be noted by the clerk on the judgment docket; and when it is returned wholly or partially satisfied, it is the duty of the clerk of the court to which it is returned to send a copy of such last mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, who must note such copy in his judgment docket, opposite the judgment, and file the copy with the transcript of the docket of the judgment in his office. A clerk failing to send a copy of the payments on the execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and a clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars nis, and the judgment shall be made absolute upon notice to show cause at the succeeding term of the superior court of his county. (Rev., ss. 637, 638; Code, ss. 455; 1871-2, c. 74, s. 2; 1873-4, c. 75; C. S. 684.)

Execution Returned Becomes Part of Record.—An execution returned into court with an entry of satisfaction endorsed, in whole or in part, extinguishes so much of the debt and becomes a part of the record in the case. Walters v. Moore, 50 N. C. 41.

§ 1-322. Cost of keeping livestock; officer's account.—The court or justice shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property taken into their custody under legal process, the keeping of which is chargeable to them; and this allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold. The officer must make out his account and, if required, give the debtor or his agent a copy of it, signed by his own hand, and must return the account with the execution or other process, under which the property has been seized or sold, to the officer authorized to make the sale, and the sale shall be made in the same manner, and upon the same conditions, as if the former sale had not been made within that time. Any other officer who has levied upon the property may keep and sell it. (Rev., ss. 637, 638; Code, ss. 455, 467; R. C., ss. 1807, c. 731; C. S. 684.)

§ 1-323. Purchaser of defective title; remedy against defendant.—Where real or personal property is sold on any execution or decree, by any officer authorized to make the sale, and the sale is made legally and in good faith, and the property did not belong to the person against whose estate the execution or decree was issued, by reason of which the purchaser has been deprived of the property, or been compelled to pay damages in lieu thereof to the owner, the purchaser, his executors or administrators, may sue the person against whom such execution or decree was issued, or the person legally representing him, in a civil action, and recover such sum as he may have paid for the property, with interest from the time of payment; but the property, if per-
sonal, must be present at the sale and actually delivered to the purchaser. (Rev., s. 639; Code, s. 458; K. C. v. 43, s. 27; 1807, c. 729; C. S. 653.)

Editor's Note.—The remedy provided by this section is available only in cases where the judgment debtor, whose property is sold under the execution, has no title at all to the property sold. If the judgment debtor has any title at all, the equitable subrogation by his own real owner, is nonetheless satisfied, and the remedy of the creditor is under this section not upon the judgment, but against the judgment debtor for reimbursement. Halcombe v. Loudermilk, 48 N. C. 491, 493; Wall v. Brown, 47 N. C. 105.

1-324. Costs on execution paid to clerk; penalty.
—The sheriff or other officer must pay the costs on all executions which are satisfied in whole or in part, to the clerk of the court from which the execution issued, and to no other person, on the second day of the term of the court, and any such officer who neglects or refuses to pay the costs as aforesaid, and who is guilty of willful wrongdoing, must forfeit and pay forty dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amering sheriffs. (Rev., s. 640; Code, s. 472; R. S., c. 76, s. 5; 1822, c. 1149; C. S. 688.)

Art 29. Execution and Judicial Sales.

1-325. How advertised.—No real property shall be sold under execution, deed of trust, mortgage or other contracts, except as provided in other sections of this article until notice of sale has been posted at the courthouse door in the county for thirty days immediately preceding the sale, and also published once a week for four successive weeks in some newspaper published in the county, if a paper is published in the county; Provided, that if there be no newspaper published in said county the notice of such sale must be posted at the courthouse door and three other public places in the county for thirty days immediately preceding the sale. (Rev., s. 641; Code, s. 450; 1885, c. 38; 1905, c. 147; 1869-9, c. 237, s. 10; R. C. c. 45, s. 16; 1881, c. 278; 1909, c. 705; 1927, c. 253, s. 1; C. S. 687.)

Cross References.—As to advertisement of sale of personal property, see section 1-336. As to notice and place of sale of personalty sold under mortgage or other contracts, see section 1-337.

Editor's Note.—The amendment of 1927 (Pub. Laws, ch. 255) introduced some changes into this section. Prior to this amendment the notice of sale was to be posted at three public places in the county and published in the county newspaper, whereas under the section as amended the notice is to be posted at three public places in addition to the court-house door. The notice of sale may be posted not less than thirty days prior to the date of sale. The section as amended also provides for publication for "successive" weeks, formerly there being no requirement that the publication be successive.

Application to Mortgages, etc., under Power of Sale.—This section, which prescribes the notice of sale under mortg- age or other contracts, also has an operative form in cases where the parties have made no provisions of their own prescribing the giving of notice of sale. But it is the accepted rule that the notice given be in strict compliance with the provisions of the mortgage or trust deed, and that, in the absence of such provisions, in compliance with the terms of the instrument, and, if the execution sale is held after mortgage, in strict conformity with the notice given. (Rev., s. 384; Code, s. 190; 1899, s. 224; 1911, c. 196; 1917, c. 332, s. 95 S. E. 655; Eubanks v. Becton, 158 N. C. 230, 234, 73 S. E. 1009; Ferebee v. Sawyer, 167 N. C. 217, 147 S. E. 83; Wall v. Young, 155 N. C. 757, 65 S. E. 257.)

The advertisement of the sale in the newspaper in this county is to be made at the courthouse in the county for thirty days immediately preceding the sale. (Rev., s. 640; Code, s. 472; R. S. c. 76, s. 5; 1822, c. 1149; C. S. 688.)
§ 1-326. Advertisement on resale.—No resale of real property sold under execution, deed of trust, mortgage or other contracts shall be held to be valid and not obtained when the purchaser at a resale is not a bona fide purchaser for value, unless the advertisement on the resale is published in the county as follows:

§ 1-327. Judicial foreclosure; notice of sale and resale.—When any mortgage or deed of trust on real property shall be foreclosed by judicial proceedings it may be provided in the decree of foreclosure that the advertisement of the sale shall be begun at any time after the date of the decree of foreclosure, and such real property shall then be sold under judicial foreclosure proceedings only after notice of sale has been duly posted at the courthouse door and three other public places in the county for fifteen days immediately preceding the resale. (1913, c. 10; 1927, c. 255, s. 2; 1943, c. 543; C. S. 688.)

Editor's Note.—The 1943 amendment added the proviso to this section and made other changes.

§ 1-328. Notice defined.—In any sale of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where the original sale was published for four successive weeks and any re-sale published for two successive weeks shall be and the same are in all respects validated as to publication of notice. (1933, c. 96, s. 3.)

§ 1-329. Validation of certain sales.—All sales of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where the original sale was published for four successive weeks and any re-sale published for two successive weeks shall be and the same are in all respects validated as to publication of notice.

§ 1-330. Notice served on defendant; when on governor and attorney general.—In addition to the advertisement above required, the sheriff shall in every case, at least ten days before a sale of real property under execution, serve a copy of so much of the advertisement as relates to the real property of any defendant on him personally if he is found in the county, or on his agent if he has a known agent therein, or if he cannot be found within the county and has no known agent therein, but his address is known, by mail to such address; and the date of service shall be ascertained by the usual course of the mail from the place where sent to the place of its address. In case of the sale under execution, or under the order of any court, of any real or personal property in which the state is interested as a stockholder or otherwise, notice in writing must be served upon the governor and attorney general, at least thirty days before the sale, of the time and place of sale, and under what process it is made, otherwise the sale is invalid. (Rev., s. 642; Code, s. 457; 1858-9, c. 237, s. 11; 1876-7, c. 224; C. S. 689.)

Requirements Directory.—The requirements of section 3-225, that a sheriff advertise a sale under execution, and of this section, that he serve a copy upon the defendant ten days before the sale, are directory, and when not followed will not render the sale void as against a stranger without notice of the irregularity. Williams v. Dunn, 163 N. C. 206, 79 S. E. 512.

Notice Required in Resale.—Where after sale of property under execution the judgment creditor posts an advertisement within ten days and resale is ordered, and no notice of the resale is given the judgment debtor or the purchaser at the first sale, the judgment debtor is entitled to an order for a ressale, and if the order for a ressale is made, the requirement of the notice to the judgment debtor of sale of his property under execution being applicable to resales as well as to first sales. Bank of Pinehurst v. Gardner, 218 N. C. 594, 11 S. E. (2d) 872.

Procedure to Set Aside Sale.—The procedure to set aside a sale of lands under an execution which has not been advertised, and where notice has not been given the defendant in compliance with this section, is, as against a purchaser with notice of the irregularity, by motion in the cause, for the sale cannot be collateraly attacked. Williams v. Dunn, 163 N. C. 206, 79 S. E. 512.
§ 1-331. Sale days; place of sale; ratification of prior sales.—All real property sold under execution shall be sold at the courthouse door of the county in which all or a part of the property is situated, on any day of the week or month except Sunday, after advertising as required by law. All sales of real property sold under order of court shall be sold at the courthouse door of the county in which all or any part of the property is situated on any day of the week or month except Sunday, unless in the order directing such sale some other place and time are designated and then it shall be sold as directed in such order on any day of the week or month except Sunday, after advertising as required by law.

Sales and resales of real property under execution, or by order of court, or under the power of foreclosure in any deed of trust or mortgage may be made on any day of any week or month, except Sunday.

All sales made prior to March 2, 1939, under execution or by order of court on any day other than the first Monday in any month, or the first three days of any month, are hereby validated, ratified and confirmed. (Rev., s. 643; Code, s. 456; 1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2; 1931, c. 23; 1937, c. 26; 1939, c. 71, 256; C. S. 690.)

Editor's Note.—Public Laws 1929, c. 71, effective March 2, 1939, struck out this section as amended in 1931 and added the following words in lieu thereof.

Public Laws 1939, c. 256, effective March 30, 1939, directed that the last paragraph be added to this section as amended in 1931 and 1937, apparently through inadvertence. The first three days in any month are hereby validated, ratified and confirmed. (Rev., s. 643; Code, s. 456; 1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2; 1931, c. 23; 1937, c. 26; 1939, c. 71, 256; C. S. 690.)

Editor's Note.—Public Laws 1929, c. 71, effective March 2, 1939, struck out this section as amended in 1931 and added the following words in lieu thereof.

Public Laws 1939, c. 256, effective March 30, 1939, directed that the last paragraph be added to this section as amended in 1931 and 1937, apparently through inadvertence. The cases cited below were decided prior to the 1939 amendments. See 17 N. C. Law Rev. 372. The question whether a sale, not effected in accordance with the time and place at which this section requires that it should be effected, is void, so as to render the title of the purchaser invalid, has at various times given great difficulty to the court, which has resulted in conflicting decisions. Thus in Mayers v. Carter, 87 N. C. 146, it was held that an execution sale made at an improper time and place is void. For the same effect, see State v. Rivers, 27 N. C. 297. The abstract principle of law announced by these cases is that the non-observance, by the officer making the sale, of those provisions of law which are directory merely and relate to matters in form, in the execution of, or in the sale under, an execution or decree of the court, will not affect the title acquired under an execution sale. Thus it is stated in the last cited case that third persons need not show affirmatively the observance on the part of the sheriff of all legal prerequisites for the sale, nor are they charged to take notice of all the irregularities. That this is the rule is plainly shown by the annotations to section 1-325. But we can find no case which decides the question in controversy whether the requirement of time and place of the sale under this section is mandatory with the necessary result of avoiding the purchaser's title, or merely directory, so as to dispose of any question which would make such a sheriff to an action for damages. The decision reached in Mayers v. Carter, supra, tends to indicate that it is mandatory and yet the case with approval Brooks v. Katula, 49 N. C. 194, reached the same result, in which it was held that a sale made on Tuesday and Wednesday of the week will pass title, and the case of Wade v. Saunders, 70 N. C. 270, to the same effect.

§ 1-332. Sale hours.—No sale under an execution or decree shall commence before ten o'clock in the morning or continue after four o'clock in the afternoon of the day on which the sale is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares and merchandise may be continued until ten o'clock p. m. Provided, a certain hour for such sales shall be named and the sale shall begin within one hour after the time fixed, unless postponed as provided by law, or delayed by other sales. (Rev., s. 644; Code, s. 459; R. C., c. 45, s. 17; 1794, c. 41; 1927, c. 19; C. S. 691.)

Editor's Note.—The proviso appearing at the end of this section was added by the amendment of 1927, Pub. Laws, ch. 19.

§ 1-333. Postponement.—The sheriff or other person making the sale, for the absence of bidders or any other just cause, may postpone the sale from day to day, but not for more than six days in all, and upon postponement he must post...
§ 1-335

CH. 1. CIVIL PROCEDURE—EXECUTION

§ 1-340

a notice thereof on the courthouse door of his county. (Rev., s. 645; Code, s. 455; 1868-9, c. 237, s. 9; C. S. 692.)

Sale on Friday upon Postponement.—A sheriff, who advertises a sale of land levied upon execution to take place on Monday, the first day of the term, as prescribed by law, which sale is postponed from day to day, has a right to sell the same on the Friday succeeding. Wade v. Saunders, 70 N. C. 270.

Sale of Provisions of Law not Applicable in Case of Postponement.—The strict compliance with the terms of the mortgage and statutory provisions required to make a valid sale upon foreclosure does not apply when a postponement is held, but if the sale is being postponed for other reasonable purposes, for in the absence of statutory or contract provisions to the contrary, as in this State, a notice of postponement made in good faith, and reasonably calculated to give proper publicity of the time and place, is held sufficient. Werebee v. Sawyer, 167 N. C. 199, 83 S. E. 17.

Application to Court Sales and Mortgage Sales.—This section, authorizing the postponement of the sale from day to day for not more than six days, is held to apply to sales by the sheriff or person acting under court decrees, and not to apply to sales under power contained in a mortgage. Werebee v. Sawyer, 167 N. C. 199, 83 S. E. 17.

 Sufficiency of Notice.—Under the facts of the case where a sale under a power contained in a mortgage was advertised and posted at the courthouse of the county, the notice of the postponement consisting of a mere memorandum at the bottom of one of the original notices was held insufficient. Werebee v. Sawyer, 167 N. C. 199, 83 S. E. 17.

§ 1-335. Certain sales validated.—All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such executions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff’s deed for three years: Provided further, that the rights of minors and married women shall in nowise be prejudiced hereby. (Rev., s. 646; 1901, c. 742; C. S. 693.)

§ 1-336. Advertisement as to personal property.

—No sale of personal property under execution may be made until it has been advertised for ten days at the door of the courthouse of the county in which it is to be sold, and at three other public places in the county, and the advertisement must designate the place and the time of sale. (Rev., s. 648; Code, s. 490; R. C., c. 45, s. 16; 1808, c. 753; 1820, c. 1066; C. S. 698.)

Cross References.—As to advertisement of sale of real property, see section 1-325. As to advertisement of personal property sold under the terms of a mortgage, see § 45-23.

Purchaser with Notice of Lack of Advertisement.—A purchaser at an execution sale of personal property, who has full knowledge of such irregularities as absence of advertisement, etc., required by this section, is not an innocent purchaser, and the rule that a purchaser at a sheriff’s sale is not bound to look further than to see that he is an officer who sells, empowered to do so by a valid execution, is not applicable to his case, for the rule presupposes that the purchaser is a bona fide purchaser. Phillips v. Hyatt, 167 N. C. 570, 373, 83 S. E. 894.

§ 1-337. Penalty for selling contrary to law.—A sheriff or other officer who makes any sale contrary to the true intent and meaning of this article shall forfeit two hundred dollars to any person suing for it, one-half for his own use and the other half to the use of the county where the offense is committed. (Rev., s. 649; Code, s. 461; R. C., c. 45, s. 18; 1820, c. 1066, s. 2; 1822, c. 1155, s. 3; C. S. 696.)

Cross Reference.—As to liability of sheriff’s bond, see sections 162-8, 162-13.

§ 1-338. Officer’s return of no sale for want of bidders; penalty.—When a sheriff or other officer returns upon an execution that he has made no sale for want of bidders, he must state in his return the several places he has advertised and offered for sale the property levied on; and an officer failing to make such statement is on motion subject to a fine of forty dollars; and every constable, for a like omission of duty, is subject to a fine of ten dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which, or by justice to whom, the execution shall be returned. Nothing in, nor any recovery under, this section is a bar to any action for a false return against the sheriff or other officer. (Rev., s. 650; Code, s. 462; R. C., c. 45, s. 19; 1815, c. 887; C. S. 697.)

Cross Reference.—As to penalty for false return, see section 162-14.

§ 1-339. Officer to prepare deed for property sold.—Sheriffs or other officers selling lands by authority of any execution or process shall, upon payment of the price, prepare, execute and deliver to the purchaser a deed for the property purchased. The purchaser of land must furnish the officer with a description of it. (Rev., s. 651; Code, s. 471; R. C., c. 45, s. 30; 1848, c. 39; C. S. 698.)

Cross Reference.—As to execution of a deed of trust estate sold, see section 1-315.

A deputy clerk has power to issue executions in the name of the clerk. Miller v. Miller, 89 N. C. 402.

Means to Compel Sheriff.—A motion in the cause, and not a distinct action, is the proper means of compelling the sheriff to make title to the purchaser at the execution sale. Fox v. Kline, 85 N. C. 174.

Where the purchaser is implicated in the sheriff’s derelictions, he is not entitled to call for a conveyance. Skinner v. Warren, 81 N. C. 373.

Failure to Pay Purchase Money—Resale by Sheriff.—If a sheriff at a sheriff’s sale fails to pay his bid the sheriff shall not sell the property to the person paying the price, or may apply for a rule to compel payment, or he may at his own peril as to the plaintiff indulge the purchaser. Maynard v. Moore, 76 N. C. 158, 161, citing McKee v. Lineberger, 69 N. C. 277. A sheriff is not obliged to resell immediately, but may give the purchaser time in which to pay the purchase money, if neither party to the execution objects or complains. Id.

Recital in Deed Prima Facie Evidence.—The recital of execution and sale in a sheriff’s deed is prima facie evidence thereof. Wainwright v. Bobbitt, 127 N. C. 274, 37 S. E. 336.

Recitals in a sheriff’s deed are prima facie evidence of an execution sale, notwithstanding the return upon the execution may be imperfect. The fact that there was a sale may also be proved by parol. Miller v. Miller, 89 N. C. 462.

Necessity of Seal.—A deed of a sheriff without a seal attached is not competent evidence in ejectment to show title, and a sheriff will not be allowed to affix his seal to a deed which is not his. Title is set up in the complaint. Fisher v. Owens, 133 N. C. 686, 44 S. E. 369.

Art. 30. Betterments.

§ 1-340. Petition by claimant; execution suspended; issues found. — A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed
to be good, have made permanent improvements thereon, and praying that he may be allowed for the use and occupation of the land. The court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment and impain a jury to assess the damages of the plaintiff and the allowance to the defendant for the improvements. In any such action this inquiry and assessment may be made upon the trial of the case. (Rev., s. 659; Code, s. 473; 1871-2, c. 117; C. S. 609.)

Cross-references.—As to registration of conveyances, contracts to convey, and leases, see § 47-38. As to judgment for betterments having priority over homestead rights, see annotation "Judgment for Improvements," division III, under section 1-369.

Editor's Note.—In Scott v. Battle, 85 N. C., 185, 192, it was held that the purchaser of lands from a feme covert, who was not privily examined, and whose husband did not claim for betterments. This decision was based on Battle's asserts


Same—Parol Contract to Convey.—A vendor in possession, who repudiates a parol contract to convey land, will not be permitted to evict a vendee who has entered and made improvements, until the latter has had the purchase money and compensated for betterments. Vann v. Newcomb, 80 N. C. 669.

One who was induced to enter on and improve land by a parol promise that it would be settled on him as an advancement or gratuity will not be evicted until compensation is paid. Baker v. Carson, 16 N. C. 316; Hedgepeth v. Rose, 95 N. C. 41.

Same—Fraudulent Misrepresentations.—Where, by fraudulent misrepresentations as to area of the vendor, a vendee is induced to purchase land, on a rescission of the contract he is entitled to reimbursements for improvements put on the land. Hill v. Brower, 76 N. C. 124.

Same—Unregistered Deed.—One who has improved land held by him under an unregistered deed is not entitled to the value of the betterments as against judgment creditors of his grantor. Eaton v. Dorib, 190 N. C. 14, 23, 128 S. E. 499.

Same—Notice Required.—Notice sufficient to bar the right to compensation is not a constructive notice, or such a notice as the petitioner might have acquired by a diligent inquiry of the title, but such facts and circumstances as might reasonably suggest to the ordinary citizen serious defects in his own title. Carolina Cent. R. Co. v. McCaskill, 98 N. C. 538.

Where the title to the land was in a feme covert who married in 1846, when under age, and she and her husband executed a bond to convey the land after she became of age. If the bond was never registered, and the defendant had no actual notice of any defect in his title, which he believed to be good, the doctrine of constructive notice of improvements, and the fact that he has been on the property since 1846, he is entitled to compensation under the section for permanent improvements made by him on the land. Justice v. Baxter, 93 N. C. 405.

Same—Reasonable Belief.—The petitioner must show not only an honest and bona fide belief in his title, but he must satisfy the jury, also, that he had good reason for such belief. Pritchard v. Williams, 176 N. C. 108, 109, 96 S. E. 733.

One holding under a tenant for life, making substantial and permanent improvements on the lands, under facts and circumstances which would have put a reasonable man upon inquiry, was entitled to recover for the betterments he has thus made. Harriett v. Harriett, 181 N. C. 565, 157 S. E. 103.

1—21
in evidence in an action to recover the land, that he has in good faith made permanent improvements after his estate had expired and their value to the extent of the rents and profits accrued against or damages for waste or other injury done by him, or those under whom he claims, and also the damages for waste or other injury to the premises committed by the defendant. The defendant is not liable for the annual value or for damages for waste or other injury for any longer time than three years before the suit, unless he claims for improvements. (Rev., ss. 653, 654; Code, ss. 477, 478; 1871-2, c. 147, ss. 2-3; C. S. 700.)

Three Year Limitation Inapplicable.—Where one in possession or interest thereon is entitled to recover, against the true owner, for betterments he has placed thereon, he will be charged with the use and occupation of the land, without regard to the three-year statute of limitation. Pritchard v. Williams, 176 N. C. 108, 109, 96 S. E. 733; Whitfield v. Boyd, 158 N. C. 451, 453, 74 S. E. 452. But this is because generally the owner of the land at the time of its recovery also owns the rents, and the law gives to each what belongs to him, it awards to the owner the land and his rents, and to the occupant the value of his improvements. Harriett v. Harriett, 181 N. C. 75, 77, 105 S. E. 221.

When Remaindermen May Not Recover.—When one holding under a tenant for life by deed apparently conveying the lands in fee after her death, is entitled to betterments, as aforesaid, the last-entitled if no improvements had been made, until that time, the remaindermen, after the death of the tenant for life, are not entitled to and may not recover such rents and profits, or have them credited on the value of the betterments, the jury shall find a verdict for the contrary being inapplicable. Harriett v. Harriett, 181 N. C. 75, 106 S. E. 221.

§ 1-342. Value of improvements estimated.—If the jury is satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the premises, permanent and valuable improvements, they shall estimate in his favor the value of the improvements made before notice, in writing, of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount for which the value of the premises is actually increased thereby at the time of the assessment. (Rev., ss. 653; Code, s. 477; 1871-2, c. 147, s. 4; C. S. 701.)

Value of Property Permanently Enhanced.—The sole matter for consideration is embraced in one proposition, and that is, "how much was the value of the property permanently enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the benevolently held property?" Pritchard v. Williams, 176 N. C. 108, 109, 96 S. E. 733.

Same.—Fact for the Jury to Find.—It is a matter of fact for the jury, rather than one of law, to estimate upon the use of the improvements thereon made by the betterments put thereon by the labor and expenditure of the benevolently held property. Pritchard v. Williams, 181 N. C. 46, 50, 106 S. E. 144.

§ 1-343. Improvements to balance rents.—If the sum estimated for the improvements exceeds the damages estimated against the defendant as aforesaid, the jury shall then estimate against him for any time before the said three years the rents and profits accrued against or damages for waste or other injury done by him, or those under whom he claims, so far as is necessary to balance his claim for improvements; but the defendant in such case shall not be liable for the excess, if any, of such rents, profits, or damages beyond the value of improvements. (Rev., ss. 656; Code, s. 477; 1871-2, c. 147, s. 5; C. S. 702.)

If the betterments exceed in value the rental and damages for waste, the rents and profits accruing prior to the three years may be assessed so far as to balance the improvements, but no further. Whitfield v. Boyd, 158 N. C. 451, 74 S. E. 452; Barker v. Owen, 93 N. C. 198, 202.

§ 1-344. Verdict, judgment, and lien.—After offsetting the damages assessed for the plaintiff, and the allowances to the defendant for any improvements, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered therefor according to the verdict. Any such balance due to the defendant is a lien upon the land recovered by the plaintiff until it is paid. (Rev., ss. 657, 658; Code, ss. 477, 479; 1871-2, c. 147, ss. 6, 7; C. S. 703.)

The sum adjudged the defendant constitutes a lien upon the land, and this can only be made effectual and enforced, if not paid, by a sale of the premises. Barker v. Owen, 93 N. C. 198, 202.

In ejectment a writ of ouster should not issue until a verdict for betterments has been paid. Bond v. Wilson, 129 N. C. 325, 332, 40 S. E. 179.

§ 1-345. Life tenant recovers from remainder.
man.—If the plaintiff claims only an estate in life in the land recovered and pays any sum allowed to the defendant for improvements, he or his personal representative may recover at the determination of his estate from the remainderman or reversioner, the value of the said improvements as they then exist, not exceeding the amount as paid by him, and he has a lien thereon on the premises as if they had been mortgaged for the payment thereof, and may keep possession of said premises until it is paid. (Rev., s. 659; Code, s. 480; 1871-2, c. 147, s. 8; C. S. 704.)

General Rule.—It is the general rule that a life tenant is not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements. Harriett v. Harriett, 181 N. C. 75, 77, 106 S. E. 221.

A devise of lands for life with limitation over, does not entitle the life tenant to compensation for betterments he has placed on the land during his tenancy. Northcott v. Northcott, 175 N. C. 148, 149, 95 S. E. 104.

Same—Mistake of Contract.—The section does not apply to a situation where the tenant makes improvements upon land during his occupation, as lessee, where he believed he was entitled to the possession for the lessor's life, when under the contract he was not; nor does the fact that the lessee mistakenly proceeded in the putting up the improvements change the situation. Dunn v. Bagley, 88 N. C. 91.

§ 1-346. Value of premises without improvements.—When the defendant claims allowance for improvements, the plaintiff may by entry on the record require that the value of his estate in the premises without the improvements shall also be ascertained. The value of the premises in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made by the tenant or any person under whom he claims, and shall be ascertained in the manner hereinbefore provided for estimating the value of improvements. (Rev., ss. 661, 662; Code, ss. 482, 483; 1871-2, c. 147, ss. 10-11; C. S. 705.)

The rents should be assessed upon the basis of the property without the improvements. Whittington v. Boyd, 139 N. C. 451, 453, 74 S. E. 452; Barker v. Owen, 93 N. C. 198.

§ 1-347. Plaintiff's election that defendant take premises.—The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney in the cause, enter on the record his election to relinquish his estate in the premises to the defendant at the value as ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit, if he pays therefor the said value with interest in the manner ordered by the court. (Rev., s. 663; Code, s. 484; 1871-2, c. 147, s. 12; C. S. 706.)

If the enhanced value is greatly disproportionate to the value of the land improved, so that it might almost be said that the owner is "improved out of his property," he has an election to let the land go, relinquishing his estate, upon payment by the defendant of its value as unimproved. Barker v. Owen, 93 N. C. 198, 199.

§ 1-348. Payment made to court; land sold on default.—The payment must be made to the plaintiff, or into court for his use, and the land is bound therefor, and if the defendant fails to make the payment within the time limited therefor, the court may order the land sold and the proceeds applied to the payment of said value and interest, and any surplus to be paid to the defendant; but if the net proceeds are insufficient to satisfy the said value and interest, the defendant is not bound for the deficiency. (Rev., s. 664; Code, s. 485; 1871-2, c. 147, s. 13; C. S. 707.)

§ 1-349. Procedure where plaintiff is under disability.—If the party by or for whom the land is claimed in the suit is a married woman, minor, or insane person, such value is deemed to be real estate, and shall be disposed of as the court considers proper for the benefit of the persons interested therein. (Rev., s. 665; Code, s. 486; 1871-2, c. 147, s. 14; C. S. 708.)

§ 1-350. Defendant evicted, may recover from plaintiff.—If the defendant, his heirs or assigns, after the premises are so relinquished to him, is evicted by force of a better title than that of the original plaintiff, the person so evicted may recover from the plaintiff or his representatives the amount paid for the premises, as so much money had and received by the plaintiff in his lifetime for the use of such person, with lawful interest thereon from the time of the payment. (Rev., s. 666; Code, s. 487; 1871-2, c. 147, s. 15; C. S. 709.)

§ 1-351. Not applicable to suit by mortgagee.—Nothing in this article applies to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises. (Rev., s. 660; Code, s. 481; 1871-2, c. 147, s. 9; C. S. 710.)

When Section Inapplicable.—Where relationship of mortgagor and mortgagee is terminated by foreclosure prior to claimant's possession under mesne conveyances from mortgagor, this section, does not apply. Metropolitan Life Ins. Co. v. Allen, 208 N. C. 13, 179 S. E. 15.

In Wharton v. Moore, 84 N. C. 479, 483, it was said: "It is very probable the Legislature in making the exception had in view the generally admitted principle that the right to betterments is not conceded to mortgagors, for the current of authorities is to the effect that it has no application to them. In 2 Washburn Real Prop., it is laid down that, 'if the mortgagee or any one standing in his place enhances the value of the premises by improvements, they become additional security for the debt, and he can only claim the surplus, if any, upon such sale being made after satisfying the debt.'"

Art. 31. Supplemental Proceedings.

§ 1-352. Execution unsatisfied, debtor ordered to answer.—When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the state, to the sheriff of the county where a judgment roll or a transcript of a justice's judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution...
was issued. (Rev. s. 667; Code, s. 458, subsec. 1; C. C. P., s. 264; 1806-9, c. 95, s. 2; C. S. 711.)

Cross Reference.—As to execution against debts due corporate defendants, see § 53-143.

Purpose of Proceedings Supplemental.—The purpose is to give supplemental execution, and only to perfect the power to reach property liable to execution, or to what is in the nature of execution, viz: proceedings to enforce its sale. Hutchison v. Symons, 67 N. C. 156, 159; McKeithan & Sons v. Walker, 66 N. C. 12.

The proceedings are intended to perfect the creditors' remedy in the same action and to supersede that which in a divided judgment debt by a judgment at law, and was unable to obtain satisfaction of the debt by a judgment at law, and was unable to obtain satisfaction of the debt. He must proceed by supplemental proceedings. Rand v. Rand, 78 N. C. 12, 15.

Supplemental proceedings are based upon an execution and may not be instituted against a defendant when there has been a personal judgment without three years within the time of the institution of such supplemental proceedings. International Harvester Co. v. Brockwell, 202 N. C. 805, 164 S. E. 322.

Same—Substitute for Creditor's Bill.—In Carson v. Oates, 64 N. C. 115, it was said: "Supplemental proceedings were intended to supply the place of proceedings in equity, where relief was given after a creditor had ascertained his property to be insufficient to pay the debt, and may not be instituted against a defendant when there has been a personal judgment without three years within the time of the institution of such supplemental proceedings. International Harvester Co. v. Brockwell, 202 N. C. 805, 164 S. E. 322.

Same—Complete Determination of Action. — Proceedings supplemental to execution are but a prolongation of the action necessary to the final discharge of the judgment, the purpose being that all matters affecting the complete satisfaction and enforcement of the judgment shall be settled in the same action, instead of by a multiplicity of suits. Rand v. Rand, 78 N. C. 12, 15.

Nature of Proceedings—Final Process. —They are in the nature of a final process, a proceeding a like as a substitute for a creditor's bill to enforce the payment of a judgment at law or as a proceeding having the essential qualities of an equitable fi. fa. Goodwin v. Clayton, 137 N. C. 224, 225, 226, 49 S. E. 173.

Same—Equitable Execution.—Such proceedings are in the nature of an equitable execution, and are intended to determine the interests of the creditors and the debtor; and in all matters affecting the complete satisfaction and enforcement of the judgment, the same are to be adjudged by the court, to be examined in a supplementary proceeding, without the necessity of a personal demand, to the process in a supplementary proceeding, and to subject a distribute the share of the judgment debtor in the estate to the satisfaction of the debt. He must proceed by supplemental proceedings. Rand v. Rand, 78 N. C. 12.

Three Year Limitation.—When the ordinary execution is returned unsatisfied in whole or part, the judgment creditor, at any time after such return, within three years from the date of the judgment, may apply by proceedings supplemental to execution, in aid of such execution, to subject the corporation and its stockholders, demanding an account to assure them of the proper distribution of the corporation's property.
some provision of the statute under which the garnishment suit is conducted." Rood on Garnishment, sec. 280, quoted in Bank v. Southern R. Co., 141 N. C. 164, 168, 53 S. E. 831.

Ten Days’ Notice Not Required.—The requirement of ten days’ notice of motions generally, has no reference to the examination of judgment debtors under supplemental proceedings, but such cases are governed by this section, which refers the time and place of examination to the discretion of the court or judge. Weiller & Co. v. Lawrence, 81 N. C. 65, 67.

Part of Judgment Owned by Person Other Than Defendant Cannot Be Attached.—In Armour Fertilizer Works v. Newbern, 210 N. C. 9, 185 S. E. 471, it was held that if the time of the rendition of a judgment another person was the equitable owner of a stipulated part thereof, so defendant had no legal or equitable interest in such part, and plaintiff was not entitled to attach such part in the supplemental proceedings instituted by it against defendant.

§ 1-353. Property withheld from execution; proceedings.—After the issuing of an execution against property, and upon proof by affidavit of a party, its agent or attorney, to the satisfaction of the court or a judge thereof, that any judgment debtor residing in the judicial district where such judgment or sheriff resides has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear to answer concerning the same; and proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as provided upon the return of an execution, and the judgment creditor is entitled to the order of examination of the debtor, if it does not negative such negative averments may be remedied by amendment.

§ 1-354. Proceedings against joint debtors.—Proceedings supplemental to execution may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which the action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in like manner and to the like effect. These provisions apply to all proceedings and actions pending and to those terminated by final decree or judgment. (Rev., s. 669; Code, s. 490; C. C. P., s. 206; 1869-70, c. 79, s. 2; 1870-1, c. 245; C. S. 713.)

Joint, as well as single debtors, may be examined after the issuance of an execution, and before its return. Weiller & Co. v. Lawrence, 81 N. C. 65.

§ 1-355. Debtor leaving state, or concealing himself, arrested; bond.—Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise to his satisfaction that there is danger of the debtor leaving the state or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the judgment, issue a warrant requiring the sheriff of any county where such debtor is to arrest him and bring him before the court or judge. Upon being brought before the court or judge, the debtor may be examined on oath, and, if it appears that there is danger of his leaving the state, and that he has property which he unjustly refuses to apply to the judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as directed, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt. (Rev., s. 671; Code, s. 488, subsec. 4; 1869-70, c. 148, s. 4; 1868-9, c. 277, s. 8; C. S. 714.)

§ 1-356. Examination of parties and witnesses.—On examination under this article either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness; and the party or witnesses may be required to appear before the court or judge, or a referee appointed by either, and testify on any proceedings under this article in the same manner.
manner as upon the trial of an issue. If before a referee, the examination shall be taken by the referee, and certified to the court or judge. All examinations and answers before a judge or referee under this article must be on oath, except that when a corporate body answers, the answer shall be on the oath of an officer thereof. (Rev., ss. 488 [subsec. 2], 491, 492; C. C. P., ss. 264, 267, 268; 1868-9, c. 95, s. 2; 1871-2, c. 245; C. S. 713.)

Cross-Examination.—Where the judgment debtor is examined the creditor does not make him his witness, but may cross-examine and contradict him. Coates Bros. v. Wilkes, 92 N. C. 377.

Evidence Taken Down in Writing.—In supplemental proceedings the evidence should be taken down in writing. Coates Bros. v. Wilkes, 92 N. C. 377, 383.

Production of Documents.—Where, on examination of a debtor, it appears that his account books are material to the investigation, the court may require him to produce them. Coates Bros. v. Wilkes, 92 N. C. 377.

§ 1-357. Incriminating answers not privileged; not used in criminal proceedings.—No person, on examination pursuant to this article, is excused from answering any question on the ground that it will tend to convict him of the commission of a crime or that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. (Rev., s. 672; Code, s. 488, subsec. B; C. C. P., s. 264; 1868-9, c. 95, s. 2; C. S. 714.)

Witness Must Answer Questions.—A witness must answer the questions and he cannot shield himself behind his declaration that they involve self-crimination. LaFontaine v. Southern Underwriter's Ass'n, 83 N. C. 133.

So when called to testify as to his dealings in behalf of a defunct corporation, of which he was an officer, he cannot excuse himself on the ground the evidence thus elicited might be used on the trial of indictments pending against him and others for conspiring to cheat and defraud divers persons in the management of the affairs of such corporation. LaFontaine v. Southern Underwriters Association, 83 N. C. 133.

Not Available for Criminal Proceedings.—Facts developed in supplemental proceedings are forbidden to be used in evidence against them in any criminal proceeding or prosecution. State v. Mallett, 125 N. C. 718, 34 S. E. 651.

§ 1-358. Disposition of property forbidden.—The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution. (Rev., s. 673; Code, ss. 488 [subsec. 6], 491; C. C. P., ss. 284; 1868-9, c. 95, s. 2; C. S. 715.)

Only Parties May Be Restrained.—In supplemental proceedings, the court cannot restrain the transfer of property owned by one not a party to the action. Banks v. Burns, 109 N. C. 105, 13 S. E. 871.

Where one, who is charged or alleged to be the owner of such property, refuses to deliver it to the receiver, the court may, by order, require the spouse or other person who is not a party to the action, to deliver the property to the receiver. Coates Bros. v. Wilkes, 94 N. C. 174.

§ 1-359. Debtors of judgment debtor may satisfy execution.—After the issue of an execution against property, all persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the amount of their debt, or as much thereof as is necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount paid. (Rev., s. 674; Code, s. 489; C. C. P., s. 265; C. S. 718.)

Protection to Debtors of Judgment Debtor.—The section furnishes an easily secured and safe protection to the debtors of the judgment debtor, who are called upon to satisfy the execution. Parks v. Adams, 113 N. C. 473, 477, 18 S. E. 265.

Authority of Sheriff.—A sheriff is authorized by this section to receive from debtors of the defendant in the execution, his answer containing the same. The court or judge may, by order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same. The court or judge may, in its discretion, require notice to the proceeding to be given to any party to the action, in such manner as seems proper. (Rev., s. 675; Code, s. 490; C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; C. S. 719.)

When Proceedings May Commence.—The proceedings given by the section may be commenced before the sale of the property levied on, at the presentation of an affidavit or other proof of its insufficient value. McKeithan & Sons v. Walker, 66 N. C. 95, 99.

Purpose of Appearance and Answer.—The purpose of the appearance and answer required by the section is to determine whether the sum alleged, or any part thereof is due the judgment debtor. Rice v. Jones, 103 N. C. 226, 231, 95 S. E. 571.

Assignee May Be Examined.—An order for examination against the defendant's assignee. Bruce v. Crabtree, 116 N. C. 528, 21 S. E. 194.

Procedure.—The section expressly prescribes that persons having property of the judgment debtor may be examined as to the same, and mere notice is sufficient to bring them before the courts and make them subject to its jurisdiction for the purpose of securing the debtor's property, not for the purpose of contesting any right of such persons having the same, or the claims of the judgment debtor, or the same belongs to them, may properly suspect so. Banks v. Burns, 109 N. C. 105, 109, 13 S. E. 871; Bowers v. Charles, 65 N. C. 175.

Where one, who is charged in supplemental proceedings as holding property belonging to a judgment debtor, claims such property as his own, the question cannot be decided in the course of such proceedings, but must be settled by an independent action. Carson v. Oates, 64 N. C. 115.

Same.—Notice to Defendant.—Notice to the defendant is not required, though the court may, in its discretion, order notice to be given. Wright v. Southern R. Co., 141 N. C. 164, 168, 53 S. E. 831. Wilmington v. Sprunt, 114 N. C. 310, 19 S. E. 348.

§ 1-360. Where proceedings instituted and defendant examined.—Proceedings supplemental to execution must be instituted in the county in which the judgment was rendered; but the place designated where the defendant must appear and answer must be within the county where he resides. (Rev., s. 677; C. S. 720.)

Editor's Note.—This section is a substantial enactment of the rule laid down in Hasty v. Simpson, 77 N. C. 69, 70. In Upchurch v. Symons, 67 N. C. 156, it was held that proceedings supplementary should be instituted in the county in which the action was pending; that is, where the judgment was rendered. Hasty v. Simpson, supra, quoted, and approved this ruling, but not the other, viz., that the place designated for the appearance and answer of the defendant should be in the county of his residence. Thus a beneficial rule was formulated which was, apparently, followed by the legislature in enacting this section.

§ 1-362. Debtor's property ordered sold.—The court or judge may order any property, whether
subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, and any earnings of a non-debtor party to the proceeding, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor. (Rev., s. 678; Code, s. 493; C. C. P., s. 269; 1870-1, c. 243; C. S. 721.)

Order for Condemnation of Debtor's Property.—In proceedings supplemental to execution, an order for the condemnation of the property of the judgment debtor not exempt from execution in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to the receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver relates back to the service of the restraining order, herein provided for. (Rev., s. 679; Code, s. 494; C. C. P., s. 270; 1870-1, c. 245; 1876-7, c. 293; 1879, c. 63; 1881, c. 51; C. S. 722.)

Cross Reference.—As to duty of receiver generally, see secs. 1-591 to 1-594.

In a case of diligence between creditors under the supplementary proceedings, the earliest applicant is entitled to be entitled to the earliest appointment. Parks v. Sprinkle, 64 N. C. 637.

Use as Prerequisite to Appointment.—Where supplementary proceedings had discovered that the defendant held a specific fund which had been adjudged to belong to the plaintiff, and the clerk directed the defendant to pay over the fund to the plaintiff, the plaintiff had no other course than appeal to a judge to take charge of the fund until the plaintiff should institute an action to recover the specific fund. Ross v. Ross, 119 N. C. 109, 25 S. E. 792.

Evidence with Application.—The application for a receiver shall be made as in other cases, that is, the motion shall be supported by affidavits and other written or documentary evidence. Coates Bros. v. Wilkes, 92 N. C. 377, 383.

Motion Pending Appeal.—The motion for appointment of a receiver may be made before the judge, pending an appeal to him from the ruling of the clerk upon other questions. Coates Bros. v. Wilkes, 92 N. C. 377.

Subject to Review.—The appointment of a receiver in these proceedings does not rest solely in the discretion of the judge, and his action in appointing or refusing to appoint is subject to review by the Supreme Court. Coates Bros. v. Wilkes, 92 N. C. 377.

Reasonable Ground.—It is sufficient for the appointment of a receiver if there is reasonable grounds to believe that the judgment debtor has property which ought to be applied to the payment of the judgment. Coates Bros. v. Wilkes, 92 N. C. 377.

Judge to Ascertian if Other Proceedings Pending.—While it is the duty of a judge appointing a receiver under this section to ascertain if other supplementary proceedings are pending against the judgment debtor, and if so, to notify the plaintiff, wherein is the duty of the judge of a failure to do so does not require the reversal of an order appointing a receiver, where some of the creditors actually appear and make themselves parties, and all have an opportunity to interpose before the final distribution of the fund. Corbin v. Berry, 83 N. C. 28.

There Shall Be but One Receiver.—This section prescribes there shall be but one receiver of the property of a judgment debtor, to prevent a conflict of authority between the courts having a concurrent jurisdiction over the subject. Corbin v. Berry, 83 N. C. 28, 31.

Consolidation of Several Proceedings.—Where several supplementary proceedings are pending, and the same property is sought to be subjected, or where, in either of such proceedings, a receiver is appointed of property which is the subject of other proceedings, the court should, in proper cases, order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants. Marine Bros. & Co. v. Lewald, 107 N. C. 635, 32 S. E. 297.


§ 1-364. Filing and record of appointment; property vests in receiver.—When the court or a judge grants an order for the appointment of a receiver of the property of the judgment debtor, it shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed;
and the clerk shall record the order in a book to be kept for that purpose in his office, to be called Book of Orders Appointing Receivers of Judgment Debtors, and shall note the time of its filing therein. A certified copy of the order shall be delivered to the receiver named therein, and he is vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order has been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor is subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. (Rev., s. 680; Code, s. 495; C. C. P., s. 270; 1870-1, c. 215; C. S. 732.)

§ 1-365. Where order of appointment recorded. —Before the receiver is vested with any real property of the judgment debtor, a certified copy of the order of appointment must be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of the judgment debtor is situated, and also in the office of the clerk of the superior court of the county in which the debtor resides. (Rev., s. 681; Code, s. 496; C. C. P., s. 270; C. S. 724.)

Death of Judgment Debtor before Order Filed. —When the property belonging to him which may be in the hands of the clerk of the superior court, the property and estate of the debtor, or their proceeds, under the direction of the court. Rand v. Rand, 78 N. C. 12, 16.

While the court may exercise very great control over the administration of a receiver, it is not the duty of such receivers to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons. Coates Bros. v. Wilkes, 92 N. C. 377.

§ 1-366. Receiver to sue debtors of judgment debtor. —If it appears that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person or corporation by the receiver; but the court or judge may, by order, forbid a transfer or other disposition of such property or interest till a sufficient opportunity is given to the receiver to commence and prosecute the action to judgment and execution, but such order may at any time be modified or dissolved by the court on application of such receiver for security as he directs. (Rev. s. 682; Code, s. 497; C. C. P., s. 271; 1870-1, c. 245; C. S. 725.)

Cross Reference. —As to execution against debts due corporate defendants, see § 55-143.

Court May Restrain Transfer of Property. —Under this section when it is found that a third person, not a party to the action, claims an interest in the property, or denies the debt, which is sought by the plaintiff to be applied to his judgment as belonging to the judgment debtor, court may, by an order in the cause, restrain the transfer or other disposition of such property till the receiver can recover it, but such is brought by the receiver as the agent of the court. Ross v. Ross, 119 N. C. 109, 112, 25 S. E. 792.

Remedy of Debtor When Receiver Is Negligent. —If the receiver is negligent in the performance of his duty, the remedy of the judgment debtor might be in the removal of the receiver and appointment of a successor, or in seeking compensation in damages for the losses due to such negligence, and, if necessary, upon his bond to secure a faithful discharge of duty, he cannot interfere with the receiver's collection and control of the property. Turner v. Holden, 94 N. C. 70, 72.

Receiver Is under Direction of Court. —A receiver may be appointed who is invested with all the property and effects of the debtor, and may collect, preserve, and pay out the property and estate of the debtor, or their proceeds, under the direction of the court. Rand v. Rand, 78 N. C. 12, 16.

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§ 1-368. Where order of appointment recorded. —Before the receiver is vested with any real property of the judgment debtor, a certified copy of the order of appointment must be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of the judgment debtor is situated, and also in the office of the clerk of the superior court of the county in which the debtor resides. (Rev., s. 681; Code, s. 496; C. C. P., s. 270; C. S. 724.)

Death of Judgment Debtor before Order Filed. —When the property belonging to him which may be in the hands of the clerk of the superior court, the property and estate of the debtor, or their proceeds, under the direction of the court. Rand v. Rand, 78 N. C. 12, 16.

While the court may exercise very great control over the administration of a receiver, it is not the duty of such receivers to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons. Coates Bros. v. Wilkes, 92 N. C. 377.
§ 1-368. Disobedience of orders punished as for contempt.—Any person, party or witness, who disobeys an order of the court or judge or referee, duly served, may be punished by the judge as for a contempt. In all cases of commitment under this article the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from the same. (Rev., 1864, c. 44; 1865, c. 51; 1866-7 Me., S. 250; 1868, c. 250; 1869-70, c. 79, s. 3; C. S. 727.)

Cross Reference.—As to commitment generally, see §§ 5-1 to 5-9.

Court May Enforce Its Lawful Orders.—It is an essential attribute of a court to enforce by proper process its lawful orders, and without this its essential functions would be paralyzed or destroyed. LaFontaine v. Southern Underwriters, 117 N. C. 132, 133; P. v. P., 80 N. C. 322.

As to whether the violation of a void order of a court constitutes contempt, see note in 12 N. C. Law Rev. 360.

Contempt of Referee Punished by Court.—When, in the course of proceedings supplementary to the execution, a witness is examined by a referee, a contempt, in refusing to answer the questions, must be punished by the court making the reference. LaFontaine v. Southern Underwriters, 83 N. C. 132, 133.

Judge Passes on Inability to Comply.—Where a party to an action, having been directed to perform an order of the court, otherwise to be in contempt, applied, after notice to have the order discharged, and offered to produce affidavits showing his inability to comply with the order, it was the duty of the judge to hear and pass on the affidavits. Childs v. Wiseman, 119 N. C. 497, 26 S. E. 126.

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

Art. 32. Property Exempt from Execution.

§ 1-369. Property exempted. — The homestead and personal property exemptions as defined and declared by the article of the state constitution entitled Homesteads and Exemptions are exempt from sale under execution and other final process, as provided in the state constitution: Provided, the allotment of the homestead shall, as to all personal property therein embraced, suspend the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead. (Rev., 1864, c. 44; 1865, c. 51; 1868, c. 250; 1869-70, c. 79, s. 3; C. S. 727.)

I. In General.
A. Nature of Homestead.
B. Nature and Duration of Exemptions.

II. Constitutional Provisions and Purpose.
A. In General.
B. Who Entitled to Homestead and Exemptions.
C. Homestead in Land Only.

III. Judgments and Liens.

Cross References.
As to conveyance of homestead, see sec. 1-370 and annotations thereto. See also, N. C. Constitution, Art. X, §§ 1, 2, 3, 4, 5 and 8.

I. IN GENERAL.
Editor's note.—In Poe v. Hardie, 65 N. C. 467, the homestead has been called a “domain, estate, and fee,” and in Littlejohn v. Egerton, 77 N. C. 379, it was spoken of as “a quality annexed to land whereby the estate is exempted from sale under execution.” These decisions point to the fact that from the debtor’s estate in the exempt land, he was debarred from selling the same and placing the proceeds of sale in a separate fund in which he could not be reached by his creditors.

The correct view is expressed by Bynum, J., in Bank v. Green, 78 N. C. 247, 252: “Their legal effect is simply to claim for the debtor the enjoyment of the land, not the estate in it, as a homestead, un molested by his creditors.” No new estate is conferred upon the owner, and no limitation is imposed upon his old estate. It is obvious that it would be quite correct to say that 5-1 has conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him. It cannot be consistently maintained that the same is not applicable to any conveyance of land, nor does it profess to pass title. It only serves to indicate where the homestead is and whether there is any excess subject to levy and sale to pay judgment creditors. Keener v. Goodson, 69 N. C. 273; Methe v. Layton, 89 N. C. 396; Markham v. Hicks, 90 N. C. 204.

Favored by Law.—The law favors the homestead. Every safeguard is given the homesteader and the courts have parity to his rights as guaranteed by the Constitution. Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465.


A. Nature of Homestead.

Exemptions to Homestead Exemption.—A homestead is exempt from sale under execution, except (1) for taxes; (2) for obligations contracted in the purchase of the premises; (3) for mechanics and laborer’s lien; (4) for debts contracted prior to the inception of the Constitution. Cheek v. Floyd, 89 N. C. 396; Cumming v. Bloodworth, 87 N. C. 83, 85.

Definition of a Homestead.—In Hager v. Nixon, 69 N. C. 108, 110, it is said: “No precise definition of a homestead is given in the constitution, and it would only mislead us if we should look into dictionaries or the laws of other states and take the definitions there given as fixing the meaning of the word as given in our laws. We must look to our own legislation alone to ascertain what it is.”

Same—Not an Estate.—A homestead is not an estate at all, but merely an exemption. Cudle v. Morris, 100 N. C. 168, 76 S. E. 17; Champion v. Sash, etc., Co. v. Parker, 153 N. C. 130, 69 S. E. 1; Thomas v. Fulford, 117 N. C. 607, 23 S. E. 635; Jones v. Britton, 102 N. C. 166, 9 S. E. 554. See also, Hicks v. Wooten, 171 N. C. 97, 96 S. E. 107. Cheek v. Floyd, 89 N. C. 396, 465, 143 S. E. 465, it was said: “In some of the earlier decisions it is treated as an estate and called a determinable fee, but this doctrine has long since been abandoned, and we are now pronounced decisions that hold the homestead is not an estate, but an exemption only.

Same—Not Color of Title.—The assignment of a homestead does not constitute color of title. Keener v. Goodson, 89 N. C. 273, 277.

Time of Application.—The “poor debtor” is in time if he makes his application and procures the assignment to be made at any time before the time of the order of commitment and converted by a sale. State v. Floyd, 33 N. C. 496, 498.

Assignment by Sheriff Not Needed to Vest Right.—The action of a sheriff in assigning a homestead by metes
B. Nature and Duration of Exemptions.

Effect of Exemption Laws.—Exemption laws have no extraterritorial force or effect. Goodwin v. Claytor, 137 N. C. 253, 49 S. E. 170; Colwell v. Mitchell, 137 N. C. 473, 43 S. E. 479; Balk v. Harris, 122 N. C. 64, 30 S. E. 318.

The exemption laws of this state protect the property of a debtor in this state from executions issued by the courts of this state and from the courts of the United States. Balk v. Harris, supra.

Exemptions relate only to the remedy, and the right to an exemption is not the law of the forum. Goodwin v. Claytor, 137 N. C. 225, 49 S. E. 173; Sexton v. Phoenix Ins. Co., 122 N. C. 1, 3, 43 S. E. 479.

Same—Remedial in Nature.—Exemption laws are remedial in their nature and should always receive a liberal construction. Goodwin v. Claytor, 137 N. C. 225, 236, 49 S. E. 173.

Same—Exchange of Exempt Goods.—If an article of property, which has been exempt from execution, is exchanged for another article, the one received in exchange is not exempt. Lloyd v. Durham, 60 N. C. 282, 283.

Presumption in Favor of Exemption.—There is a presumption, of fact in favor of the exemption, and the creditor who wishes to enforce a claim upon the property, must bring himself within one of the exceptions by proper averment and proof. Mebane v. Layton, 89 N. C. 396.

Duration of Exemption.—The personal property exemption exists only during the term of the life of Smith v. McDonald, 95 N. C. 163; Johnson v. Cross, 66 N. C. 167.

How Choices in Action Made Available.—Except in case of attachment proceedings wherein provision is made in exceptional and urgent cases, choices in action can only be made available to the creditor by civil action in the nature of an equitable fi. fa. or by the statutory method of supplemental proceedings, both of which remedies in ordinary instances are here still open to claimants. McIntosh Grocery Co. v. Newman, 184 N. C. 370, 373, 11 S. E. 335; Bowman v. McGill, 184 N. C. 215, 114 S. E. 10.

II. CONSTITUTIONAL PROVISIONS AND PURPOSE.

A. In General.

Favored by the Constitution.—The homestead interest is favored by the Constitution. Leak v. Gay, 107 N. C. 468, 12 S. E. 836.

Purpose of Homestead Provisions.—The framers of the Constitution meant exactly what they said and ordained, that a certain part of the real property of a debtor, being a homestead, or a part thereof, should be set apart for his use and occupation, where he might dwell with his family in peace and contentment without fear of creditors to molest or make him afraid, so long as he might live, and to extend the benefit of the exemption to the children of the intestate. Hinsdale v. Williams, 75 N. C. 251, 266, 11 S. E. 439; see also, Gregory v. Ellis, 86 N. C. 579, 583.

The homestead right is a vested right and is inalienable; it cannot be sold to satisfy a debt created before the ratification of the Constitution of 1868, one thousand dollars of the proceeds of sale, if that sum is left, or to mortgage it if he desires to raise money on the credit of it. Jenkins v. Bobbitt, 77 N. C. 387, 389.

Sale by Homesteader of Estate in Reversion.—A sale by the owner of a homestead of his estate in reversion stands as at common law, and the purchaser has full power to sell, or to mortgage it if he desires to raise money on the credit of it. Jenkins v. Bobbitt, 77 N. C. 387, 389.

B. Who Entitled to Homestead and Exemptions.

Only Residents Entitled to Homestead and Exemptions.—The homestead and personal property exemptions claimed only by residents of this state. Goodwin v. Claytor, 137 N. C. 225, 49 S. E. 173; Jones v. Alabrock, 115 N. C. 46, 54 S. E. 170.

Same—Constitutional Purpose.—The right of homestead provided and secured by the Constitution (Art. X, sections 2, 5, 6) is incident to residence in this state. Only residents having these rights are entitled thereto. A non-resident has no such right, although he may be the owner of a homestead situated in the state. The terms of the Constitution do not embrace him, and moreover, the plain purpose is to exempt the homestead and property connected therewith, "from sale under execution or other final process obtained on any debt." He has no home within the state for himself, and the reason for the exemption as to him does not exist. Baker v. Legget, 98 N. C. 304, 305, 4 S. E. 37.

Residents Defined.—The leading purpose of the Constitution, Article X, sec. 1, 2, 5, 6, is to secure the homestead to the debtor and his family and the term "resident" therein should be so construed as to accomplish that purpose, unless there should be found some positive or necessary and reasonable rule of law to the contrary. Chitty v. Chitty, 118 N. C. 647, 649, 24 S. E. 517.

The words "a resident of this state," employed in the Constitution, Art. X. Sec. 2, in respect to homesteads, have a more restricted meaning than that usually given to domicile. Lee v. Mosely, 101 N. C. 410, 414.

The residence must be actual, and not constructive. Monds v. Cassidy, 98 N. C. 538, 4 S. E. 353, 355.

Same—Forfeiture of Right.—If the person claiming a homestead voluntarily removes from the state, his right to make his home elsewhere, he forfeits his right in this respect. Finley v. Saunders, 98 N. C. 462, 4 S. E. 516.

Whether a debtor deceased be a resident of the state before his property became applicable to a creditor's claim is a matter of constitutional purpose. The general exemption laws of the state do not operate in the case of a widow. Where a person residing in another state, having the property in this state, and in the event of the death of the father or husband. The law does not embrace him, and moreover, the plain purpose is to exempt the homestead and property connected therewith, "from sale under execution or other final process obtained on any debt." He has no home within the state for himself, and the reason for the exemption as to him does not exist. Baker v. Legget, 98 N. C. 304, 305, 4 S. E. 37.

Neither the assignee nor the attaching creditors could get the benefit of the exemptions. Latta v. Bell, 122 N. C. 639, 30 S. E. 15. See also, Winn v. Craft, 90 N. C. 211.

Right Not Destroyed by Fraud.—A husband has sold his homestead to satisfy a debt created before the ratification of the Constitution of 1868, one thousand dollars of the proceeds of sale, if that sum is left, or to mortgage it if he desires to raise money on the credit of it. Jenkins v. Bobbitt, 77 N. C. 387, 389.

Evidence of Fraud.—The homestead cannot be sold by an administrator in a petition to make real estate assets during the minority of one of the children of the intestate. Hindsdale v. Williams, 75 N...
§ 1-370

CH. 1. CIVIL PROCEDURE—HOMESTEAD

§ 1-370. Conveyed homestead not exempt.—The allotted homestead is exempt from levy so long as owned and occupied by the homesteader or by any one for him, but when conveyed by him in the mode authorized by the constitution, article ten, section eight, the exemption ceases so as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect. (Rev. s. 688; 1905, c. 111; C. S. 729.)

Construction of Constitution.—This section is in accordance with the views of the court, and expresses the proper construction of the Constitution. Article X, sec. 2, Chadbourn Sash, etc., Co. v. Parker, 153 N. C. 130, 92 S. E. 1; section eight, the exemption ceases so as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect. (Rev. s. 688; 1905, c. 111; C. S. 729.)

Conveyance of Homestead.—The homestead exemption ceases upon its conveyance by the homesteader. Crouch v.
of the legality of his action in selling until a party attack- 

gether with counties added by later amendments, are 

within the meaning of this section, see annotations under 

endorsed on return, see sec. 1-392, No. 4; as to resident 

1933, c. 147, made the amendment of 1931 applicable in On-

the original act was applicable to Martin. Public Laws 

an execution in his hands upon the land. Neither his igno-

rance of the rights of a debtor nor his obstinate refusal to 

debtor who is entitled to such exemption, before levying 

should apply only to certain named counties. They, to-

slow county.

recognize them will be allowed to defeat the latter's claim 

sheriff the mandatory duty of summoning three discreet 

brackets in this section, and provided that the amendment 

he deems it necessary he may summon the county 

assist in laying off the homestead by metes and 

surveyor or some other competent surveyor to 

sessor, as the case may be), in valuing and laying 

section in brackets, and provided that the amendment 

they were sworn the proceedings may be treated as a nullity, see on a3 0) 

Same—May Be Appointed by Clerk.—For the allotment of 

a homestead, the court may direct the clerk to appoint three 


Same—Constable May Summons.—A constable, to whom an 

reservation from the homestead of the section which has 

been delivered, may summons appraisers and administer to 


Necessity That Appraisers Be Sworn.—Appraisers ap-

pointed to lay off a homestead must be sworn; and unless it 

appears that they were sworn the proceedings may be treated as a nullity, see Hunt, 76 N. C. 483.

Same—Oath Administered by Deputy Sheriff.—That appraisers 

laying off a homestead were sworn by a deputy sheriff 

is, at most, an irregularity, and can not be taken advantage 


§ 1-371. Sheriff to summon and swear apprais-
ers.—Before levying upon the real estate of any 

resident of this state who is entitled to a home-

stead under this article, and the constitution of this 

state, the sheriff [or a deputy sheriff design-

ated by the sheriff, and who shall be twenty-one 

years of age or over], or other officer charged with 

the levy shall summon three discreet persons 

qualified to act as jurors, to whom he shall ad-

minister the following oath: "I, A. B., do solemnly 

swear (or affirm) that I have no interest in the 

land or buildings or the use thereof, nor have 

any personal interest in the persons of the 

proceedings, and will perform my duty as a 

sheriff as nearly as possible, and according to 

law." The sheriff shall make a transcript of the 

return of the officers, setting forth the 

oaths, and make minute of the same as above directed. 

Officers laying off a homestead were sworn by a deputy sheriff 

and make minute of the same as above directed. The oaths 

must be sworn; and unless it appears that they were sworn 

the proceedings may be treated as a nullity, see Hunt, 76 N. C. 483.

Same—Oath Administered by Deputy Sheriff.—That appraisers 

laying off a homestead were sworn by a deputy sheriff 

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

turn.—The appraisers shall value the homestead with its 

dwellings and buildings thereon, and lay 

off to the owner or to any agent or attorney, in 

his behalf, such portion as he selects not exceed-

ing one thousand dollars, and must fix and 

describe the same by metes and bounds. 

They must then make and sign in the presence 

of the officer a return of their proceedings, setting 

forth the property exempted, which shall be 

turned by the officer to the clerk of the court for 

the county in which the homestead is situated and 

filed with the judgment roll in the action, and a 

minute of the same entered on the judgment 

docket, and a certified copy thereof under the 

hand of the clerk shall be registered in the office 

of the register of deeds for the county. The offi-

cer must likewise make a transcript of the return 

over his hand and return it without delay to the 

clerk of the court of the county from whence the 

execution issued, and said clerk must likewise file 

and make minute of the same as above directed. 

In all judicial proceedings the original return or 

a certified copy may be read in evidence. (Rev., 

ss. 688, 689; Code, ss. 503-4; 1886-9, c. 137, ss. 4-8; 1877, c. 272; C. 731.)

Cross References.—As to appeal as to reapportionment, see sec. 1-392. As to costs of laying off and appraising homestead, see sec. 6.

Interpretation of Section.—The section, prescribing how the homestead shall be valued and laid off, is as broad and comprehensive in its terms and effect as it can be; properly interpreted, there is no exceptive provision in it, by im-


§ 1-373. Seal of appraisers.—A seal of appraisers 

should be issued to every corporation of appraisers 

constituted under this act, and it shall be appalled 

or impressed upon their certificates of valuation, if any, 

and on the return of the officers. (Rev., s. 687; Code, s. 502; 1898, c. 58; 1868-9, c. 137, s. 2; 1931, c. 58; 1933, ss. 147; C. 730.)

Cross References.—As to form of a certificate to be endorsed on return, see sec. 1-392, No. 4; as to resident within the meaning of this section, see annotations under sec. 1-369.

Editor's Note.—The Act of 1931 inserted the words in brackets in this section, and the amendments so indicated should only apply to certain named counties. They, to-

gether with counties added by later amendments, are 

enumerated in the last sentence of the section.

Public Laws 1933, c. 147, made the amendment of 1931 applicable in On-

slow county.

Duty of Officer Mandatory.—This section enjoins upon the 

sheriff the mandatory duty of summoning three discreet 

persons to appraise the homestead to any judgment 

debtor who is entitled to such exemption, before 

levying an execution in his hands upon the land. Neither his igno-

rance of the rights of a debtor nor his obstinate refusal to 

refer the facts and his claim to the benefit of a homestead for which the Constitution 

provides, though the presumption of law prevails in favor 

of the legality of his action in selling until a party attack-

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statute enacted to carry into effect the organic law. Dickens 


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

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and on the return of the officers. (Rev., s. 687; Code, s. 502; 1898, c. 58; 1868-9, c. 137, s. 2; 1931, c. 58; 1933, ss. 147; C. 730.)
§ 1-373. Appeal as to reallotment.—From the order of the clerk commanding or refusing a reallotment, either party may appeal to the judge resident in the county where the homestead lies for an order for its reallocation, if there is in the hands of the sheriff of that county an execution issued by the proper court against said debtor. The application must be accompanied by the affidavits of three disinterested freeholders of the county in which the homestead lies, setting forth that, in their opinion, it has increased in value fifty per centum or more since the last allotment. Upon the filing of the application and affidavits the clerk shall issue notice to the judgment debtor to appear before him on a day not more than five days from the date of its service and show cause why his homestead should not be reallocated. The notice must state upon whose application it is issued. Upon the return day of the notice the clerk shall consider the return that he has received, and if he is of opinion that the homestead has probably appreciated in value fifty per centum or more since the last allotment, he shall order the sheriff to reallocate to the judgment debtor his homestead, in the same manner as if no homestead had been allotted. If upon the reallocation it is seen that there is not such an appreciation of the value of the homestead as is required by the act, the clerk shall order the sheriff to dispose of the surplus as if it were unregistered. This section does not prevent the judgment debtor from resorting to the equity jurisdiction of the courts for a reallocation of the homestead of his judgment debtor in any case.

Cross Reference.—As to costs, see sec. 6-21.

Procedure for Reallotment.—If the increase is 50 per cent or more, the creditor may have a reallocation in a proceeding before the clerk, in aid of an execution in the sheriff's hands. If the increase is less than 50 per cent, the judgment creditor can proceed by suit in the nature of an equitable action to subject the excess to his debt. McCaskill v. McKinnon, 125 N. C. 179, 34 S. E. 253; Vanstory v. Thornton, 110 N. C. 10, 14 S. E. 637.

Where a portion of the land included in the allotment was unencumbered, it was held, that he had the right to have his homestead allotted from the unencumbered lands without reference to whether they embraced his dwelling house and buildings. Flora v. Robbins, 93 N. C. 38, 47 S. E. 421.

Manner of Allotment.—The law does not intend that the defendant shall have the empty form of a homestead, but the substance as well, when he has land that may be laid off to him. Shoaf v. Frost, 123 N. C. 343, 344, 31 S. E. 653.

In the allotment of a homestead the appraisers shall estimate the value of the interest of the homesteader in the land and in the improvements thereon, and assign to him his interest in the land, and not the corpus itself. McCaskill v. McKinnon, 125 N. C. 179, 34 S. E. 253.

Debtor's Right to Select.—A judgment debtor is entitled to an opportunity to be present and exercise his constitutional right to select his homestead; and where it appears upon the return that he has not presented himself, no fault of his own, the appraisal and allotment of a homestead under an execution is void. McKeithen v. Blue, 142 N. C. 360, 55 S. E. 285; McGowan v. McGowan, 122 N. C. 440, 44 S. E. 172.

Same—What Constitutes.—Where a mortgagor conveyed his personal property, more than $500 in value, with a clause in the deed reserving his "personal property exempt from execution and to be selected by him" the title to the whole of it passed to the mortgagee and remained in him, until the extinguished articles were legally set apart; and the act of executing a second mortgage conveying a part of said personal property is not a selection of such part, nor a separation of the same from the bulk. Norman v. Craft, 90 N. C. 211.

Description of Allotment.—When the land is sufficiently identified to be readily located, an unregistered allotment is competent evidence, unless objected to in apt time. Gudger v. Penland, 118 N. C. 832, 833, 23 S. E. 921.

Same—When Less than $1,000.—An allotment of a homestead to the value of $600, laid off under execution, does not render the allotment void, even though the section, in an independent action contesting its validity has introduced the former record containing the proceedings for laying off the homestead, and contends on appeal that it was erroneously admitted in the trial court. Carstarphen v. Carstarphen, 193 N. C. 541, 137 S. E. 658.

Same—As Notice of Extent.—The direction contained in the section as to the disposition to be made of the report of the exemption, is not to give notice of its extent only, but to subject it to a motion made in a reasonable time to set aside. Burton v. Spiers, 87 N. C. 95, 50.


§ 1-374. Appeal as to reallotment.—From the order of the clerk commanding or refusing a reallocation, either party may appeal to the judge resident in or holding the courts of the district, who

exceeds one thousand dollars in value. Campbell v. White, 55 N. C. 491, 494.

Where the jury return the tract at $2,000, the land should be divided into two parts of equal value, and the homesteader will take his choice. Shoaf v. Frost, 123 N. C. 343, 344, 31 S. E. 653.

Same.—When Less than $1,000.—An allotment of a homestead to the value of $600, laid off under execution, does not render the allotment void, even though the section, in an independent action contesting its validity has introduced the former record containing the proceedings for laying off the homestead, and contends on appeal that it was erroneously admitted in the trial court. Carstarphen v. Carstarphen, 193 N. C. 541, 137 S. E. 658.

Same—Conclusive.—The valuation placed on the tract by the jury is conclusive. Shoaf & Co v. Frost, 123 N. C. 343, 344, 31 S. E. 653.

Same.—May Take Present Value.—Judgment creditors cannot complain of the homesteader's election to take the present value of this homestead. Leak v. Gay, 107 N. C. 462, 12 S. E. 315.

Same.—Duty of Appraisers.—The duty of the appraisers extends no further than the valuation and allotment by bonds of the homestead. Aiken v. Gardner, 107 N. C. 235, 236, 239, 12 S. E. 253.

In the allotment of a homestead the appraisers should estimate the value of the interest of the homesteader in the land and improvements thereon, and assign to him his interest in the land, and not the corpus itself. McCaskill v. McKinnon, 125 N. C. 179, 34 S. E. 253.
shall hear the matter in chambers in any county of the judicial district to which belongs the county in which the proceedings were instituted. In other respects the proceedings upon such appeal are as now provided for appeals from the clerk on issues of law. (Rev., s. 691; 1893, c. 149; C. S. 733.)

Cited in Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 646.

§ 1-375. Levy on excess; return of officer.—The levy may be made upon the excess of the homestead, not laid off according to this chapter, and the officer shall make substantially the following return upon the execution: "A. B., C. D., and E. F., summoned and qualified as appraisers or assessors (as the case may be), who, acting off X. Y. Z., the homestead and by law "Levy made upon the excess." (Rev., s. 692; Code, s. 505; 1868-9, c. 137, s. 5; C. S. 734.)

Cross Reference.—As to sale of the excess, see annotations to sections under Execution, Article 28, and Execution and Judicial Sales, Article 29.

The levy must be only upon the excess. Gardner v. McCornaghe, 127 N. C. 481, 483, 51 S. E. 125.


§ 1-376. When appraisers select homestead.—If no selection is made by the owner, or any one acting in his behalf, of the homestead to be laid off as exempt, the appraisers shall make selection and Judicial Sales, Article 29.

to be sold is all that the execution debtor has, he is entitled to have his homestead therein laid off to him, although the personal property exemption cannot be claimed as against a fine and costs in a criminal action. State v. Williams, 97 N. C. 414, 415, 23 S. E. 370.

Value of Exemption.—The section merely follows the language of the Constitution, Art. X, sec. 1, in giving each resident of the state a personal property exemption of $500, against execution or any other final process, Befarrah v. Spell, 178 N. C. 231, 233, 100 S. E. 321; Chemical Co. v. Sloan, 136 N. C. 122, 48 S. E. 577.

As to right to claim income from life insurance policies as exempt, see note in 12 N. C. Law Rev. 67.

Section Subsidiary to Constitution.—This section was enacted to carry out the provisions of Art. X section 1, Jones v. Allsbrook, 115 N. C. 46, 49, 20 S. E. 170.

Continuation of Levy.—In Befarrah v. Murrill, 90 N. C. 208, 210, the language of the section, "whenever the personal property of any resident of this state shall be levied upon,", etc., is held to mean, at any time, while it is levied upon, and the levy continues to the day of sale.

Same—Time of Allotment.—The complete capacity to make the allotment would be destroyed with the sale, and we can see no reason, certainly no substantial reason, why it might not be done on the day of the levy, or on any day before the sale, or on that day. Shepherd v. Morgan, 90 N. C. 208, 210. See Crow v. Morgan, 210 N. C. 153, 185 S. E. 686.

Unlike the homestead exemption, which must be allotted before levying upon the land, the right to personal property exemption is vested in the debtor at any time before sale, or appropriation of the property by the court. Befarrah v. Spell, 178 N. C. 231, 233, 100 S. E. 321; Chemical Co. v. Sloan, 136 N. C. 122, 48 S. E. 577.

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Order of Court as Final Process.—The order of the court directing the payment of money is "final process," within the meaning of the Constitution and this section. Befarrah v. Spell, 178 N. C. 231, 233, 100 S. E. 321.

Same—Choses in Action.—A chose in action may be chosen: by a sale, so that, in behalf of the debtor, the exemption may be enlarged if any property to which he is entitled has been omitted, and so that, in behalf of the creditor, no exemption shall be allowed to the debtor if it appears at the sale that he is not entitled to the same. Jones v. Allsbrook, 115 N. C. 46, 20 S. E. 170.

Property from Which Exemption is Made.—In lying off the personal property exemption of a debtor, the property upon which there is no lien must be first exempted. Cowan v. Phillips, 122 N. C. 72, 28 S. E. 901. See Crow v. Morgan, 210 N. C. 153, 185 S. E. 686.


A judgment is personal property, and, if it was required to make up the amount to which the person, in whose favor it was rendered, was entitled to exemption, it is the duty of the officer having the execution to so allot it. Curlee v. Thomas, 74 N. C. 51, 54.

Property Not Subject to Exemption.—A tenant cannot claim his personal property exemption out of the crops, as against his landlord, until the rents are paid. Hamer v. McCall, 121 N. C. 196, 197, 28 S. E. 297.

Fines and Costs in Criminal Action.—The personal property exemption is not claimed as a defense to fine and costs in a criminal action. State v. Williams, 97 N. C. 414, 415, 23 S. E. 370.

§ 1-378. Personal property appraised on demand.—When the personal property of any resident of this state is levied upon by virtue of an execution or other final process issued for the collection of a debt, and the owner or an agent, or attorney in his behalf, demands that the same, or any part thereof, be exempt from sale under such execution, the sheriff or other officer making the levy shall summon three appraisers, as heretofore provided, who, having been first duly sworn, shall appraise and lay off to the judgment debtor such articles of personal property as he is entitled to have his homestead allotted in his dwelling-house to be laid off as exempt, the appraisers shall make selection and Judicial Sales, Article 29.

A homestead may be laid off in two tracts of land not contiguous, the two not exceeding $1,000 in value. Martin v. Hughes, 67 N. C. 293.

§ 1-377. Homestead in tracts not contiguous.—Different tracts of land not contiguous may be included in the same homestead, when a homestead of contiguous land is not of the value of one thousand dollars. (Rev., s. 694; Code, s. 509; 1868-9, c. 137, s. 15; C. S. 736.)

Application of Section.—While it may have been supposed by the framers of the organic law that a debtor who usually elect to have his homestead allotted in his dwelling-house and the surrounding land, his choice is not positively restricted to that, nor to contiguous land. Fulton v. Roberts, 113 N. C. 421, 423, 18 S. E. 510. Hughes v. Hodges, 102 N. C. 256, 9 S. E. 437; Flora v. Robbins, 93 N. C. 38.

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Cross Reference.—As to sale of the excess, see annotations to sections under Execution, Article 28, and Execution and Judicial Sales, Article 29.

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Value of Exemption.—The section merely follows the language of the Constitution, Art. X, sec. 1, in giving each resident of the state a personal property exemption of $500, against execution or any other final process, Befarrah v. Spell, 178 N. C. 231, 233, 100 S. E. 321.

A debtor is entitled to $500 as personal property as a personal property exemption, and when this amount has been once allotted, and has been diminished by use, loss or other cause, the debtor has a right to have any other per-
§ 1-379. Appraiser's oath and fees.—The persons summoned to appraise the personal property exemption must take the same oath and are entitled to the same fees as the appraisers of the homestead, and when both exemptions are claimed by the judgment debtor, at the same time, one board of appraisers may lay off both, and are entitled to but one fee. (Rev., s. 696; Code, s. 508; 1868-9, c. 137, s. 14; C. S. 738.)

§ 1-380. Returns registered.—It is the duty of the register of deeds to "indorse on each of said returns the date when received for registration, and to cause the same to be registered without unnecessary delay. He shall receive for registering the returns the same fees allowed him by law for other similar or equivalent services, which fees shall be paid by said resident applicant, his agent or attorney, upon the reception of the returns by the register. (Rev., s. 698; Code, s. 513; 1868-9, c. 137, s. 9; C. S. 739.)

§ 1-381. Exceptions to valuation and allotment; procedure.—If the judgment creditor for whom levy is made, or judgment debtor or other person entitled to homestead and personal property exemption, is dissatisfied with the valuation and allotment of the appraisers or assessors, he, within ten days thereafter, or any other creditor within six months and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county where the allotment is made a transcript of the return of the appraisers or assessors which they or the sheriff shall allow to be made upon demand, together with his objections in writing to said return.

Thereupon the said clerk shall put the same on the civil issue docket of the superior court for trial at the next term thereof as other civil actions, and such issue joined has precedence over all other issues at that term. The sheriff shall not sell the excess until after the determination of said action. The ten days and six months respectively begin to run from the date of the return of the valuation and allotment of the appraisers or assessors by the officer with the clerk of the superior court of the county from whence the execution issued. (Rev., s. 699; Code, s. 519; 1887, c. 272, s. 2; 1888, c. 357; C. S. 740.)

Cross References.—As to proof of service, see section 1-102. As to costs of reassessment, see sec. 6-29.

Editor's Note.—By the Act of 1858-69, ch. 127, it was provided that if a judgment creditor, or debtor entitled to a homestead, should be dissatisfied with the allotment of the appraisers, it should be the duty of the township trustees to examine the action of the appraisers, and make a report of their findings.

The township board of trustees was a quasi corporation, organized under the Constitution of 1868, with limited governmental functions. The duty of reassessing the allotment of homesteads, personal property, and real estate was vested in the board of commissioners, and not those duties and obligations imposed by legislative enactment. Hence, there was a failure to deposit elsewhere an appellate jurisdiction for revising the action of the appraisers. The remedy for a party aggrieved was a direct application to the court to which the execution and allotment were returnable, yet there was no basis for such procedure. The Legislature came to the relief of the situation by passing the Act of 1903, ch. 357, the first section of which constitutes this section. See Hartman v. Spiers, 94 N. C. 150; Jones v. Commissioners, 85 N. C. 278; Burton v. Spiers, 87 N. C. 87, 90; Hartman v. Spiers, 87 N. C. 28.

Estopped from Claiming Additional Allotment.—An allotment of a homestead to the debtor of lands less in value than one thousand dollars is final in form and unobjectionable to the within the time allowed by law, was an absolute estoppel to the debtor from claiming any additional allotment in other lands which he had at the time of the allotment. Whitehead v. Smith, 101 N. C. 256, 7 S. E. 885.

Time of Application.—The application for a re-assessment of a homestead by the township board of trustees (now the superior court) must be made before the sale of the excess by the sheriff. Hepinstall v.erry, 76 N. C. 190.

Service of Notice.—Notices of dissatisfaction with allotment of personal property exemption under the section cannot be served by mail or given orally. Allen v. Strickland, 100 N. C. 225, 6 S. E. 790.

Where Exception Filed.—Exceptions to the allotment of a homestead or personal property exemptions, in all cases, must be made in the office of the clerk of the superior court of the county where the allotment is made, together with a transcript of the allotment or appraisement. McAuley v. Morris, 101 N. C. 369, 7 S. E. 885.

The section does not require that the exception be filed in the court of a justice of the peace if the judgment shall be in or the execution shall issue thereupon from that court. McAuley v. Morris, 101 N. C. 369, 371, 7 S. E. 885.

Appraiser's Return.—The return of the appraisers of the personal property exemption in question should regularly have been made by the constable to the clerk of the superior court of the county where the allotment is made and filed there as directed in the statute; but that the return was inadvertently or improperly made to the court of the justice of the peace did not render the appraisal and allotment void. McAuley v. Morris, 101 N. C. 369, 372, 7 S. E. 883.

Collateral Attack of Allotment.—An allotment of a homestead cannot be challenged collaterally by the judgment debtor on the ground that the creditor was not entitled to the same under the Act of 1903, because the allotment was made in good faith, without fraud or mistake of any kind on the part of the judgment debtor. Welch v. Welch, 101 N. C. 865, 570, 8 S. E. 156.
§ 1-382. Revaluation demanded; jury verdict; commissioners; report.—When an increase of the exemption or an allotment in property other than that set apart is demanded, the party demanding must in his objections specify the property from which the increase or reallocation is to be had. If the appraisal or assessment is reduced, the jury shall assess the value of the property embraced therein; if increased, the value of the property specified in the objections from which the increase is demanded shall also be assessed; but if the allotment is made in property other than that first set apart, the jury shall assess the value of the property so allotted. The court shall appoint three disinterested commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury and the judgment of the court, and in the manner prescribed by this law. The commissioners, who shall be summoned by the sheriff, must meet upon the premises and, after being sworn by the sheriff or a justice of the peace to faithfully perform the duties of appraisers or assessors in allotting and laying off the homestead or personal property exemption, or both, in accordance with the verdict and judgment aforesaid, must allot and lay off the same and file their report to the next term of the court, when it shall be heard by the court upon exceptions thereto. (Rev., s. 700; 1885, c. 347; C. S. 741.)

When Valuation by Jury Unnecessary.—Where the debtor designated the particular land which he desires to have allotted as an "increase of exemption" and the creditors assent thereto, neither party can demand that the property shall be valued by a jury. Bevans, etc. & Co. v. Goodrich, 98 N. C. 217, 220, 3 S. E. 516.

Appointments and Summons of Commissioners.—Upon an appeal from the appraisal of a homestead and personal property exemptions and the assessment of the value thereof by a jury, the commissioners to set apart the exemption in accordance with the verdict must be appointed by the court and summoned by the sheriff. Shoaf & Co. v. Frost, 116 N. C. 675, 21 S. E. 409.

Valuation by Jury Is Final.—Upon an appeal from the appraisal the valuation as determined by the verdict of the jury is final and the commissioners appointed by the court to set apart the exemptions in accordance with the verdict must be guided by that valuation. Shoaf & Co. v. Frost, 116 N. C. 675, 21 S. E. 409; Shoaf & Co. v. Frost, 121 N. C. 255, 28 S. E. 412.

§ 1-383. Undertaking of objector.—The creditor, debtor, or claimant objecting to the allotment made by the appraisers or assessors under execution or petition must file with the clerk of the superior court an undertaking to the adverse party of such costs as are adjudged against him. (Rev., s. 701; Code, s. 522; C. S. 742.)

§ 1-384. Set aside for fraud, or irregularity.—An appraisal or allotment by appraisers or assessors may be set aside for fraud, complicity, or other irregularity; but after an allotment or assessment is made or confirmed by the superior court at term time, as hereinafter provided, the homestead shall not thereafter be set aside or again laid off by any other creditor except for increase in value. (Rev., s. 702; Code, s. 523; C. S. 743.)

Cross References.—As to reallotment for increase of value, see sec. 1-373; as to appeal as to re-allotment, see sec. 1-374.

§ 1-385. Return registered; original or copy evidence.—When the homestead and personal property exemption is decided by the court at term time the clerk of the superior court shall immediately file with the register of deeds of the county a copy of the same, which shall be registered as deeds are registered; and in all judicial proceedings the original or a certified copy of the return may be introduced in evidence. (Rev., s. 703; Code, s. 524; C. S. 744.)

§ 1-386. Allotted on petition of owner.—When any resident of this state desires to take the benefit of the homestead and personal property exemption as guaranteed by article ten of the state constitution, or by this article, such resident, his agent or attorney, must apply to a justice of the peace of the county in which he resides, who shall appoint as assessors three disinterested persons, qualified to act as jurors, residing in said county. The jurors, on notice by the order of the justice, shall meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars in value, and make and sign a descriptive account of the same and return it to the office of the register of deeds.

Said assessors shall set apart of the personal property of said applicant, to be by him selected, articles of personalty to which he is entitled under this chapter, not exceeding in value the sum of five hundred dollars, and make, sign and return a descriptive list thereof to the register of deeds. (Rev., ss. 607, 704; Code, ss. 511, 512; 1868-9, c. 137, ss. 7, 8; C. S. 745.)

Cross References.—As to form of petition, see section 1-392, No. 23; as to form of return, see sec. 1-392, No. 3; as to who is a resident within the meaning of the section, see annotations under sec. 1-399; as to qualifications of assessors, see annotations under sec. 1-371; as to procedure generally, see annotations under sec. 1-369 to 1-372.

Who May Petition.—In Hughes v. Hodges, 102 N. C. 236, 254, 9 S. E. 437, Merrimon, J., dissenting, said as follows: "It is not true that the homestead right is operative and beneficial only when the owner is in debt, or pressed by final process, obtained upon any debt. It is ever operative; the owner has it at any time, though he might own nothing, and be possessed of great wealth, his wife and children have the benefit of it, and he could divest himself of it only with the assent of his wife. He might have it valued and sell it to him at any time, though ordinarily he would not do so."

Nature of Proceedings.—The allotment of a homestead is a quasi in rem proceeding. Williams v. Whitaker, 110 N. C. 593, 595, 14 S. E. 924.
§ 1-387. Advertisement of petition; time of hearing.—When a person entitled to a homestead and personal property exemption files the petition before a justice of the peace to have the same laid off and set apart under the preceding sections, the justice shall make advertisement in some newspaper published in the county, for six successive weeks, and if there is no newspaper in the county, then at the courthouse door of the county in which the petition is filed, notifying all creditors of the applicant of the time and place for hearing the petition. The petition shall not be heard nor any decree made in the cause in less than six nor more than twelve months from the day of making advertisement as above required. (Rev., s. 705; Code, s. 515; 1868-9, c. 137, s. 11; C. S. 746.)

§ 1-388. Exceptions, when allotted on petition.—When the homestead or personal property exemption is allotted on the petition of the person entitled thereto, any creditor may, within six months from the time of the assessment or appraisal, and upon ten days notice to the petitioner, file his objections with the register of deeds of the county in which the premises are situated, and the register of deeds shall return the same to the clerk of the superior court of that county, who shall place them on the civil issue docket, and they shall be tried as provided for homestead and personal property exemptions set off under execution. (Rev., s. 706; Code, s. 520; C. S. 747.)

§ 1-389. Allotted to widow or minor children on death of homesteader.—If a person entitled to a homestead exemption dies without the homestead having been set apart, his widow, if he leaves no children, or his child or children under the age of twenty-one years, if he leaves such, may proceed to have the homestead exemption laid off by petition. If the widow or children have failed to have the exemption set apart in the manner provided, then in an action brought by his personal representatives to subject the property to the payment of debts and charges of administration, it is the duty of the court to appoint three disinterested freeholders to set apart to such widow, child or children a homestead exemption under metes and bounds in the lands of the decedent. The freeholders shall under their hands and seals make return of the same to the court, which shall be registered in the same manner as homestead exemptions. (Rev., s. 707; Code, s. 514; 1868-9, c. 137, s. 10; 1893, c. 332; C. S. 748.)

Cross References.—As to constitutional provisions, see Art. X, § 3. As to proceedings and cases following and minors entitled to homestead, see annotations under sec. 1-369.

Purpose and Constitutionality.—The manifest purpose of the section is to prevent the widow and minor children from being prejudiced by the failure of one entitled to a homestead to carry it to be laid off in his lifetime. It cannot be supposed that the effect of the statute is to go beyond the Constitution when its professed object is to carry into effect its provisions. Watts v. Leggett, 66 N. C. 137. When Homestead Allotted.—If a person who has no homestead of her own, is entitled to have one allotted to her out of the lands of her deceased husband, even though no homestead was allotted to him during his life. Smith v. McDonald, 95 N. C. 163.

But a widow cannot, under this section, have a homestead laid off for herself and minor children after the death of her husband, when he died without leaving debts. Hager v. Nixon, 69 N. C. 108.

Unborn Child Entitled to Allotment.—A child in ventre sa mere at the time of its father's death is entitled to have a homestead allotted to it from the homestead of its father. In re Seabolt, 113 F. 766, 771. When to "Widow and Minor Children."—The fact that an assignment of a homestead was made to "the widow and minor children" of decedent does not make it void, since it will be considered surplusage as to the widow. Formeyduval v. Rockwell, 117 N. C. 330, 23 S. E. 483.

When Homestead Can Not Be Divested.—A homestead, whether laid off to a husband in his lifetime, or to his widow (there being no children), after his death, can not be divested in favor of the heir by the release or extinguishment of the deceased husband's debts. Tucker v. Tucker, 103 N. C. 170, 9 S. E. 299.

Widow Not Entitled to Exemption of Personalty.—The personal property exemption, whether laid off to a husband in his lifetime, or to his widow, except as herein provided, is guilty of a misdemeanor, and he and his sureties are liable to the owner of the homestead for all costs and damages in a civil action. (Rev., ss. 708, 5558; Code, s. 516; 1868-9, c. 137, s. 17; C. S. 749.)

Officer's Breach of Duty.—The section subjects the sheriff to indictment and to liability on his official bond for disregarding or performing his duty under the provisions of the law relating to homestead and personal property exemptions. Welch v. Welch, 101 N. C. 565, 559, 10 S. E. 176; Lebene v. Layton, 89 N. C. 396, 400. Richardson v. Wicker, 80 N. C. 172, 174; State v. Barefoot, 104 N. C. 224, 228, 10 S. E. 170.

And for such a breach of duty, an action on the officer's official bond lies in favor of the debtor. Scott v. Kenan, 95 N. C. 298, 299.

Where a complaint alleges that a judgment debtor demanded his personal property exemptions in apt time, but that the sheriff failed and refused to allot it to him, and afterwards sold the property and applied the money to executions in his hands, it sufficiently alleges a breach of the bond, Scott & Burton v. Kenan, 94 N. C. 298.

Meaning of Damage.—The measure of damages is the actual loss sustained, and not the value of the property at the time of the levy. Jones v. Allsbrough, 115 N. C. 46, 55, 20 S. E. 170.


§ 1-390. Liability of officer as to allotment, return and levy.—Any officer making a levy, who refuses or neglects to summon and qualify appraisers as herefore provided, or fails to make due return of his proceedings, or levies upon the homestead not set off by the personal property exemptions, except as herein provided, is guilty of a misdemeanor, and he and his sureties are liable to the owner of the homestead for all costs and damages in a civil action. (Rev., ss. 708, 5558; Code, s. 516; 1868-9, c. 137, s. 17; C. S. 749.)

Officer's Breach of Duty.—The section subjects the sheriff to indictment and to liability on his official bond for disregard or non-performance of his duty under the provisions of the law relating to homestead and personal property exemptions. Welch v. Welch, 101 N. C. 565, 559, 10 S. E. 176; Lebene v. Layton, 89 N. C. 396, 400. Richardson v. Wicker, 80 N. C. 172, 174; State v. Barefoot, 104 N. C. 224, 228, 10 S. E. 170.

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Meaning of Damage.—The measure of damages is the actual loss sustained, and not the value of the property at the time of the levy. Jones v. Allsbrough, 115 N. C. 46, 55, 20 S. E. 170.


§ 1-391. Liability of officer, appraiser, or assessor, for conspiracy or fraud.—Any officer, appraiser, or assessor who willfully or corruptly conspires with a judgment debtor, judgment creditor, or other person, to undervalue or to overvalue the homestead or personal property exemption of a debtor, or applicant, or assigns false metes and bounds, or makes or procures to be made a false and fraudulent return thereof, is guilty of a misdemeanor and is liable to the party injured thereby for all costs and damages in a civil action. (Rev., ss. 690, 3555, 3596; Code, ss. 517, 518; 1868-9, c. 137, s. 195; 1870, c. 730.)

Duty of Sheriff.—It is the duty of a sheriff to lay off the
§ 1-392. Forms.—The following forms must be substantially followed in proceedings under this article:

[No. 1]

Appraisers' Return.

When the homestead is valued at less than one thousand dollars, and personal property also appraised,

The undersigned having been duly summoned and sworn to act as appraisers of the homestead and personal property exemption of A. B., of Township, County, do hereby make the following return: We have viewed and appraised the homestead of the said A. B.; and the dwellings and buildings thereon, owned and occupied by said A. B. as a homestead, to be one thousand dollars (or any less sum) and that the entire tract, bounded by the lands of, and is therefore exempted from sale under execution according to law. At the same time and place we viewed and appraised at the values annexed the following articles of personal property, selected by said A. B., (here specify the articles and their value, to be selected by the debtor or his agent), which we declare to be a fair valuation, and that the said articles are exempt under said execution. We hereby certify that we are not related by blood or marriage to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this day of , 19 .

O. K. [L. S.]
L. M. [L. S.]
R. S. [L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D. [Sheriff or Constable].

[No. 2]

Petition for Homestead before a Justice of the Peace.

In the Matter of A. B.

A. B. respectfully shows that he (or they, as the case may be) is (or are) entitled to a homestead exempt from execution in certain real estate in said county, and bounded and described as follows: (Here describe the property). The true value of which he (or they, as the case may be) believes to be one thousand dollars, including the dwelling, and buildings thereon. He (or they) further shows that he (or they, as the case may be) is (or are) entitled to a personal property exemption from execution, to the value of (here state the value), consisting of the following property: (Here specify). He (or they, as the case may be) therefore prays your worship to appoint three disinterested persons qualified to act as jurors, as assessors, to view the premises, allot and set apart to your petitioner his homestead and personal property exemption, and report according to law.

[No. 3]

Form for Appraisal of Personal Property Exemption.

The undersigned having been duly summoned and sworn to act as appraisers of the personal property of A. B., of Township, County, and to lay off the exemption given by law thereto, by C. D., Sheriff (or other officer) of said county, do hereby make and subscribe the following return:

We viewed and appraised at the values annexed, the following articles of personal property selected by the said A. B., to wit: which we declare to be a fair valuation, and that said articles are exempt under said execution.

We hereby certify, each for himself, that we are not related by blood or marriage to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this day of , 19 .

O. K. [L. S.]
L. M. [L. S.]
R. S. [L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D. [Sheriff or Constable].

[No. 4]

Certificate of Qualification to Be Endorsed on Return by Sheriff.

The within named B. F., G. H., and J. R. were summoned and qualified according to law, as appraisers of the exemption of the said A. B., under an execution in favor of X. Y., this day of , 19 .

C. D. [Sheriff or Constable].

[No. 5]

Minute on Execution Docket.

X Y

vs.
A B

Execution issued , 19 .

Homestead appraised and set off and return made , 19 .

(Rev., s. 709; Code, s. 524; C. S. 731.)


SUBCHAPTER XII. SPECIAL PROCEEDINGS.

Art. 33. Special Proceedings.

§ 1-393. Chapter applicable to special proceedings.—The provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided. (Rev., s. 710; Code, s. 278; C. S. 722.)

Statutory Provisions.—The provision that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, etc.," contained in section 1-69 is applicable in special proceedings. Welfare v. Welfare, 108 N. C. 272, 12 S. E. 1025. But in an action by the heirs at law for partition of an intestate's lands, the administrator cannot be made a party defendant, upon his opposition to the partition, as he does not come within the foregoing provision. Garrison v. Cox, 99 N. C. 478, 6 S. E. 124.

Regular Action Bars Right to Special Proceedings.—Where an action in the nature of a creditor's bill was brought by
§ 1-394. Some form of action or special proceeding is essential to the rendition of a judgment and in this state it must always be commenced by summons or an equivalent. Morris v. House, 125 N. C. 530, 560, 34 S. E. 712.

§ 1-395. Where Service Made Returnable to Court in Term.—Where a summons in special proceeding was improperly made returnable to the superior court in term, it is proper for the judge to remand the proceeding, with directions that the summons be amended so as to make it returnable before the clerk or county court instead of the superior court. Stafford v. Gallops, 123 N. C. 19, 31 S. E. 265.

§ 1-396. Return of summons.—The officer to whom the summons is addressed shall note on it the day of its delivery to him, and, if required by the plaintiff, shall execute it immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it. (Rev., s. 713; Code, s. 280; C. C. P., s. 75; C. S. 754.)

Cross Reference.—See section 1-88 et seq. and notes thereunder.

The failure of the clerk to note on the summons the day it was received is irregular but does not render the summons void. Strayhorn v. Blalock, 92 N. C. 292, 294.

Before Whom Returnable.—The summons in special proceedings is returnable before the clerk. Tate v. Powe, 64 N. C. 644.

“Service” or Prima Facie Sufficient.—When the sheriff returns that he has “served” the summons, this is prima facie sufficient and implies that he has served it as the statute directs, until the contrary is made to appear in clear and proper way. Strayhorn v. Blalock, 92 N. C. 292, 294.

Fees.—Under the practice of the Code of Civil Procedure a sheriff is not required to execute process until his fees are paid or tendered by the person at whose instance the service is to be rendered; but this does not excuse him for a failure to make a return of the process. A writ of summons is a mandate of the court, and must be obeyed by its officer, and if he has any valid excuse for not executing the writ, he must state it in his return. Johnson v. Kennedy, 70 N. C. 436.

§ 1-398. Filing time enlarged.—The time for filing the complaint, petition, or any pleading may be enlarged by the court for good cause shown by affidavit, but may not be enlarged by more than ten additional days, nor more than once, unless the default was occasioned by accident over which the party applying had no control, or by the fraud of the opposing party. (Rev., s. 716; Code, s. 281; C. C. P., s. 75; C. S. 755.)

Editor's Note.—Prior to the 1943 amendment the plaintiff was required to file his complaint or petition at the time of issuing the summons or within ten days thereafter.

§ 1-397: Repealed by Session Laws 1943, c. 543.

§ 1-398: Filing time enlarged.—The time for filing the complaint, petition, or any pleading may be enlarged by the court for good cause shown by affidavit, but may not be enlarged by more than ten additional days, nor more than once, unless the default was occasioned by accident over which the party applying had no control, or by the fraud of the opposing party. (Rev., s. 716; Code, s. 283; C. C. P., s. 79; C. S. 715.)

Power of Clerk Extinguished.—Where an application was filed to remove an administrator, and no answer having been filed, the clerk proceeded to issue a commissioners' report. The judge reversed the order and remanded the case, the clerk had power to allow an answer to be filed. Patterson v. Wadsworth, 94 N. C. 538, 540.
§ 1-359. Defenses pleaded; transferred to civil issue docket; amendments.—In special proceedings a defendant or other party thereto may plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings. The trial judge may, with a view to substantial justice between the parties, allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property. (Rev., s. 717, 1903, c. 566; C. S. 758.)

Clerk Must Transfer Case Where Equitable Defense Pleaded.—"When a party shall plead any equitable or other defense, or ask for any equitable or other relief in the pleadings, it is required that the clerk shall transfer the cause to the civil issue docket, for trial during term, upon all issues raised by the pleadings, and the judge may allow amendments to the pleadings for the purpose of a hearing of the case upon its merits." Little v. Duncan, 149 N. C. 84, 85, 62 S. E. 770. See also, Ex parte Wilson, 222 N. C. 99, 22 S. E. (2d) 262 (con. op.).

149 N. C. 84, 85, 62 S. E. 770. See also, Ex parte Wilson, 222 N. C. 99, 22 S. E. (2d) 262 (con. op.).

Clerk May Not Grant Affirmative Equitable Relief.—The clerk, in special proceedings, has no power to make any order granting affirmative equitable relief. Equitable defenses may be set up in the answer in such proceedings by way of avoidance, and when such equitable defenses exist they should be so pleaded; but when pleaded they amount to no more than defenses, and cannot be affirmatively adjudicated. Injunctions, see section 38-1 for treatment of partition of land and settlement of boundary disputes, see section 38-1 et seq. and the notes thereto.

Ejectment.—When tenancy in common is denied and there is a plea of sole seisin, non tenent in simul, the proceeding in legal effect is converted into an action in ejectment and should be transferred, by virtue of this section, to the civil issue docket for trial at term on issue of title, the burden being upon the petitioners to prove their title as in ejectment. (Rev., s. 718; Code, s. 284; 1868-9, c. 93; C. S. 759.)

Partition.—While the clerk has original jurisdiction of special proceedings for the partition of land held by tenants in common, this jurisdiction is divested or suspended by the regular judge of the superior court. It is the duty of the clerk to notify the parties of the nature of the relief demanded. (Rev., s. 719; Code, s. 285; 1868-9, c. 93, s. 2; C. S. 760.)

All Parties Interested Must be Joined.—When in special proceedings, pending before the clerk, the parties have the right to insist upon a verdict upon all issues raised by the pleadings, and the judge may allow amendments to the pleadings for the purpose of a hearing of the case upon its merits. (Rev., s. 719; Code, s. 285; 1868-9, c. 93, s. 2; C. S. 760.)

Amendments on Appeal.—In cases of appeal from the probate court (now the clerk of the superior court) to the superior court the judge has the right to allow amendments to the pleadings as if the case had been constituted in his court. Suddeth v. McCombs, 67 N. C. 353.

Evidence Considered Upon Appeal.—If there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. Mills v. Mc- Cullock, 161 N. C. 112, 163 S. E. 544. See also, Ex parte Wilson, 222 N. C. 99, 22 S. E. (2d) 262 (con. op.).

Cited in Jackson v. Jernigan, 216 N. C. 401, 5 S. E. (2d) 143.

§ 1-400. Ex parte; commenced by petition.—If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded. (Rev., s. 718; Code, s. 284; 1868-9, c. 93; C. S. 759.)

Judgment Creditors May Become Parties.—Where the executrix has filed a proper petition, the judgment creditors interested in the surplus, if not made parties, and desiring to contest one of the debts set out in the petition, may make themselves parties and proceed therein according to the procedure being on the part of the executrix and an independent action by them will not lie for fraud until after final judgment in the proceedings. Wadford v. Davis, 192 N. C. 484, 135 S. E. 255.

§ 1-401. Clerk acts summarily; authority from nonresident.—In cases under § 1-400, if all persons to be affected by the decree, or their attorney, have signed the petition and are of full age, the clerk of the superior court has power to hear and decide the petition summarily. If any of the petitioners reside out of the state, an authority from them, to the attorney, in writing, must be filed with the clerk before he may make any order or decree to prejudice their rights. (Rev., s. 719; Code, s. 285; 1868-9, c. 93, s. 2; C. S. 760.)

All Parties Interested Must be Joined.—When in special proceedings, under which certain timber interests were sold by a commissioner, it does appear upon the face of the record that certain petitioners interested in the timber were not made parties, or that they have not appeared as such in person or by attorney, and they have in no way waived their rights, they are not bound by a judgment rendered therein, and as to them the entire proceeding is void upon its face. Moore v. Rowland Lumber Co., 150 N. C. 261, 63 S. E. 953.

§ 1-402. Judge approves when petitioner is infant.—If any petitioner is an infant, or the guardian of an infant, acting for him, no final order or judgment of the clerk, affecting the merits of the case and capable of being prejudicial to the infant, is valid, unless submitted to and approved by the judge resident or holding court in the district. (Rev., s. 720; Code, s. 286; 1887, c. 61; C. C. P., s. 420; 1885-9, c. 93, s. 3; C. S. 761.)

Infants Represented by Guardian.—In an ex parte proceeding to sell land for assets infant heirs are represented by a guardian or next friend, and the order must be approved by the judge. Harris v. Brown, 123 N. C. 419, 424, 31 S. E. 877.

Same—Where Represented by Administrator.—While it is true the administrator or conservator in such case to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation or elsewhere in the proceeding, such irregularity will not vitiate the title of purchaser. Harris v. Brown, 123 N. C. 419, 420, 31 S. E. 877.

Who May Approve.—An emergency judge has the same jurisdiction for making approvals under this section as has the regular judge of the superior court. See discussion in 1 N. C. Law Rev. 284.

One who joins as infant in a petition is bound by the judgment, though he is not a party to the proceeding in the court. Lindsay v. Beam, 128 N. C. 189, 190, 38 S. E. 511.

Court Presumed to Have Protected Interests of Infants.—Where the lands of infants are sold under an order of the court, and the infant is not made a party, it is the duty of the regular judge of the superior court to represent the infant, and the court is presumed to have done so, in the absence of an order to the contrary. E. S. 634. See also, Ex parte Wilson, 222 N. C. 99, 22 S. E. (2d) 262 (con. op.).

§ 1-403. Orders signed by judge.—Every order or judgment in a special proceeding required to be made by a judge of the superior court, in or out of term, must be authenticated by his signature. (Rev. s. 725; Code, s. 288; 1868-9, c. 93, s. 5; 1872-3, c. 112; C. S. 763.)

§ 1-404. Reports of commissioners and jurors.—Every order or judgment in a special proceeding imposing a duty on commissioners or jurors must prescribe the time within which the duty must be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within twenty days after the performance of the duty file their report with the clerk of the superior court, and if no exception is filed to it within twenty days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties. (Rev., s. 725; 1893, c. 209; C. S. 763.)

Confirmation Discretionary with the Court.—The confirmation by the court, if no exception is filed to the report within the time prescribed, is subject to the discretion of the court. Ex parte Garrett, 174 N. C. 343, 91 S. E. 838. But in partition proceedings it is obligatory for the court to confirm the same. Id.

Conveyances to Sell Land Applicable.—An order to sell lands to make assets to pay the debts of the deceased, under this section, is appealable from the clerk of the Superior Court, and open to revision and such further or additional proceedings on the part of the judge as justice and the rights of the parties may require, and is to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. Perry v. Perry, 179 N. C. 445, 102 S. E. 772.

Same—Jurisdiction of Judge.—The fact that the commissioner appointed to sell lands to make assets to pay the debts of the deceased has sold the property several times under resales ordered by the clerk of the Superior Court, and that the clerk has granted the purchaser’s motion to confirm the sale after the lapse of more than twenty days from that date, does not affect the jurisdiction of the judge on appeal to examine into the matter and order resale upon being satisfied that justice and the rights of the parties require it. Perry v. Perry, 179 N. C. 445, 102 S. E. 772.

Power of Clerk.—The clerk has no power to confirm a sale reported by a commissioner until the expiration of twenty days from the date on which the report was filed. Vance v. Vance, 203 N. C. 667, 668, 166 S. E. 903. Applied in Buncombe County v. Arbogast, 205 N. C. 745, 171 S. E. 881.

§ 1-405. No report set aside for trivial defect.—No report or return made by any commissioners may be set aside and sent back to them or others for a new report because of any defect or omission not affecting the substantial rights of the parties, but the defect or omission may be amended by the court, or by the commissioners with permission of the court. (Rev., s. 724; Code, s. 289; 1868-9, c. 93, s. 7; C. S. 764.)

Report Conclusive until Set Aside.—The report of commissioners must be conclusive of the facts therein ascertained, until set aside. Norfolk Southern R. Co. v. Elly, 101 N. C. 8, 7 S. E. 476. Substantial Rights Affected.—The omission in a report of commissioners to make partition of lands to state affirmative that the allotments in their opinion were equal in value, affects the substantial rights of the parties, and the clerk or judge may set it aside with directions, either that the commissioners shall make a reallocation, or that others shall be appointed to do so. Skinner v. Carter, 102 N. C. 106, 12 S. E. 908.

Description of Land Unnecessary. —A report of the commissioners is not invalid because it does not contain a description. Hanes v. R. R., 100 N. C. 493, 491, 13 S. E. 896. Nor is it mandatory that such report be under seal. Id.

§ 1-406. Commissioners of sale to account in sixty days.—In all actions or special proceedings when a person is appointed commissioner to sell real or personal property, he shall, within sixty days after the maturity of the note or bond for the balance of the purchase money of said property, or the payment of the amount of the bid when the sale is for cash, file with the clerk of the superior court a final account of his receipts and disbursements on account of the sale; and the clerk must audit the account and record it in the book in which the final settlements of executors and administrators are recorded. If any commissioner appointed in any action or special proceeding before the clerk fails, refuses or omits to file a final account as prescribed in this section, or renders an insufficient or unsatisfactory account, the clerk of the superior court shall forthwith order such commissioner to render a full and true account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such commissioner shall fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against said commissioner for a contempt and commit him till he exhibits such account, or files a bond for the amount held or unaccounted for as is prescribed by law for administrators, the premium for which is to be deducted from the commissioner’s fee, earned by said commissioner in said action or special proceeding. (Rev., s. 725; 1901, c. 614, ss. 1, 2; 1933, c. 98; C. S. 765.)

Editor’s Note.—The last two sentences of this section, giving the clerk power to force a final settlement, were added by Public Laws 1933, c. 98.


§ 1-407. Commissioners selling land for reinvestment, etc., to give bond.—Whenever in any cause or special proceeding there is a sale of real estate for the purpose of a reinvestment of the money arising from such sale or for any other purpose, and the proceeds from such sale are held by a commissioner or other officer designated by the court to receive such money, for purposes of reinvestment or otherwise, the commissioner or officer so receiving such money shall be and is hereby authorized to employ the same to give bond, to be approved by the court, in an amount at least equal to the corpus of the fund, and payable to the state of North Carolina for the protection of the fund and the parties interested therein, and conditioned that such custodian of the money shall faithfully comply with all the orders of the court made or to be thereafter made concerning the handling of reinvestment of said funds and for the faithful and final accounting of the same to the parties interested; but the court in its discretion may waive the requirement of such bond in those cases where the court requires the funds or proceeds from such sale to be paid by the purchaser.
or purchasers direct to the court. The premium § 1-408  
der the direction of the court.  
at the end of the first sentence provided that the court could dispense with the bond where it was not contem-  
plated that the money would be ultimately reinvested un-  
der the direction of the court.  

When an order has been made for the sale of timber growing upon lands affected with contingent inter-  
provisions does not affect the title of the purchaser, who is  
proper order in this respect may be supplied by amend-  
ment & Tumber Co., 185 N. C. 423, 117 S. E. 836. See also,  
all civil actions and special proceedings instituted  
commissioners, are appointed under a judgment  
be taxed as a part of the costs in such action or  
reasonable fee for their services performed under  
such order, decree or judgment, which fee shall  
the right of appeal to the judge, who shall hear  
see section 1-311, As to persons taken in arrest and bail  
section, and a judgment of non-suit is reversed, the mo-  
been a motion for an order of arrest and bail under this  
E. 463; Preiss v. Cohen, 117 N. C. 54, 60, 23 S. E. 162.  
Application to Partnership.—Where a partnership has  
terminated, and debts owing from the partner-  
]. 1919, c. 259; 1935, c. 45; C. S. 766.)  
Editor's Note.—Prior to the amendment of 1935 the clause at the end of the first sentence provided that court could  
with the bond where it was not contemplated that the money would be ultimately reinvested under the direction of the court.  

Subchapter XIII. Provisional Remedies.  
Art. 34. Arrest and Bail.  
§ 1-409. Arrest only as hereinafter prescribed.—No person may be arrested in a civil action except as prescribed by this article, but this provision shall not apply to proceedings for contempt. (Rev. s. 726; Code, s. 290; C. C. P., s. 148; C. S. 767.)  

Cross References.—As to execution against the person, see section 1-311. As to persons taken in arrest and bail proceeding being entitled to insolvent debtor's oath, see § 23-13. As to arrest and bail proceeding being entitled to jury oath, see Art. C. 3.  

In General.—The following cases were decided before the 1943 amendment, and should be evaluated with that fact in mind.  
In Hoover v. Palmer, 80 N. C. 313, 315, the court said:  
it is fair to conclude that the legislature in providing for arrest and bail in an action for injury to person used those words—jury to person—according to their established legal signification in the classification of rights of person absolute or relative. This, we hold, was intended to be and is the proper construction of the section.  

Mere Negligence Insufficient.—A judgment that execution may issue against the defendant cannot be secured upon the mere finding that the defendant negligently injured the plaintiff's property; in order to justify such execution under this section and section 1-311, the injury must have been intentionally or maliciously inflicted, i. e., with some element of violence, fraud or criminality. Oakley v. Lasater, 172 N. C. 96, 89 S. E. 1063.  


Wrongful Conversion.—Where a cotenant wrongfully converted a race horse, by selling it while in his possession, he was liable to arrest under this section. Doyle v. Bourg, 171 N. C. 10, 86 S. E. 165.  


Slandering of Title.—Although it was not necessary in the case to decide the precise point, the court stated in Sneed v. Harris, 109 N. C. 349, 354, 13 S. E. 920, that it was ques-  
stionable whether an action for slander of title was embraces by this article on arrest and bail.  
Seduction.—The seduction of a daughter, being an in-  
fringement of the relative rights of persons, is an injury to his person within the meaning of the present section, and a sufficient ground for the arrest of the defendant in an action for such tort. Hoover v. Palmer, 80 N. C. 313. It involves also fraud and deceit ex uti termini. Hood v. Sud-
der, 111 N. C. 215, 16 S. E. 397. See also the next subsection as to seduction.

This section was mentioned as applying to injury to character in Michael v. Leach, 156 N. C. 224, 225, 81 S. E. 790. As applying to injury to person in Howe v. Spittle, 156 N. C. 189, 61, 2 S. E. 207.

In an action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

Editor's Note.—Originally, this section contained the words "in an action on a promise to marry." In Moore v. Mullen, 77 N. C. 327, the court held this provision to be in or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

In General—This section is plain and very comprehensive in its terms and purpose. It intends, certainly, to embrace all cases where the relation of trust and confidence, in which the complainant, as a necessary, or agent, or attorney, or public officer, or any other person, is placed, in respect to money received by, or personal property in trust for which, upon proper affidavits and the required provisions of this section, authorizing arrests for frauds in fiduciary relation, this section since there is no action pending wherein the cause of action involves a breach of trust on the part of the defendant sustaining a fiduciary relation to the plaintiff, Travers v. Deaton, 114 N. C. 89, 98, 19 S. E. 106; Chemical Co. v. Johnson, 98 N. C. 123; 3 S. E. 723; Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

The section gives to a plaintiff, whose money or property has been put beyond his reach by his agent or trustee by an act in violation of his duty, the remedy of arrest and bail. That he may the better compel his unfaithful or trusts to another, or amend for his misconduct, and where the cause of action involves a breach of trust on the part of the defendant sustaining a fiduciary relation to the plaintiff, Travers v. Deaton, 114 N. C. 89, 98, 19 S. E. 106; Chemical Co. v. Johnson, 98 N. C. 123; 3 S. E. 723; Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

The section gives to a plaintiff, whose money or property has been put beyond his reach by his agent or trustee by an act in violation of his duty, the remedy of arrest and bail. That he may the better compel his unfaithful or trusts to another, or amend for his misconduct, and where the cause of action involves a breach of trust on the part of the defendant sustaining a fiduciary relation to the plaintiff, Travers v. Deaton, 114 N. C. 89, 98, 19 S. E. 106; Chemical Co. v. Johnson, 98 N. C. 123; 3 S. E. 723; Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

Applications of the Section.—Where a firm of merchants gave to manufacturers of fertilizers its note for a consignment of goods, agreeing to hold such goods or the proceeds thereof in trust for the manufacturers, a fiduciary relation was established and a violation of the contract was a breach of trust for which, upon proper affidavits and the required provisions of this section, an order of arrest could be obtained. Boykin, etc. Co. v. Maddrey, 114 N. C. 89, 19 S. E. 106.

One who fraudulently conveys property held by him as trustee can be legally arrested under this section. Durham Fertilizer Co. v. Little, 118 N. C. 808, 24 S. E. 664.

An action for seduction may be brought under this section. Durham Fertilizer Co. v. Little, 118 N. C. 808, 24 S. E. 664.

An action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

Non-resident Liable.—A non-resident of this State may be arrested and held to bail for fraud under this section, Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

Application Applies to Subsequent Fraud.—A person may be arrested and held to bail for a fraud committed after the contracting of the debt—e. g.—by concealing property, or conveying property, or devising property for the benefit of the creditor. Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

Partner Must Have Knowledge.—One partner can not be arrested for the fraud of his copartner of which he had no knowledge. Boykin v. Haynes, 76 N. C. 122.

Fraud Necessary for Arrest under Section.—A defendant cannot be arrested under this section, unless he has been guilty of fraud in contracting the debt for which the action is brought. McNeely v. Haynes, 76 N. C. 122.

A debt is fraudulently contracted where a purchase of property is made with an intent on the part of the purchaser not to pay for the same. See 69 Ohio State Reports, 477, construing the similar provision of the Ohio Code.

In General.—That there can be no arrest on Sunday, see White v. Morris, 107 N. C. 91, 12 S. E. 80.

Frustrated Conveyance.—One who fraudulently conveys his real estate with intent to defeat his creditors can be legally arrested under this section. Durham Fertilizer Co. v. Little, 118 N. C. 808, 24 S. E. 664.

That there can be no arrest on Sunday, see White v. Morris, 107 N. C. 91, 12 S. E. 80.

Frustrated Conveyance.—One who fraudulently conveys his real estate with intent to defeat his creditors can be legally arrested under this section. Durham Fertilizer Co. v. Little, 118 N. C. 808, 24 S. E. 664.
§ 1-411. Order and affidavit.—An order for the arrest of the defendant must be obtained from the court in which the action is brought or a judge thereof, and may be made where it appears to the court or judge, by affidavit of the plaintiff or of any other person, that a sufficient cause of action exists and that the case is one of those provided for in this article. (Rev., ss. 729, 729; Code, ss. 292, 293; C. C. P., ss. 15, 15; C. S. 769.)

The affidavit must proceed from the court in which the action is brought or from a judge thereof. Houston v. Walsh, 79 N. C. 36, 38.

Same.—Jurisdiction.—An order of arrest, under this section, may be obtained by affidavit on a minor material and evidential issue of which the judge and the clerk have concurrent jurisdiction. Bryan v. Stewart, 123 N. C. 93, 31 S. E. 286.

Same.—Voidable Only.—An order of arrest granted by a court having jurisdiction is not void. It may be erroneous if issued upon an insufficient affidavit. Tucker v. Davis, 77 N. C. 330.

Grounds May Be Stated in Complaint.—The grounds for arrest may be, and most usually are, set forth in an affidavit by the plaintiff, or any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 1-410. Roulhac v. Brown, 87 N. C. 25, 65 S. E. 678.

Filing Second Affidavit.—The refusal to allow a second affidavit shall not bar the plaintiff from obtaining a warrant therefor. Melvin v. Melvin, 72 N. C. 384.

Grounds of Belief Should Be Stated.—If the affidavit states certain things which the party believes are about to be done, then the grounds of belief must be stated in order to justify a judge of the reasonableness thereof. Peebles v. Foote, 83 N. C. 102, 104 and cases cited.

Examples—Sufficient Statement.—In an action for arrest and bail, the affidavit of the plaintiff alleged the existence of a cause of action and the fraud committed by defendants in contracting the debt, and that upon information and belief they had fraudulently removed and disposed of their property; held, sufficient to justify the order of arrest. Paige v. Price, 76 N. C. 10.

Where the affidavit upon which an order of arrest and attachment was obtained was as follows: That the defendant has disposed of and secreted his property with intent to defraud his creditors—it was held to be sufficient. Hughes v. Person, 63 N. C. 548.

Same.—Insufficient Statement.—An affidavit for arrest of an absent defendant charged with and untried for fraud, if certain amount is not sufficient if it does not show fraud in the misappropriation of the funds by an administrator. Melvin v. Melvin, 72 N. C. 384.

General Rumor.—Mere general rumor that a person in- debted has removed to another state is not sufficient to justify his creditor in suing out a warrant for his arrest. Melvin v. Melvin, 72 N. C. 384.

The Order.—The order of arrest must proceed from the court or judge, by affidavit of the plaintiff or any other person. (Rev., s. 730; Code, s. 294; C. C. P., s. 153; 1869-9, c. 277, s. 7; C. S. 771.)

Process Can Be Served on Prisoner in Jail.—The sheriff can serve process anywhere in his county—the jail possesses no "privilege of sanctuary" and service of process upon a prisoner there is valid. White v. Underwood, 125 N. C. 35, 34 S. E. 104.

This section is mentioned in Powers v. Davenport, 101 N. C. 291, 7 S. E. 747.

Written Warrant Necessary.—For the benefit of the citizen the person may at all times be able to call upon the sheriff or other officers to produce his authority, and to see precisely what it was, the law established the necessity of a written warrant. Lutterloh v. Powell, 2 M. & K., 915.

Defendant under Criminal Process.—A defendant, who has been brought into court on criminal process, and discharged from arrest under the same on bail, is not privileged from being arrested on civil process immediately afterwards, during the sitting of the court and before he leaves the court room. Moore v. Green, 73 N. C. 394.

Witnesses Attending Court.—The principle of the common law, that a suitor, while going to, remaining at, and returning home from court, is exempted from arrest, is in force in this state. Hammersholl v. Rose, 52 N. C. 629.

Nonresident Attending as Witness.—A citizen of another state, while voluntarily attending court as a witness, is privileged from arrest in a civil case. Ballinger v. Elliott, 72 N. C. 596.

§ 1-414. Copies of affidavit and order to defendant.—The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof. (Rev., s. 732; Code, s. 296; C. C. P., s. 154; C. S. 772.)

§ 1-415. Execution of order.—The sheriff shall
execute the order by arresting the defendant and keeping him in custody until discharged by law. The sheriff may call the power of the county to his aid in the execution of his order. (Rev., s. 739; Code, s. 297; C. C. P., s. 155; C. S. 773.)

§ 1-416. Vacation of order for failure to serve.—The order of arrest is of no avail, and shall be vacated, or set aside, or at the order of the court, or upon motion, unless it is served upon the defendant, as provided by law, before the dethaining of any judgment in the action. (Rev., s. 734; Code, s. 295; C. C. P., s. 153; C. S. 774.)

An order of arrest issued after final judgment in an action is illegal and void. Houston v. Walsh, 79 N. C. 36.

§ 1-417. Motion to vacate order; jury trial.—A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. He may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the affidavit of the plaintiff and the defendant's denial be submitted to the jury and tried in the same manner as other issues. If the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging him from arrest and vacating the order of arrest, and he shall recover of the plaintiff all costs of the proceeding incurred by him in defending the action. (Rev., s. 735; Code, s. 316; 1889, c. 497; C. C. P., s. 174; C. S. 775.)

In General.—This section and sections 1-419 and 23-29 et seq., prescribing the methods by which a prisoner may be discharged and bail proceedings, where a motion was made by the plaintiff may produce further evidence. Harriss v. Sneeden, 110 N. C. 273, 7 S. E. 801.

Facts Must Be Fully Controverted.—When one who has been arrested moves to vacate the order of arrest upon counter affidavits, purporting to meet the facts alleged against him, he should do so fully and clearly, otherwise the order of arrest will be continued. Powers v. Davenport, 101 N. C. 500, 12 S. E. 584.

Additional Evidence.—Where the defendant moves to vacate the order on the ground that it was irregularly or improperly granted, the plaintiff will not be allowed to offer additional evidence in support of his application; but if the defendant moves to vacate upon counter proofs the plaintiff may produce further evidence. Harriss v. Sneeden, 110 N. C. 273, 7 S. E. 801.

The order of arrest is of no avail, and shall be executed by arresting the defendant and his aid in the execution of the arrest. (Rev., s. 739; Code, s. 297; C. C. P., s. 155; C. S. 773.)

§ 1-418. Counter affidavits by plaintiff.—If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made. (Rev., s. 736; Code, s. 317; C. C. P., s. 173; C. S. 776.)

Simple Denial Insufficient.—If the order was properly granted it cannot not to be vacated upon the simple denial of the alleged cause of action; but where the answer or counter affidavits meet the allegations of the plaintiff fully and in detail, and furnish convincing evidence of their truth, the order should be vacated. Harriss v. Sneeden, 110 N. C. 273, 7 S. E. 801.

Motions Heard Anywhere in District.—A motion to vacate an order of arrest may be heard by a judge out of court anywhere within the district that his duties require him to be during the time in which he is assigned to the district. Parker v. McPhail, 112 N. C. 502, 16 S. E. 848. See also In re Johnston, 114 N. C. 113, 19 S. E. 597. In arrest proceedings, where a motion was made by the plaintiff to vacate the order of arrest, the judge finds as a fact that the act upon which the order was based was not committed, the finding is final and can not be reviewed. Parker v. McPhail, 112 N. C. 502, 16 S. E. 848.

An appeal from the judgment of a justice of the peace holding that a person has been arrested in a civil action vacates the judgment, and the order of arrest continues in force pending the appeal. Patton v. Gash, 99 N. C. 280, 6 S. E. 193.

Where Jury Trial Demanded.—If the defendant demanded a jury trial in the order of arrest, the judge finds as a fact that the act upon which the order was based was not committed, the finding is final and can not be reviewed. Parker v. McPhail, 112 N. C. 502, 16 S. E. 848.

Additional Evidence.—Where the defendant moves to vacate the order on the ground that it was irregularly or improperly granted, the plaintiff will not be allowed to offer additional evidence in support of his application; but if the defendant moves to vacate upon counter proofs the plaintiff may produce further evidence. Harriss v. Sneeden, 110 N. C. 273, 7 S. E. 801.

How defendant discharged.—The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this article. (Rev., s. 737; Code, s. 298; C. C. P., s. 156; C. S. 777.)

Rights of Nonresidents.—Where nonresidents are arrested under the provisions of this article they are entitled to the benefit of sections 23-29 to 23-42, relating to insolvent debtors, in securing their discharge. Burgwyn v. Hall, 105 N. C. 489, 11 S. E. 222.

§ 1-420. Defendant's undertaking.—The defendant may give bail by causing a written undertaking, payable to the plaintiff or to the order of the court, to be executed by sufficient sureties to the effect that the defendant will at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he is arrested

[345]
§ 1-421. Defendant's undertaking delivered to clerk; exception.—Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return endorsed, and a copy of the undertaking of the defendant, and notify the plaintiff or his attorney thereof. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted it and the sheriff is exonerated from the liability. (Rev., s. 739; Code, s. 304; C. C. P., s. 162; C. S. 779.)

§ 1-422. Notice of justification; new bail.—On the receipt of notice of exception to the bail, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or his attorney notice of the justification of the same or other bondsmen (specifying the places of residence and occupation of the latter) before the court, judge of the peace, or judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bondsmen are given, there must be a new bond, in the form hereinbefore prescribed. (Rev., s. 741; Code, s. 305; C. C. P., s. 168; C. S. 780.)

§ 1-423. Qualifications of bail.—The qualifications of bail shall be as follows:

1. Each of them must be a resident and freeholder within the state.
2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail. (Rev., s. 740; Code, s. 306; C. C. P., s. 164; C. S. 781.)


Bond Should Show Facts.—A bail bond should show on its face that the surety is a resident and freeholder within the state, or his justification should establish these facts. Howell v. Jones, 113 N. C. 429, 18 S. E. 672.

§ 1-424. Justification of bail.—For the purpose of justification, each of the bail shall attend before the court or judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the court, judge or justice of the peace, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. (Rev., s. 742; Code, s. 307; C. C. P., s. 165; C. S. 782.)

§ 1-425. Allowance of bail.—If the court, judge or justice of the peace finds the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is then exonerated from liability. (Rev., s. 743; Code, s. 308; C. C. P., s. 166; C. S. 783.)

Purpose of Bail.—The main object of a bail bond taken to release the prisoner from custody in arrest and bail is to secure his presence to answer the process of the court and, for this purpose, to keep him within its jurisdiction, and not merely to obtain money upon his defaults. Pikel simer v. Glazener, 173 N. C. 630, 92 S. E. 700.

§ 1-426. Deposit in lieu of bail.—The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall then give a certificate of the deposit to the defendant, who shall be discharged from custody. (Rev., s. 744; Code, s. 309; C. C. P., s. 167; C. S. 784.)

§ 1-427. Deposit paid into court; liability on sheriff's bond.—Within four days after the deposit the sheriff must pay it into court, and take from the officer receiving it two certificates of such payment, one of which he must deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency. (Rev., s. 745; Code, s. 310; C. C. P., s. 168; C. S. 785.)

Cross Reference.—As to payment by sheriff of money collected on execution, see section 162-18.

§ 1-428. Bail substituted for deposit.—If money is deposited, as provided in §§ 1-426 and 1-427, bail may be given and justified upon notice according to law at any time before judgment. Thereupon the judge, court or justice of the peace shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly. (Rev., s. 746; Code, s. 311; C. C. P., s. 169; C. S. 786.)

§ 1-429. Deposit applied to plaintiff's judgment.—When money has been deposited, and remains on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, cross-reference, to collect the sum deposited, as in other cases of delinquency. (Rev., s. 747; Code, s. 312; C. C. P., s. 170; C. S. 787.)

§ 1-430. Defendant in jail, sheriff may take bail.—If a person for want of bail is lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail bond shall be regarded in every respect as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (Rev., s. 748; Code, s. 318; R. C., c. 11, s. 8; C. S. 788.)
§ 1-431. When sheriff liable as bail.—If, after arrest, the defendant escapes, or is rescued, or bail is not given or justified, or a deposit is not made instead thereof, the sheriff is liable as bail. But he may discharge himself from such liability by the giving and justification of bail at any time before process against the person of the defendant to enforce an order or judgment in the action. (Rev., s. 749; Code, s. 313; C. C. P., s. 171; C. S. 789.)

In General.—A sheriff who accepts an insufficient undertaking in arrest and bail proceedings, or who, after exceptions filed thereto by the plaintiff, fails to give notice of his objection to the place where he will justify, is liable as special bail to the plaintiff, and he will not be exonerated from liability by the fact that he acted in good faith in taking the insufficient bond, or by the fact that the plaintiff was nearby and knew what was going on when an alleged justification was being made by the surety. Howell v. Jones, 113 N. C. 429, 18 S. E. 672.

In State v. Brittain, 25 N. C. 17, it is said that after once taking the bail the sheriff, on finding the bail to be insufficient, has no right to rearrest the defendant, and that the defendant in such a case is justified in resisting the arrest. State v. Queen, 66 N. C. 615, 617.

Escape of Prisoner.—A sheriff having permitted one arrested by him upon mesne process in a civil action to go into an adjoining room, from which he escaped, subjected himself to liability as bail. Wimborne & Bro. v. Mitchill, 111 N. C. 13, 15 S. E. 882.

Same.—Defendants Insolvency Immaterial.—When the sheriff is sued as bail he cannot give evidence, in mitigation of damage, of the defendant's insolvency. Wimborne & Bro. v. Mitchell, 111 N. C. 13, 14, 15 S. E. 882.

Notice and Exceptions Unnecessary.—If the sheriff fails to take bail, the plaintiff need not file exceptions nor give notice to fix him as bail. Adams v. Jones, 60 N. C. 198.

Defective Bond Does Not Satisfy Section.—A paper, though intended as a bail bond, which is so defective and imperfect as to be adjudged not to be such, cannot be regarded as the taking of bail. Adams v. Jones, 60 N. C. 198, 199.

§ 1-432. Action on sheriff's bond.—If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency. (Rev., s. 750; Code, s. 314; C. C. P., s. 172; C. S. 790.)

§ 1-433. Bail exonerated.—At any time before final judgment against them, the bail may be exonerated, either by the death of the defendant or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution of the judgment. (Rev., s. 751; Code, s. 303; C. C. P., s. 161; C. S. 791.)

Meaning of "State Prison."—The term "State prison," as used in this section, applies to either the penitentiary or the county jail. Sedberry v. Carver, 77 N. C. 319.

When Imprisonment Does Not Exonerate.—Where the imprisonment of a defendant under this section, expired before judgment, the surety need not be discharged at the original action or against the bail upon his undertaking: Held, that such imprisonment does not exonerate the bail. Sedberry v. Carver, 77 N. C. 319; Adrian v. Scamin, 77 N. C. 317.

Imprisonment on Other Charges.—Upon the failure of defendant to appear when his case was called, judgment nisi entered and a capias issued. Upon the hearing of the scire facias, the court on examination of the record concluded that the defendant had been turned over to a federal court by a prior bondsman and that defendant was then serving a sentence imposed by that court, it was error for the court to enter absolute judgment on the bond, the cases against defendant as well as the hearing on the scire facias being subject to continuance. State v. Welborn, 205 N. C. 650, 172 S. E. 174.

§ 1-434. Surrender of defendant.—At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and acknowledge the surrender by a certificate in writing.

2. Upon the production of a copy of the undertaking and sheriff's certificate, the court or judge may, upon a notice to the plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application, he shall be exonerated accordingly. But this section does not apply to an arrest in an action to recover the reversion of personal property unjustly detained, so as to discharge the bail from an undertaking given to the effect provided by law to be given by defendant for the retention of property, under the article entitled Claim and Delivery. (Rev., s. 752; Code, s. 300; C. C. P., s. 158; C. S. 792.)

Cross Reference.—As to surrender of defendant when he appears upon motion against the surety, see § 1-436 and §§ 1-451 to 1-455 of this chapter.

As to claim and delivery, see sections 1-472 to 1-484.

Where Prisoner Again Arrested.—Where in arrest and bail the prisoner under bail bond has been again arrested to await a warrant in extradition proceedings, and imprisoned in the jail of the county by the same sheriff, as being prior to those of other jurisdictions, the trial judge upon hearing the obligations of the bond, that the trial judge upon hearing the obligations of the bond, and of the person retained in custody pending the action of the Governor, who, upon notification, may consider the rights of the debtors as being superior to those of other jurisdictions, and hold the prisoner to answer in our courts. Pickelsimer v. Glazener, 173 N. C. 630, 92 S. E. 700.

§ 1-435. Bail may arrest defendant.—For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a writ of authority endorsed on a certified copy of the undertaking may empower any person over twenty-one years of age to do so. (Rev., s. 753; Code, s. 301; C. C. P., s. 159; C. S. 793.)

In General.—Where a prisoner in arrest and bail is released from custody of the law upon bail, the principal is
§ 1-436. Proceedings against bail by motion.—In case of failure to comply with the undertaking the bail may be proceeded against by motion in the cause on ten days’ notice to them. (Rev., s. 754; Code, s. 302; C. C. P., s. 160; C. S. 794.)

Cross Reference.—As to when the statute of limitations runs against an action under this section, see section 1-52, page 338.

Motion Must Be Brought Within Three Years.—Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the state in the meantime. Albermarle Steam etc., Co. v. Williams, 111 N. C. 35, 15 S. E. 877.

Principal’s Insolvency—No Defense.—Insolvency of the principal is no defense to an action against the bail. Winborne v. Bro. & Co., 111 N. C. 13, 15 S. E. 882.

When Action Against Bail Lies.—When the debtor is released upon bail, the creditor may proceed to judgment, and issue execution against the debtor, and on his non-appearance, if returned “nulla bona”; and should the latter writ be returned “non est inventus,” the plaintiff may move on ten days’ notice for judgment against the bail, and may issue execution against the debtor’s property, and should the latter writ be returned “non est inventus,” a judgment rendered against him at an intermediate stage of the proceedings is reversible error. Pickelsimer v. Glazener, 173 N. C. 630, 92 S. E. 700.

§ 1-437. Liability of bail to sheriff—The bail is liable for all costs which accrue on said notice, to notice served upon his surety or bail, he was then “amenable to the process of the court,” notwithstanding his refusal thus to surrender himself, and the court should have ordered execution against the person of the defendant, rather than hold the surety or bail, for failure to surrender him. Stepp v. Robinson, 203 N. C. 803, 804, 167 S. E. 147.

§ 1-438. When bail to pay costs.—When a notice issues against a person, as the bail of another, and the bail, at or before the term of the court at which he is bound to appear, or ought to plead, is not discharged from his liability by the death or surrender of his principal or otherwise, he is liable for all costs which accrue on said notice, notwithstanding he may be afterwards discharged, by the death or surrender of the principal, or otherwise. (Rev., s. 756; Code, s. 319; R. C., c. 11, s. 10; C. S. 796.)

Certain Costs Not Allowed.—The costs allowed against bail, notwithstanding a surrender, &c., do not include such as are incurred on account of an improper and ineffectual arrest. Clark v. Latham, 53 N. C. 1.

§ 1-439. Bail not discharged by amendment.—No amendment of process or pleading discharges the bail of the party arrested thereon, unless it enlarges the sum demanded beyond the sum expressed in the bond. (Rev., s. 757; Code, s. 320; R. C., c. 11, s. 11; C. S. 797.)

Art. 35. Attachment.

§ 1-440. In what actions attachment granted.—A warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff, as specified in this article, when the action is to recover a sum of money only, or damages for one or more of the following causes:

1. Breach of contract, express or implied.
2. Wrongful conversion of personal property.
3. Any other injury to real or personal property, in consequence of negligence, fraud, or other wrongful act.
4. Any injury to the person, caused by negligence or wrongful act. (Rev., s. 758; Code, s. 347; C. C. P., s. 197; 1893, c. 77; 1901, c. 740; C. S. 798.)

Editor’s Note.—In chapter 7 section 16 of the Rev. Code of 1868 was provided that an attachment would lie against the property of one who injured the person or property of another, and within three months thereafter asconded from the State. The attachment had to be issued within three months from the time of the injury. For cases under this old provision, see Blankinship v. McMahon, 63 N. C. 180; Webb v. Bowlar, 50 N. C. 362.

Definitions and Object.—An order of attachment is an execution by anticipation. It empowers the officer to seize and hold the estate of the alleged debtor for the satisfaction of a claim or demand to be established in the future. The object of which is to prevent the plaintiff from suffering a loss, which he might otherwise sustain, if a writ of attachment was not provided. See Green v. Van Buskirk, 7 Wall. 139, 16 L. Ed. 109.

Attachment is a mesne process, merely an incident to a suit. Ex parte Des Moines etc., R. 103 U. S. 794, 842. L. Ed. 235.

The object of the writ is to enable the plaintiff to obtain a lien upon the property which may be subsequently enforced by a sale upon execution, if judgment be obtained. Rev., s. 759, 176 U. S. 390, 406, 20 Ct. 410, 44 L. Ed. 530, 533.

Origin of the Writ.—Attachment, other than the common-law writ which issued out of the common pleas upon the non-appearance of the defendant, as the result of a writ of attachment, had its origin in the civil law, and afterwards was adopted in England in the form of a custom of the London merchants, and in the Parliament, under the form of an Act by statute, has grown the modern law in respect to this remedy. It was resorted to in order to compel the attendance of the debtor as well as to afford a security to the creditor. Brown v. Knickerbocker Trust Co., 95 N. Y. 55, S. E. 90. See Chinnis v. Cobb, 210 N. C. 104, 185 U. S. 638.

History of the Section.—Under the Code of 1868, as originally enacted, this provisional remedy was allowed in actions on a contract for the recovery of money only, or in actions for wrongful conversion of personal property; and several decisions of the court construing the first clause of the statute, held that an attachment was only permissible for breaches of contract involving the recovery of liquidated damages, or damages which could be limited and defined by any standard or data contained in the contract itself. See Price v. Cox, 117 N. C. 260, 19 S. E. 662; Toms v. Warson, 66 N. C. 417. Mfg. Co., 88 N. C. 5. Shortly after these decisions were rendered, the statute was amended so as to provide the remedy for breach of contract (express or implied), wrongfu

§ 1-440. CH. 1. CIVIL PROCEDURE—PROVISIONAL § 1-440


Defects or Irregularities.—The court will not be deprived of the jurisdiction which it has acquired by the levy of a writ of attachment, on account of the defect of the process of attachment in any respect whatever. Harris v. Balk, 198 U. S. 215, 222, 25 S. Ct. 625, 49 L. Ed. 1023.

Conflict between State and Federal Jurisdiction.—In cases of conflict of authority between the State and federal process, in order to avoid unnecessarily collision between them, the question as to which authority should for the time be prevail does not depend upon the rights of the respective parties to the suit. See Chinnis v. Cobb, 210 N. C. 104, 185 S. E. 638, citing V. Heyman, 111 U. S. 176, 177, 8 S. Ct. 355, 25 L. Ed. 356.

And this rule applies notwithstanding the fact that the property has been brought into custody by illegal means. Gumbel v. Pitkin, 124 U. S. 131, 155, 8 S. Ct. 379, 31 L. Ed. 374.

Duty of Process. The court will not be deprived of the jurisdiction which it has acquired by the levy of a writ of attachment, on account of the defect of the process of attachment in any respect whatever. Harris v. Balk, 198 U. S. 215, 222, 25 S. Ct. 625, 49 L. Ed. 1023.

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port the service of process by publication and attachment, since it is not one to recover a sum of money only nor damages for one or more of the causes of action enumerated in this section. Stevens v. Cecil, 216 N. C. 350, 4 S. E. (2d) 879.

§ 1-440. Affidavit must show what.—To entitle the plaintiff to a warrant of attachment he must show by affidavit to the satisfaction of the court as follows:

1. That one of the causes of action specified in § 1-440 exists against the defendant. If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, and that the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from this state, or has removed, or is about to remove some of his property from this state with intent to defraud his creditors. The statute puts the modes in the alternative, and if not set out the affidavit is fatally defective. First Nat. Bank v. Tarboro Cotton Factory, 179 N. C. 263, 105 S. E. 195.

2. That the defendant is either a foreign corporation, or a nonresident of the state, or a domestic corporation none of whose officers can be found in the state after due diligence; or, if the defendant is a natural person or a resident of the state, that he has departed therefrom, or keeps himself concealed therein, with intent to defraud his creditors or to avoid service of summons; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with like intent. (Rev., s. 759; Code, s. 349; C. C. P., s. 201; 1867, c. 470; C. S. 799.)

I. IN GENERAL.

A. Necessary Allegations.

1. By Whom Made.—An affidavit in attachment may be made generally by the plaintiff, his agent or attorney, Henrietta Min., etc., Co. v. Gardner, 72 U. S. 121, 19 S. Ct. 327, 43 L. Ed. 640.

2. When One a Non-Resident.—Where one voluntarily removes from this to another state, for the purpose of disposing of the property of an office of indefinite duration, which requires his continued presence therein for an unlimited time, such a one is a nonresident of this state for the purpose of an attachment, and that notwithstanding a residence of this state, and that he may have the intent to return at some uncertain future. Wheeler v. Cobb, 75 N. C. 21, 26.

3. But the fact that a person leaves the state to seek work, for the purpose of prospeering with a view to change his residence if desirable, does not sustain an attachment on the ground that the defendant was a nonresident. Mahoney v. Tyler, 10 S. E. 159.

4. The party who has left the state for an indefinite time, his return depending upon a doubtful contingency, is a nonresident under subsection 2 of this section notwithstanding the fact that he intends to return at some time in the future, and his motion made by special appearance to vacate the attachment on the ground of his residence will be denied. Brann v. Hanes, 194 N. C. 436, 140 S. E. 106.

Defendant’s residence is not determinative of the question whether one is a nonresident within the meaning of such subsection. Nor is the cause of the absence, such as severe illness, material if such absence prevents personal service of summons upon him during an indefinite period of time. Brann v. Hanes, 194 N. C. 436, 140 S. E. 106.

II. THE AFFIDAVIT.

A. Necessary Allegations.

1. Specific.—The affidavit to procure an attachment must be specific. Bacon v. Johnson, 110 N. C. 114, 14 S. E. 508, and must set forth the grounds recited in this section. Mullen v. Norfolk, etc., Canal Co., 114 N. C. 8, 66 S. E. 22.

2. Grounds of Belief Must Be Stated.—Where the plaintiff makes oath that he believes or apprehends the property will be removed, he must also state the grounds of apprehension. Penniman v. Daniel, 90 N. C. 150; Penniman v. Daniel, 90 N. C. 154.

3. When the affidavit is that the defendants are “about to assign or dispose of their property with intent to defraud the plaintiffs,” which is not the assertion of a fact, but merely the belief merely, the grounds upon which such belief is founded must be set out so that the court may judge if they are sufficient. Hughes v. Persons, 63 N. C. 546; Gassine, etc., Co. v. Baer, 64 N. C. 108; Clark v. Clark, 64 N. C. 150; Penniman v. Daniel, 90 N. C. 154.


Examples of sufficient statement.—Affidavits for publication of the summons and notice of attachment are sufficient when they show that the defendant cannot, after due and diligent search, be found in this state, that he is a nonresident and has property here of which the court has jurisdiction, and that the plaintiff has a cause of action against the defendant, arising out of a contract by which he expressly promises to pay a specific sum to the plaintiff for services rendered at his request, which sum is still due and owing. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

5. The affidavit is sufficient in which it is averred that the defendant is a nonresident and has property in this state, or has removed, or is about to remove some of his property from this state with intent to defraud his creditors. The statute puts the modes in the alternative, and the plaintiff succeeds if he establishes either. Penniman v. Daniel, 90 N. C. 154.

6. In proceedings for attachment an affidavit is sufficient which sets out: 1st, that the defendant is indebted, etc.; 2d, that the defendant has departed from this state with intent, as the affiant is informed and believes, to avoid the service of summons, etc., Co. v. Brewer, 76 N. C. 428.

B. What Can Be Omitted.

1. Absence of Defendant.—It is not necessary, and therefore need not be averred, that the defendant cannot be found in the state in order to procure a warrant of attachment. Luttrell v. Martin, 112 N. C. 593, 605, 17 S. E. 573.

2. Defendant’s Property.—It is not necessary that the affidavit upon which an attachment is sought shall set out the fact that the defendant has property in this state. Branch v. Fitch, 81 N. C. 180; Foushee v. Owen, 122 N. C. 360, 363, 29 S. E. 770; Parks v. Adams, 113 N. C. 473, 476, 18 S. E. 665; Osburn v. Wilson, 87 N. C. 333; and Spiers v. Halstead, etc., Co., 71 N. C. 209.

Jurisdiction of Court.—Where, in proceedings for attachment, it sufficiently appears that the record of the court had jurisdiction of the cause, and the affidavit of the attaching creditors specifically allege its jurisdiction. County Sav. Bank v. Tolbert, 192 N. C. 126, 133 S. E. 558. Page v. McDonald, 195 N. C. 38, 43.
§ 1-442. Affidavit to be filed.—It is the duty of the plaintiff procuring a warrant of attachment, within ten days from its issuance, to file the affidavit on which it was granted in the office of the clerk of the superior court to which, or with the justice of the peace before whom, the process is returnable. (Rev., s. 760; Code, s. 355; C. C. P., s. 201; C. S. 800.)

§ 1-443. By whom granted.—If the action is not founded on a contract, or if founded on a contract and the sum demanded exceeds two hundred dollars, a warrant of attachment may be obtained from the judges of the district embracing the county in which the action was begun, or from the clerk of the superior court from which the summons in the action issued; and it may be issued to any county in the state where the defendant has property, money, effects, choses in action, or debts due him, and shall be made returnable before the clerk at the same time and place to which the summons is returnable. (Rev., s. 761; Code, s. 351; C. C. P., s. 199; 1869-70, c. 147; 1870-1, c. 166, ss. 1, 3; 1874-5, c. 111; 1876-7, c. 251; Ex. Sess. 1921, c. 92, s. 17; C. S. 801.)

Cross Reference.—As to return of summons, see § 1-89.

§ 1-444. Time of issuance; service of summons.—The warrant of attachment must be issued within ten days after its granting, or else, upon the expiration of that time, the service must be commenced pursuant to an order obtained therefor, and if publication has been or is thereafter commenced, the service must be made complete by the continuance thereof. (Rev., s. 762; Code, s. 348; C. C. P., s. 187; C. S. 802.)

Cross Reference.—As to when service by publication can be resorted to, and for the meaning of "due diligence" in such cases, see section 1-98 and annotations thereunder. [351]
Service by Publication.—The provisions of the Code, authorizing the attachment of the property of a non-resident defendant, are of a summary and peremptory character. The provisions of the Code, by reference to the Code of Civil Procedure, have many of the features of the foreign attachment. Such proceeding is an extraordinary and summary remedy, and is in derogation of the common law and statute law. An attachment cannot be recognized in a case commenced in a Federal court. Even in a State court the plaintiff must strictly and technically perform all the conditions required by the statute entitling him to such remedy. The remedy is by statute conferred, and cannot be enlarged by implication and liberal construction. Lackett v. Rumbaugh, 45 Fed. 23, 29.

Within Thirty Days Not Applicable to Publication.—Under the Code, publication is not required to be made, like personal service of summons, “within thirty days after the attachment granted,” but must be commenced upon expiration of the thirty days; that means “after” the expiration of the thirty days, and where publication was begun on the day after the expiration of the thirty days, that strictly conforms to the statute. Mills v. Hansel, 168 N. C. 651; 65 S. E. 264.

The publication of summons and attachment was not irregular because commenced within thirty days from the time of issuing the summons. Currie v. Golconda Mining, etc., Co., 157 N. C. 209, 72 S. E. 980.

Time Can Be Extended.—In Finch v. Slater, 152 N. C. 155, 156, 57 S. E. 264, it is held that where the court has acquired jurisdiction by attachment of property, the time for service of summons may be extended and publication made, by implication, in the discretion of the court. Mills v. Hansel, 166 N. C. 651, 653, 65 S. E. 17.

Main Action Commenced By Summons.—A warrant of attachment and publication is a summary and ancillary remedy and is dependent upon a main action commenced by the issuing of a summons. Lackett v. Rumbaugh, 45 Fed. 23, 29.

When Summons Not Actual Notice.—A proper instance, where civil actions are commenced and service is obtained by attachment of the defendant's property and publication of a notice based upon the jurisdiction thus acquired, the issuance of the summons was unnecessary. Jenette v. Hovey & Co., 182 N. C. 30, 108 S. E. 301.

Same.—Section 7-136 Not Applicable.—In attachment and publication, if the defendant be a debtor of the place of the county in which the court has jurisdiction, there is no requirement that the summons be made returnable not more than thirty days after its issuance, as inapplicable. Best v. British, etc., Mort. Co., 128 N. C. 351, 352, 38 S. E. 923, cited and affirmed by Walker, J., in Grocery Co. v. Collins Bros. & Co., 182 N. C. 30, 108 S. E. 642. Currie v. Golconda Min., etc., Co., 157 N. C. 209, 217, 72 S. E. 980. Mills v. Hansel, 166 N. C. 651, 85 S. E. 17.

When Nonresident Not Actual Notice.—A nonresident defendant in attachment proceedings, against whom judgment has been rendered under service of summons by publication, and who has not had actual notice of the action, or any other cause of the attachment, cannot be charged with a matter of right upon showing that he has a good and meritorious defense, have the judgment vacated by motion within the statutory period, and he can avail himself of any defense he originally had. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

Proceedings When Notice Not Duly Served.—If the notice was not duly served by the publication, it was error to dismiss an attachment granted as ancillary to an action, because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defendant may be served by publication. Branch v. Frank, 81 N. C. 180. Mills v. Hansel, 166 N. C. 651, 85 S. E. 17.

The remedy is not to dismiss the attachment, but by ordering a republication, if, as the defendant is a non-resident, the summons at the commencement of the action is not a matter of right upon showing that he has a good and meritorious defense, have the judgment vacated by motion within the statutory period, and he can avail himself of any defense he originally had. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.


§ 1-443. Undertaking.—The officer, before issuing the warrant, must require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recovers judgment, or the attachment is set aside by order of the court, the plaintiff will pay all costs that are awarded to the defendant, and all damages which he sustains by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred dollars. (Rev., s. 763; Code, s. 356; C. C. P., s. 202; C. S. 803.)

Separate Action By Successful Defendant.—This section clearly implies that the successful defendant in attachment must seek remedy by a new proceeding, not by a renewal of the justification of the undertaking instead of to the undertaking itself, this is held to be a void and binding undertaking. Mahoney v. Tyler, 136 N. C. 40, 43, 48 S. E. 549.

Mistake in Signing Undertaking.—Where, by mistake, the signature to the undertaking, or the description of the defendant, by which the surety signs his undertaking, was granted improperly, for, want of jurisdiction, the surety on the undertaking of the plaintiff signs his name to the undertaking itself, this is held to be a valid and binding undertaking. Boger v. Cedar Cove Lumber Co., 165 N. C. 557, 145 S. E. 349.

Misdjoinder of Principal and Surety.—An action will not be dismissed for a misjoinder of parties where the plaintiff is suing, in the same action, the principal and surety on an attachment bond. The remedy is by motion to have the causes divided. Smith v. American Bonding Co., 160 N. C. 574, 76 S. E. 481.

When Action Lie Against Creditor.—In an action to recover on the bond given by the creditor and his surety in attachment proceedings for a wrongful levy therein, the statute of limitations begins to run from the rendition of the bond, and, if his own complaint be not filed, the creditor may be discharged an attachment granted as ancillary to an action upon an undertaking, given upon the bond, and who has not had actual notice of the action, he can not be charged with a matter of right upon showing that he has a good and meritorious defense, have the judgment vacated by motion within the statutory period, and he can avail himself of any defense he originally had. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.


§ 1-446. Validity of undertaking.—It is not a defense to an action upon an undertaking, given upon granting a warrant of attachment, that the warrant was granted improperly, for, want of jurisdiction, or for any other cause. (Rev., s. 764; Code, s. 358; C. S. 804.)

§ 1-447. To whom warrant directed; duty of officer.—The warrant shall be directed to the sheriff of any county in which the property of the defendant is located, or, in case it is issued by a justice of the peace, to the sheriff, or any constable of such county, and shall require the sheriff or constable to attach and safely keep all the property of the defendant within his county, or so much thereof as is sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, together with costs and expenses; it must also state when and where it shall be returned. Several warrants may be issued at the same time to the sheriffs of different counties, but where the warrant is issued by a justice of the peace to another county than his own, the clerk of the superior court of his county must certify that he is a justice of the peace and that the signature to the warrant is in the handwriting of the justice. (Rev., s. 765; Code, s. 357; 1895, c. 435, s. 1; C. C. P., s. 203; C. S. 805.)
§ 1-448

CH. 1. CIVIL PROCEDURE—PROVISIONAL

§ 1-448. Notice; service and content—When the warrant of attachment is taken out at the time of issuing the summons, and the summons is to be served by publication, the order shall direct that notice be given in the publication to the defendant of the issuing of the attachment. When the warrant of attachment is obtained after the issuing of the summons, the defendant must be notified by publication of the fact for four successive weeks in some newspaper published in the county to which it is returnable, or if none, then in one published in the judicial district including said county. The publication shall state the names of the parties, the amount of the claims, and a brief way the nature of the demand and the time and place to which the warrant is returnable. In proceedings by attachment begun before justice of the peace, advertisement in a newspaper is not necessary, but advertisement at the courthouse door and four other public places in the county for four successive weeks shall be sufficient for the clerk to order service of the summons by publication, but service has not been ordered or made, and the cause has come up on the defendant's special appearance and motion to dismiss on that ground, and pending the motion the plaintiff, upon an additional affidavit, without the knowledge of the judge, has obtained an order of publication from the clerk, it is within the sound discretion of the court to permit the plaintiff to proceed with, and deny the defendant's motion. Jenette v. Hovey & Co., 182 N. C. 30, 108 S. E. 301.

Defendant's Bond Constitutes Waiver.—Where property has been given on underwriting a bond given by the defendants in discharge of the attachment as provided by section 1-457 will be considered equivalent to a personal appearance in the action and a waiver of the requirement for service of the summons. See also section 1-457. The submission of the defendant's cause to the jurisdiction of the court. Mitchell v. Elizabeth City Lumber Co., 169 N. C. 295, 154 S. E. 343.

Statement of Amount.—Under this section which provides that when the summons in an attachment suit is to be served by publication, the publication shall state the fact of attachment, the nature of the demand, and the amount, there is no mandate that the court itself perform this duty. Instead, the court is to give the defendant's cause to the jurisdiction of the court. Mitchell v. Elizabeth City Lumber Co., 169 N. C. 295, 154 S. E. 343.
§ 1-449. Execution, levy, and lien.—The officer to whom the warrant of attachment is directed and delivered shall seize and take into his possession the tangible personal property of the defendant or so much as is necessary, and he is liable for the care and custody of such property, as if it had been seized under execution. He shall levy on the real estate of the defendant as prescribed for executions; he shall make and return with the warrant an inventory of the property seized or levied on, and, subject to the direction of the court, shall collect all debts owing to the defendant. Where the sheriff or other officer levies an attachment upon real estate, he must certify the levy to the clerk of the superior court of the county where the land lies, with the names of the parties, and the clerk must note the same on his judgment docket and index it on the index to judgments, and the levy is a lien only from the date of entry by the clerk, except that if it is so docketed and indexed within five days after being made it is a lien from the time it was made. (Rev., s. 767; Code, s. 359; 1895, c. 435, s. 2; C. C. P., s. 204; 1913, c. 543; C. S. 907.)

Editor's Note.—The 1949 revision struck out the words "and take such legal proceedings in his own name or in that of the defendant as are necessary for that purpose," formerly appearing at the end of the second sentence of this section.

Section 1-116 and This Section Construed in Pari Materia.—See note to § 1-116.

A levy on land under an attachment is sufficient, if it gives such a description as will distinguish and identify the land. Grier v. Rhyme, 67 N. C. 338.

Homestead.—The lien of an attachment levied upon land of a nonresident debtor is paramount to the right of a homestead therein acquired by the debtor by becoming a citizen of the state prior to the rendition of judgment in the action. Watkins v. Overby, 83 N. C. 165.

Effect of Levy.—Property seized under attachment is only a legal deposit in the hands of the sheriff to abide the event of the action, and on judgment against the defendant, he is entitled to the same exemptions in the property attached as he would have had there been no attachment. State v. Rhyme, 80 N. C. 183.

Enforceable against Subsequent Purchasers.—When the officer has complied with the provisions of this section, the plaintiffs have a lien on such property, which is enforceable against all subsequent purchasers from the defendant. Newberry v. Meadows Fert. Co., 203 N. C. 330, 338, 166 S. E. 79.

§ 1-450. Return of warrant by sheriff.—The sheriff shall return the warrant of attachment, and the undertakings provided for in this article, with a statement of his proceedings thereon, at the time and place at which it is on its face returnable, and upon, or at any time after, the return, he may obtain from the court to which the warrant was returnable a certified copy thereof, which, for the purpose of giving him authority, is the same as the original, and when the warrant has been fully executed or discharged, the sheriff shall return it, with his proceedings, to said court. (Rev., s. 768; Code, s. 376; C. C. P., s. 214; C. S. 808.)

§ 1-451. When granted by justice of peace.—If the action is not founded on contract and the value of the property in controversy does not exceed the sum of fifty dollars, the warrant of attachment may, or if the action is founded on contract and the sum demanded does not exceed two hundred dollars, the warrant of attachment must be obtained from and made returnable before a justice of the peace of a county to the superior court of which it would have been returnable had the sum demanded exceeded two hundred dollars, or had the action not been founded on contract. (Rev., Code, s. 535; C. C. P., s. 200; 1876-7, c. 251; C. S. 809.)

Wrongful Issue by Justice.—An attachment wrongfully issued from the justice's court against a citizen of the State, transiently absent, is remedied by recordari. Merrell v. McHone, 126 N. C. 528, 36 S. E. 35.

§ 1-452. Publication in justice's court. The plaintiff, within thirty days after obtaining a warrant of attachment from a justice of the peace, must cause publication thereof to be made for four successive weeks at the courthouse door and four other public places in the county where the warrant is returnable. (Rev., s. 770; Code, s. 350; C. C. P., s. 198; 1889-9, c. 55, s. 3; 1870-1, c. 166, s. 4; 1874-5, c. 111; C. S. 810.)

§ 1-453. Justice's attachment against land.—If the attachment is levied on real property, the justice shall proceed to try the action, but may not issue an execution to sell the real property, and shall return the papers in the case to the officer of the clerk of the superior court of his county, where the judgment shall be docketed. The levy of the attachment, however, is a lien on the real estate, when the provisions of the section as to execution and levy of attachment are complied with. (Rev., s. 777; Code, s. 354; 1870-1, c. 95, s. 4; C. S. 811.)

Lien Created from Levy of Attachment. — Attachment issued by a justice creates a lien from its levy, and not merely from docketing of the judgment in the superior court. Morefield v. Harris, 126 N. C. 626, 36 S. E. 125.

§ 1-454. Sale of attached property pending litigation. — If any property seized under attachment is perishable, or of a character to materially deteriorate in value pending litigation, or of such character that the expense of keeping it until the determination of the suit would be likely to exceed one-fifth of its value, or if any part of it consists of a vessel, or of any share or interest therein, and the person to whom it belongs, or his agent, does not within ten days after the serving of the attachment reclaim the same, the sheriff or other officer having possession shall apply to the court for authority to sell the property, stating the circumstances. The property shall then be sold, under the order and direction of the court, and the proceeds are liable to the judgment obtained upon the attachment, and shall be retained by the sheriff or other officer to await the judgment. (Rev., s. 772; Code, s. 360; C. C. P., s. 205; R. C., c. 7, s. 6; 1877, c. 115, s. 28; C. S. 812.)

Sale of Third Party's Goods. — Where an attachment is levied upon the goods of a third party which, being perishable, are sold by the sheriff, and the third party interpleads the proceeds of the attachment, sale, etc., are not properly chargeable against the fund arising from such sale. Haywood v. Hardie, 76 N. C. 384.

An intervenor obtaining the possession of property attached by giving a replevy bond may not sell part of the property, such sale not being made as provided by this section and claim the right to pay for the part sold and return the balance thereof. Bulluck v. Hafey, 196 N. C. 355, 151 S. E. 731.

§ 1-455. Replevy by defendant; undertaking. — The person owning the property advertised to be sold according to the provisions of this article, or his agent or attorney, may, at any time before sale, replevy the same, by giving an undertak-
§ 1-456  Defendant may apply for discharge and delivery of property.—When the defendant has appeared in such action, he may apply to the court in which it is pending, or to the judge thereof, for an order to discharge the attachment; and if the order is granted, all the proceeds of sale, and moneys collected in the action, and all property attached remaining in the hands of any officer of the court, under any process or order in the action, attached will remain in the custody of the court to await the judgment in favor of the plaintiffs for the debt and the costs of the attachment proceedings, and then gives the defendant notice that he can vacate the warrant if insufficient, and upon his failure to move to vacate the process he will not be held to be prejudiced by a subsequent judgment. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

Vacation without Undertaking. — An attachment will be vacated by the court without any undertaking on the part of the defendant, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. Bear v. Cohen, 65 N. C. 511.

Motion out of Term.— It would be a great hardship upon a defendant whose property had been seized under an irregular attachment if he were prohibited from having it set aside until the regular term of the court, which might be nearly six months after the seizure, hence he may move to vacate before the return term. Palmer v. Bosher, 71 N. C. 291.

When Motion Lies.— Where in an action against a foreign corporation a defendant was served by publication, for it is possible that the defect as to service might be cured by amendment. Branch v. Frank, 81 N. C. 180; Price v. Cox, 83 N. C. 261.

When Discharge Not Granted.— A warrant of attachment cannot be discharged upon the special appearance of the defendant when the grounds for his motion involved the finding of facts such as he has no interest in. Foushee v. Owen, 122 N. C. 360, 76 S. E. 481.

Same.—Insufficient Affidavit. — It is error to discharge an attachment, granted as ancillary to an action, because of the insufficiency of the affidavit to obtain service of the process by publication, when the facts may be cured by amendment. Brand v. Daniel, 90 N. C. 154.

Failure of Defendant to Move to Vacate. — The proper publication of summons for a nonresident defendant has attached his property, and he does not move to vacate the attachment. Penniman v. Daniel, 90 N. C. 154.

No Sale after Vacation. — The sales of property mentioned in this section and sec. 1-468 have reference to those sales made under the order of the court in accordance with section 1-454 when the property is perishable. The sheriff has no right, after the attachment has been vacated, to sell the property thereby attached, by bringing it to the defendant notice that he may deliver it to the respondent in his hands. Mahoney v. Tyler, 136 N. C. 40, 44, 48 S. E. 549.

Does Not Apply to Subsequent Sale.—In a subsequent execution for judgment, provisions for the disposition of property upon an order disallowing the attachment, does not apply to cases where there has been a sale or transfer of the property by the defendant after the levy of the warrant, is entitled to have submitted to the jury an issue as to the ownership of the property. Jackson, etc., Co. v. Burnett, 119 N. C. 195, 25 S. E. 868.

Same.—Insufficient Affidavit. — It is error to discharge the attachment where the facts alleged in the affidavit are insufficient to justify the attachment. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

Refusal of Sheriff to Deliver Property. — If the sheriff fails or refuses to deliver the property, the defendant could perhaps apply to the court and obtain an order requiring him to do so, and if the court neglects to respond, the decision of the court will be not reviewable. Mahoney v. Tyler, 136 N. C. 40, 44, 48 S. E. 549.

Proceedings upon Vacating Attachment. — When the court vacates an attachment, the plaintiffs with the costs of the attachment proceedings, and then gives judgment in favor of the plaintiffs for the debt and the costs of the action other than the costs awarded to the defendant, its jurisdiction and power are exhausted. Nothing else can be done except, perhaps, to make an order for the return of the property seized under the attachment if the attachment is then set aside by the court. (Rev., s. 773; Code, s. 361; R. Cr. 7, C, C, P., s. 212; C, S. 814.)


By giving the undertaking in the manner provided by § 1-457 the debtor may prevent the sheriff from selling the property. Bizzell v. Mitchell, 195 N. C. 484, 142 S. E. 706. See note under § 1-457.

Vacation without Undertaking. — An attachment will be vacated by the court without any undertaking on the part of the defendant, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. Bear v. Cohen, 65 N. C. 511.

Motion out of Term.— It would be a great hardship upon a defendant whose property had been seized under an irregular attachment if he were prohibited from having it set aside until the regular term of the court, which might be nearly six months after the seizure, hence he may move to vacate before the return term. Palmer v. Bosher, 71 N. C. 291.

When Motion Lies.—Where in an action against a foreign corporation a defendant was served by publication, for it is possible that the defect as to service might be cured by amendment. Branch v. Frank, 81 N. C. 180; Price v. Cox, 83 N. C. 261.

When Discharge Not Granted.— A warrant of attachment cannot be discharged upon the special appearance of the defendant when the grounds for his motion involved...
has been levied on the defendant's property necessary for
the prosecution of his business, and upon his giving bond,
he or his receiver is permitted by the court to continue oper-
ation, the giving of the bond is then, in the event of attachment,
in attachment, and analogous to the proceedings in dis
charge authorized by this and § 1-457. Martin v. Mc
Bryde, 182 N. C. 175, 108 S. E. 739.

§ 1-457. Defendant's undertaking. — Upon the
application provided for in § 1-456 the defendant
must deliver to the court an undertaking in at least double the amount claimed by the
plaintiff in his complaint, executed by two sure-
ties residing in this state, approved by the court,
before the trial of the merits or it may be tried with the
property. If it appears by affidavit that the property
not exceeding the sum specified in the undertak-
ing is procured, when the validity is traversed. Bizzell v.
Mitchell, 195 N. C. 484, 142 S. E. 706.

When the surety signs a bond under this section, he
enters into the obligation with reference to the cause as it
then stands, and when a new element of liability is intro-
duced by an amendment, the surety is discharged. Rush-
ing v. Ashcraft, 211 N. C. 627, 639, 191 S. E. 332.

§ 1-458. All property liable to attachment.—The
rights or shares of the defendant in the stock of any
association or corporation, with the interest and
profits thereon, and all other property in this
state of the defendant, are liable to be attached,
levied on, and sold to satisfy the judgment and
execution. (Rev. v. s. 776; Code, s. 302; C. C. P.,
s. 206; C. S. 815.)

Effect of Undertaking as Waiver or Estoppel.—Giving
the undertaking does not waive the
ownership of the property levied on, but from tra-
versing the truth of the allegation on which the attach-
ment is based. Giving the undertaking does not waive the
validity of the statutory ground of attachment. Bizzell v.
Mitchell, 195 N. C. 484, 142 S. E. 706.

Hearing as to Validity of Ground of Attachment.—When
defendant gives the undertaking under this section the
matter of the validity of statutory ground on which att
achment was procured may be heard before the trial of the
main issue, but if demand is made it may be heard
before the trial of the merits or it may be tried with the
main issue. Bizzell v. Mitchell, 195 N. C. 484, 142 S. E.
706.

Necessity for Separate Action on Undertaking.—By con-
sent a surety on an undertaking on attachment can come
in and the matter of the validity of the grounds of at-
achment may be determined in one action; otherwise a
separate action must be brought on the undertaking. Bizzell
v. Mitchell, 195 N. C. 484, 142 S. E. 706.

The judgment contemplated in this section is not only
a judgment against the defendant but the defendant's bond for the judgmen
establishing the validity of the ground on which the attachment
is procured, when the validity is traversed. Bizzell v.
Mitchell, 195 N. C. 484, 142 S. E. 706.

No summary action after judgment against the surety
under this section may be rendered. Bizzell v.
Mitchell, 195 N. C. 484, 142 S. E. 706; Hofv v. Coastwise
Shipping, 183 N. C. 330, 159 S. E. 241.

Discharge of Surety.—When defendant's undertaking en-
ters a general appearance and traverses the allegations of
fraudulent concealment of his property upon which the
attachment was based, and gives bond to retain possession
of the property attached, and upon the trial the issue as
fraud is found in his favor, the surety on the bond is
discharged from liability, and it is not necessary that a
summons to vacate the judgment be previously made. Bizzell
v. Mitchell, 195 N. C. 484, 142 S. E. 706.

In General.—The intention of the Legislature, as clearly
expressed, in section 1-441, was to authorize the attachment
of stock in foreign corporations, and also in the case of
individuals or domestic corporations which are removing
their property from the State with the intent to defraud
creditors, or doing any other act for which attachment
would be had in equity. Giving the undertaking may be rendered, and the prop-
erty attached has accordingly been retained by the debtor,
the surety is concluded from asserting the insufficiency of
the bond in not having another surety thereon, as the
statute required when the bond was accepted as
he had intended, and he had not excepted thereto. Thom-
son v. Dillingham, 133 N. C. 566, 112 S. E. 321.

§ 1-459. Levy on intangible property.—The ex-
cution of the attachment upon any such rights, shares,
or any debts or other property incapable of manual delivery to the sheriff, shall be made
by leaving a certified copy of the warrant of at-
tachment with the president or other head of the
association or corporation, or with the debtor or
individual holding such property, with a notice
showing the property levied on. This certified
§ 1-460. Certificate of defendant’s interest to be furnished to sheriff.—When the sheriff or other officer, with a warrant of attachment or execution, applies to a president or other head or director, secretary, cashier or managing agent of any association or corporation, or to any debtor or individual, for the purpose of attaching or levying on the property of the defendant in such warrant, such officer, debtor or individual must furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of, or debt owing to, the defendant. If the officer, debtor or individual refuses to do so, he may be required by the court or judge to appear before him, and be examined on oath concerning the matter, and obedience to this order may be enforced by attachment. (Rev., s. 778; Code, s. 369; C. C. P., s. 208; C. S. 818.)

§ 1-461. Proceedings against garnishee.—When the sheriff or other officer serves an attachment on any person supposed to be indebted to, or to have any property of the defendant in the attachment, he shall at the same time summon in writing such person as a garnishee. The summons and notice shall be issued by the clerk of the superior court, or justice of the peace, at the request of the plaintiff, to appear at the court to which the attachment is returnable, or if issued by a justice of the peace, at a place and time named in the notice, not exceeding twenty days from date of notice, to answer upon oath what he owes to the defendant and what property of the defendant he has in his hand and had at the time of serving the attachment, and to his knowledge and belief what effects or debts of the defendant there are in the hands of any other, and what person. When an attachment is served on a garnishee in the above manner, upon his appearance and examination, judgment may be entered up and execution awarded for the plaintiff against the garnishee, for all sums of money due the defendant from him, and for all property of any kind belonging to the defendant, in his possession or custody, for the use of the plaintiff, or so much thereof as will satisfy the debt and costs and all charges incident to levying the same. All property whatsoever in the hands of any garnishee belonging to the defendant is liable to satisfy the plaintiff’s judgment, and must be delivered to the sheriff or other officer serving the attachment. (Rev., s. 779; Code, s. 364; R. C., c. 7, s. 7; 1777, c. 115, s. 28; C. S. 819.)

Cross Reference.—As to exemption of earnings, see sections 1-362 and 1-363.

In General. — A garnishment is in effect a suit by that principal debtor, the defendant in the action, in the name of the plaintiff, and for his use and benefit, against the person supposed to be indebted to, or to have any property of the defendant, to recover the debt due to the defendant, and apply it to the satisfaction of the plaintiff’s demand. Goodwin v. Claytor, 137 N. C. 224, 225, 231, 49 S. E. 173.

This section applies alike to residents and nonresidents, partnerships and corporations, and it will not be declared unconstitutional in an action instituted long subsequent to its enactment. Newberry v. Meadows Fertilizer Co., 206 N. C. 382, 171 S. E. 67.

Nature of Garnishment. — It arrests the property in the hands of the garnishee, interferes with the owner’s or creditor’s control over it, subjects it to the judgment of the court, and therefore has the effect of a seizure. Miller v. United States, 11 Wall. 268, 297, 20 L. Ed. 135.

The proceeding by garnishment is designed to subject a debt due to the defendant, to the payment of the demand creditors of the defendant by investing the creditor with a judicial power to collect and apply the amount due. Wanzer v. Truly, 17 How. 584, 596, 15 L. Ed. 278.

The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to defeat his creditors. Chicago, etc., [357]
§ 1-462. Failure of garnishee to appear.—When a garnishee is summoned and fails to appear and discover on oath as directed, the court, after solemnly calling the garnishee, shall enter a conditional judgment against him, and thereupon a notice shall issue against him returnable to the court having jurisdiction, to show cause why final judgment should not be entered against him. Upon due execution of the notice, if the garnishee fails to appear at the time and place named, and discover on oath in the manner aforesaid, the court shall confirm the judgment and award execution for the plaintiff's whole judgment and costs. Upon examination of the garnishee, if it appears to the court that there is any of the defendant's property in the hands of a person who has not been summoned, the court, upon motion of the plaintiff, shall grant a judicial attachment, to be levied in the hands of every such person having any of the property of the defendant in his custody or possession, who must appear and answer and be liable as other garnishees. (Rev., s. 780; Code, s. 365; R. C., c. 7, s. 8; 1777, c. 115, s. 28; 1835, c. 2; C. S. 820.)

§ 1-463. Garnishee denying debt; issue tried.—When a garnishee denies that he owes, or has in his possession any property of, the defendant, and the plaintiff on oath suggests to the court the contrary, or when a garnishee makes such a statement of facts that the court cannot proceed to give judgment thereon, the court shall order an issue to be made up, which must be tried by a jury, and on their verdict judgment shall be rendered. In a court of a justice of the peace, the jury may try such issue, unless a jury is demanded, and then proceedings are to be conducted, in all respects, as in jury trials before justices of the peace. (Rev., s. 781; Code, s. 366; R. C., c. 7, s. 9; 1793, c. 389, s. 2; C. S. 821.)

Jury Trial. — Under this section no lien attaches to any specific property of the garnishee until the issuance of execution on the judgment and proceedings to enforce such execution. There is no distinction between an execution on an ordinary judgment issued under § 1-305, and an execution on a judgment against a garnishee issued under this section. They are both judgments and sections to be construed in pari materia. Id.

There is no distinction between an execution on a judgment issued under § 1-440, the clerk of the Superior Court may, on application of the plaintiff, issue an execution against the garnishee without notice or a hearing under this section and § 1-305. Id.

§ 1-462. Failure of garnishee to appear.—When a garnishee is summoned and fails to appear and discover on oath as directed, the court, after solemnly calling the garnishee, shall enter a conditional judgment against him, and thereupon a notice shall issue against him returnable to the court having jurisdiction, to show cause why final judgment should not be entered against him. Upon due execution of the notice, if the garnishee fails to appear at the time and place named, and discover on oath in the manner aforesaid, the court shall confirm the judgment and award execution for the plaintiff's whole judgment and costs. Upon examination of the garnishee, if it appears to the court that there is any of the defendant's property in the hands of a person who has not been summoned, the court, upon motion of the plaintiff, shall grant a judicial attachment, to be levied in the hands of every such person having any of the property of the defendant in his custody or possession, who must appear and answer and be liable as other garnishees. (Rev., s. 780; Code, s. 365; R. C., c. 7, s. 8; 1777, c. 115, s. 28; 1835, c. 2; C. S. 820.)

Where Defendant Denies Ownership. — The judgment against a nonresident debtor being exhausted by a sale of the property attached, a nonresident defendant in attachment proceedings, who denies ownership of the attached property, cannot be injured by the judgment, and hence, is not entitled to have an issue submitted as to the title to the property. Foushee v. Owen, 122 N. C. 360, 29 S. E. 770.

Garnishee a Mere Stakeholder. — The requirement of this section that an issue shall be made up and determined by the jury where the garnishee in attachment denies ownership of the attached property, cannot be injured by the judgment, and hence, is not entitled to have an issue submitted as to the title to the property. Foushee v. Owen, 122 N. C. 360, 29 S. E. 770.

§ 1-465. Conditional judgment against garnishee. — When a garnishee declares in his answer that he has in his hands any property of the defendant of a specific nature, or is indebted to him by any security or promise for such property, he must show cause. (Rev., s. 782; Code, s. 367; R. C., c. 7, s. 11; 1793, c. 389; 1794, c. 424; C. S. 822.)

Where one contracted with a dentist: for a set of artificial teeth for his wife, and paid him full consideration, and the husband afterwards absconded before the teeth were furnished, the dentist was not liable as garnishee to a creditor for the value of the teeth. Cherry v. Hooper, 52 N. C. 82.

§ 1-466. Satisfaction of judgment. — If judgment is entered for the plaintiff in the action, the sheriff shall satisfy the same out of the property attached by him, if it is sufficient for that purpose—

1. By paying over to the plaintiff the proceeds of all property sold and debts or credits collected by him, or so much as is necessary to satisfy the judgment.

2. If any balance remains due, and an execution has been issued on the judgment, he shall sell under the execution as much of the proceeds of real or personal property, except as provided in subdivision four of this section, as is necessary to satisfy the balance, if enough for that purpose remains in his hands. In case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale, and the purchaser has all the rights and privileges in respect thereto which were had by the defendant.

3. If any of the attached property belonging to the defendant has passed out of the hands of the sheriff without having been sold or converted into money, he shall repossess himself of the same, and for that purpose has all the authority which he had to seize it under the attachment. A person who willfully conceals or withholds such property from the sheriff is liable to double damages at the suit of the party injured. Until the judgment is paid, the sheriff may collect the notes and other evidences of debt, and the debts that were seized or attached, under the warrant of attachment, and prosecute any bond he has taken in the course of such proceedings, and apply the proceeds to the payment of the judgment.

At the expiration of six months from the docketing of the judgment the court has power, upon petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, also the affidavit of the sheriff that he has used due diligence, and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same any part or portion thereof, to order the sheriff to sell the same upon such terms and in such manner as is deemed proper. Notice of this application must be given to the defendant or to his attorney, if the defendant has appeared in the action. If the summons has not been personally served on the defendant, the court shall make such rule or order, as to service of notice and time of service, as is deemed just. When the judgment and all costs of the proceedings have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property or the proceeds thereof. (Rev., s. 784; Code, s. 370; C. C. P., s. 209; C. S. 824.)

Section Grants Power. — This section gives an express direction to the sheriff to sell the defendant on by him under the attachment, and invests him with as much power and authority to act in the premises as if an execution, in the form of a venditioni exponas, had been issued to him, specially commanding him to sell the particular property. Electric Co. v. Engineering Co., 128 N. C. 199, 38 S. E. 831; Chemical Co. v. Sloan, 136 N. C. 122, 48 S. E. 577; May v. Getty, 140 N. C. 310, 318, 53 S. E. 75; Morganton Mfg. etc., Co. v. Lumber Co., 177 N. C. 404, 407, 99 S. E. 104.
Duty of Sheriff. — The attachment is simply a levy before judgment, and upon execution issuing on the judgment it is the duty of the sheriff to sell the attached property. Gamble v. Rhyme, 80 N. C. 183; Morganton Mfg., etc., v. Farmers Manufacturing Co. v. Steinmetz, 133 N. C. 192, 194, 45 S. E. 552.

Same — Not Error to Condemn Property. — Where an attachment is sought upon the funds attached in the hands of a local bank, which is only an agency for collection, which position it alleges in its answer, and also alleges ownership of title by its forwarding bank, the possession taken by the local bank is that of a mere stakeholder without interest, between two conflicting claimants, and it may successfully maintain that the forwarding bank be made a party to the action, and await the determination of this question in the action, in order to protect itself in the payment of the increased bond, or the proceeds thereof, to the payment of a judgment recovered in the action, applying to the court having jurisdiction to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative, as in cases of other provisional remedies. (Rev., s. 787; Code, s. 377; C. S. 827.)

Cross Reference. — As to appeal from order of clerk denying motion to increase security, see notes to §§ 1-274 and 1-275.

§ 1-469. Motion to vacate or increase security. — The defendant, or person who has acquired a lien upon, or interest in, his property before or after it was attached, may at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to the court having jurisdiction to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative, as in cases of other provisional remedies. (Rev., s. 787; Code, s. 377; C. S. 827.)

§ 1-470. Exceptions to and justification of security. — The sureties to all undertakings in all proceedings for attachment may be excepted to, and justified as prescribed in respect to bail upon arrest. (Rev., s. 789; Code, s. 377; R. C., c. 7, s. 10; 1793, c. 389, s. 3; C. S. 829.)

§ 1-471. Intervention. — When the property attached is claimed by any other person, the claimant may intervene, as provided for intervention in claim and delivery. (Rev., s. 789; Code, s. 377; R. C., c. 7, s. 10; 1793, c. 389, s. 3; C. S. 829.)

Cross Reference. — As to interpleader in claim and delivery, see section 1-482 and annotations thereunder.

§ 1-482. Bond of the party in interest. — A bond of the party in interest in this action, and any order directing the sheriff to release the property attached remaining in his hands, shall be delivered by him to the defendant or to his agent, on request, and the warrant shall be discharged and the property released. (Rev., s. 786; Code, s. 372; C. C. P., s. 211; C. S. 826.)

Sheriff Cannot Sell after Vacation. — The sales of property mentioned in this section remain executory until the property is vacated as for instance sales made under the order of the court in accordance with section 1-454 when property is perishable. The sheriff has no right, after the attachment is vacated, to sell any property seized by him, as it then becomes his duty to deliver at once to the defendant all property in his hands. Mahoney v. Tyler, 136 N. C. 40, 44, 48 S. E. 549.

Bank v. Muehlebach. — Where the funds of a nonresident defendant are attached in the hands of a local bank, which is only an agency for collection, which position it alleges in its answer, and also alleges ownership of title by its forwarding bank, the possession taken by the local bank is that of a mere stakeholder without interest, between two conflicting claimants, and it may successfully maintain that the forwarding bank be made a party to the action, and await the determination of this question in the action, in order to protect itself in the payment of the increased bond, or the proceeds thereof, to the payment of a judgment recovered in the action, applying to the court having jurisdiction to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative, as in cases of other provisional remedies. (Rev., s. 787; Code, s. 377; C. S. 827.)

Cross Reference. — As to appeal from order of clerk denying motion to increase security, see notes to §§ 1-274 and 1-275.
bring an action against the plaintiffs at whose instance the warrant was issued, and the property wrongfully seized, if the sheriff has taken an indemnity bond, he may sue the obligor and the sureties on such bond. Tyler v. Mahoney, 168 N. C. 237, 84 S. E. 361; Flowers v. Spears, 190 N. C. 747, 130 S. E. 740.

§ 1-472. Claim for delivery of personal property.—The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before answer, claim the immediate delivery of the property as provided in this article. (Rev., s. 790; Code, s. 321; C. C. P., s. 176; C. S. 830.)

In General. — Strictly speaking, there is no such action under the code, "claim and delivery." The action is for the recovery of a specific chattel, and the delivery of the chattel is a provisional remedy, ancillary, but not essential to such action. If the plaintiff does not see fit, delivery of the chattel may be waived, and the action prosecuted to recover possession of the chattel, as in the old action of detinue, or to recover the value of the property, as in trover or trespass. Wilson v. Hughes, 94 N. C. 192. Jarman v. Ward, 67 N. C. 32; Allsbrook v. Shields, 67 N. C. 333; Hopper v. Miller, 76 N. C. 402.

Founded on Right to Possession. — Replevin (and the action of claim and delivery) is but a longer name for the same thing) is founded on the right of the plaintiff to the possession of property. If the defendant does not claim the possession, the main issue is on that right, and the court must have judgment to retain or be restored to the possession, as the case may be. Holmes v. Godwin, 69 N. C. 407, 472.

A Substitute for Common Law Remedies. — Under this section the action of "claim and delivery" is a substitute for the action of replevin, if a bond is given by the plaintiff: if it is not a substitute for the action of detinue or trover, Jarman v. Ward, 67 N. C. 32; Hopper v. Miller, 76 N. C. 402.

An Ancillary Remedy. — Under the State Constitution, Art. IV, Sec. 1, there is but one form of action in civil cases. In that, many ancillary remedies may be asked, e. g., Arrest and Bail, Claim and Delivery, Injunction, Attachment, and Appointment of Receivers. These need not be asked, even if the plaintiff has a right to them, if the parties are simply denied or dismissed, but that does not affect the action itself, which goes on if the plaintiff seeks his end. Hudson v. Hughey, 94 N. C. 182, and if they are improperly asked they are simply denied or dismissed, but that does not affect the action itself, which goes on if the plaintiff seeks his end. Hudson v. Hughey, 94 N. C. 182.

Statute Must Be Followed. — To entitle a party to maintain an action for claim and delivery of personal property, there must not be a multiplicity of proceedings of the same description. Ebor J. v. Bennett, 65 N. C. 186; Morris v. O'Brient, 94 N. C. 72; Hargrove v. Harris, 116 N. C. 418, 419, 21 S. E. 916.


§ 1-472.

Who May Bring the Action. — One in the rightful possession of property as bailiff can maintain an action of claim and delivery against a wrongdoer for depriving him of possession, 123 N. C. 266, 67 N. C. 402.

Same. — The crop produced by a tenant being vested in the lessor until the rents shall be paid, he can maintain an action for recovery of possession, and it is not necessary that he shall specifically designate in his complaint, or affidavit in claim and delivery, such undivided part. Boone v. Darden, 109 N. C. 74, 13 S. E. 387.

Same. — Where, in a contract between the landlord and tenant, no time was fixed for the delivery of crops, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested. Rich v. Holloway, 163 N. C. 371, 163 N. C. 529.

§ 1-472.

§ 1-472. Claim and Delivery.
claim and delivery, the question is one for the jury. Allen v. McMillan, 191 N. C. 317, 318, 14 S. E. 276.

Judgment. — Where claim and delivery is brought to recover possession of property for the purpose of selling it, according to the terms of a contract, to pay an indebtedness, and all parties interested are before the court and the amount due ascertained, the plaintiff upon recovering holds as a trustee, and a judgment, directing an adjustment of all the equities involved in order that the matter may be determined, is the proper one to be rendered; and if possession of the property cannot be had, then a judgment ordering that it be delivered to the plaintiff should be in the alternative. Austin v. Seerest, 91 N. C. 214.

In claim and delivery the judgment should be for the defendant the property of the plaintiff; or, if so seized, that it is wrongfully detained by the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the protection of the plaintiff, and that it is wrongfully detained by the defendant, and that the same is not taken for tax assessments or fines pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

3. The actual value of the property. (Rev., s. 791; Code, s. 322; C. C. P., s. 177; 1881, c. 134; C. S. 831.)

4. That the property has not been taken for tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

5. The actual value of the property. (Rev., s. 791; Code, s. 322; C. C. P., s. 177; 1881, c. 134; C. S. 831.)

Broad Language. — The words of this section are as broad as can well be imagined, and include every case, with few exceptions. Where the plaintiff makes an affidavit that he is entitled to the possession of certain personal property, and that it is wrongfully detained by the defendant, the court enters the "undertaking." Jones v. Ward, 77 N. C. 337, 338.

Under this section there is no limitation or restriction put upon the plaintiff, who seeks to recover personal property in the same immediately delivered to him, except that the same has not been taken for tax assessments or fines pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure.

The language of the Code is immensely broader in its scope than the language of the REVISED STATUTES on the subject in hand. Mitchell v. Sims, 124 N. C. 411, 415, 32 S. E. 775.

Rights Conferred. — Under this section — when the immediate delivery of the property is sought, the broad language of the statute gives the right to the claimant, upon his executing the order required by law, to take the property from the possession of any person, even from an officer of the law. Mitchell v. Sims, 124 N. C. 411, 415, 32 S. E. 775.

When Section Applies. — It is only in cases when the plaintiff seeks to have the property delivered to him, instantaneous. Title to the property, and to have the possession pending the action, as in the old action of re,levin, that the affidavit and undertakings are required. Jaronian v. V. & R., 67 N. C. 147.

Rights Conferred. — Under this section — when the immediate delivery of the property is sought, the broad language of the statute gives the right to the claimant, upon his executing the order required by law, to take the property from the possession of any person, even an officer of the law. Mitchell v. Sims, 124 N. C. 411, 415, 32 S. E. 775.

Affidavit Made "Per" Another. — In claim and delivery of personal property, an affidavit made by plaintiff "per" another is sufficient. Spencer v. Bell, 109 N. C. 39, 11 S. E. 704.

Deputy Can Take Affidavit. — The deputy of the clerk of the superior court is authorized and can take the affidavit of the plaintiff and to order the seizure of personal property in an action of claim and delivery. Jackson v. Buchanan, 89 N. C. 74.

Burden of Proof. — In claim and delivery proceedings the burden is on the plaintiff to establish a cause of action. Smith v. Cook, 196 N. C. 558, 146 S. E. 229.


§ 1-474. Order of seizure and delivery to plaintiff. — The clerk of the court shall, thereupon, and upon the giving by the plaintiff of the undertaking prescribed in the succeeding section, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed is located, to take it from the defendant and deliver it to the plaintiff. (Rev., s. 792; Code, s. 322; C. C. P., s. 178; C. S. 833.)

Summons Necessary. — In an action for the claim and delivery of personal property, the issuing of a summons is necessary to give the clerk jurisdiction to make the order to the sheriff, requiring him to take such property and deliver it to the same party therein as the sheriff, or to sue, and also to that effect without such summons there is no justification to the sheriff, or defendant for any action in the premises. Potter v. Mardre, 74 N. C. 26.

A Ministerial Act. — "In issuing the order, the clerk does not represent the court, whose officer he is, and as in numerous cases he is authorized to do, under the statute, he performs a ministerial act, peremptorily enjoined, and exercises a function belonging to the office." Jackson v. Buchanan, 89 N. C. 74, 76.

 Same—Deputy Can Make Order. — It was held in Jackson v. Buchanan, 89 N. C. 74, that the clerk of the superior court, in making the order of seizure of property in the provisional remedy of claim and delivery only does a ministerial and not a judicial act or service, and therefore the deputy clerk might lawfully issue such order. Evans v. Ethridge, 96 N. C. 42, 43, 1 S. E. 613.

Plaintiff Must Continue the Action. — In an action of claim and delivery it is not competent to the plaintiff, after the property is put into his possession by process of law, to move to dismiss the action and fail to file a complaint, thereby raising no issue and depriving the defendant of an opportunity to assert his right. Manix v. Howard, 82 N. C. 439.


§ 1-475. Plaintiff's undertaking. — The plaintiff must give a written undertaking payable to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, with damages for its deterioration and detention if return can be had, and if for any cause return cannot be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention. (Rev., s. 793; Code, s. 324; 1885, c. 50; C. C. P., s. 179; C. S. 833.)

Cross Reference. — As to the judgment in an action for the recovery of personal property, see section 1-230. Judgment Should Be in Alternative. — A judgment on the forthwith bond in claim and delivery proceedings or the judgment in an action for the return of the property, or, if that cannot be had, for the value of the property with damages. Grubbs v. Stephenson, 117 N. C. 66, 67, 23 S. E. 97.

Value Ascertained. — For the benefit of the sureties upon the undertaking, it is competent for the property at the time of the seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. Griffith v. Richmond, 126 N. C. 577, 35 S. E. 620.

[ 385 ]
Where, in claim and delivery proceedings, the vendor of the property, having obtained a judgment to entitle him to have its possession restored and adjudged to be entitled to the property, the plaintiff (purchaser from the vendor), who had given bond for the return of the property to the defendant when seized, is held liable for the value of the property at the time of its seizure, and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of the amount paid on the purchase price of the car less the value of the property, as stated in the affidavit of value obtained from the car by defendant, is held error. 

§ 1-477. Exceptions to undertaking; liability of surety—The defendant may, within three days after the service of a copy of the affidavit and undertaking, notify the sheriff personally, or by leaving a copy at his office in the county-seat of the county, that he excepts to the sufficiency of the sureties, and their undertaking, by delivering the same to him personally, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. (Rev., s. 793; Code, s. 324; C. C. P., s. 179; 1885, c. 50; C. S. 834.)

Sheriff Acts Officially—The sheriff or his deputy is not the agent of the officer who served the claim and delivery, but he is an officer to carry out the mandate of the court. Williams v. Perkins, 192 N. C. 175, 124 S. E. 417.

Action against Sheriff—Where the sheriff has wrongfully seized certain personal property of the defendant in claim and delivery, not described therein as the subject of such seizure, the defendant may maintain an independent action for damages against the sheriff. Williams v. Perkins, 192 N. C. 175, 124 S. E. 417.

Quoted in General Motors Accept. Corp. v. Waugh, 207 N. C. 518, 171 S. E. 2d.


§ 1-478. Defendant's undertaking for replevy—At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to subject the sheriff as surety, it is necessary to show that execution has been returned unsatisfied. Wells v. Bourne, 113 N. C. 82, 18 S. E. 106.

When Objection Must Be Made—The objection that what purports to be the undertaking of the plaintiff, in such action, is not the undertaking of the plaintiff, in such action, must be made and decided at the trial term. Spencer v. Bell, 109 N. C. 39, 13 S. E. 704.

to be discharged upon the payment of the contract price with interest and cost, less the payments by the defendant. Hall v. Tillman, 110 N. C. 220, 14 S. E. 745.

The recovery against the surety on a replevin bond in claim and delivery is not required to be determined in a separate action. Federal Finance, etc., Co. v. Teeter, 196 N. C. 232, 145 S. E. 651.

Same—Debt Recovered.—The sureties to an undertaking, on behalf of the defendant, in a claim and delivery are not liable for any debt which the plaintiff may recover in the action, if the defendant has not been required to give bond for the payment by him of the costs of the action, if a judgment adverse to him is rendered in the action. However, when the bond is so conditioned, the bond is not for that reason void and unenforceable against either the defendant or his surety. In the absence of fraud, mistake, or other matters entitling them or either of them to equitable relief, both the defendant and his surety are not discharged by the action, if the plaintiff, or his assignee, recovers the amount of the bond, which they executed voluntarily. Wright v. Nash, 205 N. C. 221, 171 S. E. 48.

The recovery against the surety can in no event exceed the penalty of the bond. Boyd v. Walters, 201 N. C. 375, 160 S. E. 451.

Summary Judgment against Sureties.—Summary judgment may be rendered against the defendant's sureties on an undertaking, in an action of claim and delivery, but the judgment must be such as is authorized by this section, and sec. 1-230. Hall v. Tillman, 103 N. C. 276, 9 S. E. 194.

Form of Judgment against Surety.—Where the defendant in claim and delivery replevis the property, giving bond for the retention to cover loss in the action, the form of the judgment against the surety on the bond should be for the full amount of the bond, to be discharged upon return of the property and the payment of damages and costs recovered by the plaintiff. Boyd v. Walters, 201 N. C. 375, 160 S. E. 451.

Sureties' Defenses. — The surety on a replevin bond in claim and delivery, under the requirements of this section that the property shall be delivered to the plaintiff, or, if it cannot be delivered, the value thereof to the defendant, etc., may not, upon adjudication in plaintiff's favor, set up the defense that it had been taken by another, or procured by the act of God, or that another than the plaintiff had a superior title to the property by mortgage or otherwise. Garner v. Quakenbush, 188 N. C. 180, 124 S. E. 173.

The remedy of a surety on a replevin bond to contest his liability as such under a consent judgment entered by the court against the defendant, his principal, is by appeal from the judgment, or by an independent action in case of fraud, and not by action in the action. Wallace & Sons v. Robinson, 185 N. C. 530, 117 S. E. 508.

Recovery of Costs.—The language of this section is not so explicit as that of the original section of the Code, but it is conceded by the court that the costs of prosecuting the action involving the title to the property should be recovered by a plaintiff who prevails against the defendant and the sureties on the bond. Hall v. Tillman, 110 N. C. 220, 229, 14 S. E. 745.


§ 1-479. Qualification and justification of defendant's sureties.—The qualification of the defendant's sureties, and their justification, is as prescribed in respect to bail upon an order of arrest. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than six days, shall justify before the court, a judge or justice of the peace, and upon this justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until justification is completed or expressly waived, and he may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff. (Rev. ss. 796, 797; Code, ss. 327, 328; C. C. P., ss. 182, 183; C. S. 837.)

Cross References.—As to qualifications of bail in arrest and bail, see section 1-423. As to justification, see section 1-424.


§ 1-480. Property concealed in buildings.—If the property, or any part of it, is concealed in a building or enclosure, the sheriff shall publicly declare and deliver it. If it is not delivered he must cause the building or enclosure to be broken open, and take the property into his possession. If necessary, he may call to his aid the power of his county, and if the property is upon the person the sheriff or other officer may seize the person, and search for and take it. (Rev., s. 798; Code, s. 329; C. C. P., s. 184; C. S. 838.)


§ 1-481. Care and delivery of seized property.—When the sheriff has taken property, as provided in this article, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping it. (Rev., s. 799; Code, s. 330; C. C. P., s. 185; C. S. 839.)

Expenses of Seizing Included in Costs.—It is proper to allow in the bill of costs the expense of seizing and caring for the property. Hendricks v. Ireland, 162 N. C. 523, 525, 7 S. E. 1011.


§ 1-482. Property claimed by third person; proceedings.—When the property taken by the sheriff is claimed by any person other than the plaintiff or defendant the claimant may intervene upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title, and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in his affidavit, for the delivery of the property to the person entitled to it, and for the payment of all such costs and damages as may be awarded against him, this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least ten days before the return day of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint. The finding of the jury is conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. In a court of justice of the peace he may try such issue without a jury being demanded, and then proceedings are to be conducted in all respects as in jury trials before justices of the peace. In a court of a justice of the peace an intervener shall not be required to serve on the plaintiff and defendant the affidavits and bonds required by this section, ten days before return day; but if said bond and affidavit are filed by any person owning the property when such case is called for trial, he shall be allowed to intervene: Provided that this section shall not be construed to prevent any such intervener or third person from intervening and asserting his claim to the property, or any part thereof, without giving bond as herein required, where such intervener or other third person does not ask for possession of the
property pending the trial of the issue. (Rev., s. 800; Code, s. 351; C. C. P., s. 186; R. C., c. 7, s. 10; 1739, c. 389, s. 3; 1913, c. 183; 1933, c. 131; C. S. 840.)

Cross References.—As to bringing in third parties in general, see annotations under section 1-471, the provisions of which are identical with this section.

Editor's Note.—The original section required that the under- defendant, before the value in possession stated in the plaintiff's affidavit, while the 1933 amendment required double the value as stated in the intervenor's affidavit. This was probably intended to apply where the intervening claim and the intervener's affidavit were made prior to the introduction of the claim. The 1933 amendment has depreciated, and not to allow his statement of the value of the property involved or its value as stated in the intervener's affidavit. This has been required to give judgment vacated, when they have not offered to interplead and claim the property in the manner prescribed by the third claimant, to becoming a party to the action, it being a matter of procedure. Temple v. Eades Hay Co., 184 N. C. 239, 114 E. 162.

Husband and Wife.—Where the plaintiffs attach property and bring action against a husband and wife to have a deed from the husband to the wife set aside, and to attach property by attachment attached to the property, and the wife has a right to set up her claim to the property attached, and the refusal of the trial court to require her to give a general answer, and to proceed as in the case of Unaka, etc., Nat. Bank v. Lewis, 201 N. C. 148, 159 S. E. 312.


§ 1-483. Delivery of property to intervener.—Upon the filing by the claimant of the undertakings set forth in § 1-482, the sheriff is not bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff executes and delivers to him a similar undertaking to that required of claimant; and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity. (Rev., s. 801; Code, s. 332; R. C., c. 7, s. 10; 1739, c. 389, s. 3; C. S. 841.)

Purpose of Section.—This section is intended only for the benefit of the sheriff, and to enable him to protect himself against the claim of the third party, by taking from the plaintiff an indemnity against such claim before he delivers the property to the third party. It does not amount, on the part of the third claimant, to becoming a party to the action, it is not a necessary step in that direction, and the third claimant may become a party under section 1-73 without having made and served such affidavit. Clemmons v. Hampton, 70 N. C. 534.

Sheriff Must Take Security.—Under this section the property is not to be delivered to the intervener by the sheriff until the security is given. Bear v. Cohen, 65 N. C. 511, 514.

§ 1-484. Sheriff to return papers in ten days.—The sheriff must return the undertaking, notice and affidavit, with his proceedings therefore, to the court in which the action is pending, without delay, ten days after taking the property mentioned therein. (Rev., s. 802; Code, s. 133; C. C. P., s. 187; C. S. 849.)

Art. 37. Injunction.

§ 1-485. When temporary injunction issued.—A temporary injunction may be issued by order in accordance with the provisions of this article. The order may be made by any judge of the superior court in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried:
I. General Considerations.

II. Nature.

III. Grounds of Relief.

A. Character of Relief In General.

B. Availability of Other Relief.

C. Application of Section.

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

2. When, during the litigation, it appears by affidavit that a party thereto is doing, or threatens to do, an act which is not germane to the subject of the action, and tending to render the judgment ineffectual; or,

3. When, during the pendency of an action, it appears by affidavit of any person that the defendant or the third party is or is about to remove or dispose of his property, with intent to defraud the plaintiff. (Rev. s. 806; Code, ss. 334, 338; C. C. P., ss. 188, 189; C. S. 843.)

I. GENERAL CONSIDERATION.

Effect upon Prior Law.—This section is merely a statutory recognition of the abolition of the distinction between special and common injunctions, a distinction existing under the old practice. Since the adoption of the Code all injunctions are simply ancillary proceedings and are not available to anyone upon the basis of whose claim for such relief does not come within at least one of the enumerated classes of this section. Person v. Person, 154 N. C. 453, 70 S. E. 752. Under the existing procedure issuance of an injunction presupposes, as an essential requisite, the pendency of an action which the action is to restrain or deter. Armstrong v. Kinsell, 164 N. C. 125, 80 S. E. 235.

Definitions.—An injunction in its ordinary sense is a command, and this command may be either to do or refrain from doing some particular thing. See Frinck v. Hay, 22 Wall. 250, 22 L. Ed. 857.

Injunctions are also classified as interlocutory or temporary and permanent. Kickling v. Owings, 17 How. 47, 49, 15 L. Ed. 256.

Restrain Sought Must Be Germane to Subject of Action.—This section does not permit injunction to issue when the restraining sought does not involve the subject of the action. Union Pacific R. Co. v. Cheyenne, 113 U. S. 516, 5 S. Ct. 601, 28 L. Ed. 1098; Corbus v. Baltimore & Ohio Co., 7 114, U. S. 182, 5 S. Ct. 925, 28 L. Ed. 1098.

Restraining Order and Injunction Distinguished. — This section in no wise abolishes the distinction between restraining orders and injunctions. Nevertheless the terms are so used that a distinction may be drawn between the two.

Injunctions are a species of process and are of a continuing nature and involve the perpetuating of a determination. Armstrong v. Kinsell, 164 N. C. 125, 80 S. E. 235.

Injunctions are simply ancillary proceedings and are not available to anyone on whose claim for such relief does not come within at least one of the enumerated classes of this section. Person v. Person, 154 N. C. 453, 70 S. E. 752. Under the existing procedure issuance of an injunction presupposes, as an essential requisite, the pendency of an action which the action is to restrain or deter. Armstrong v. Kinsell, 164 N. C. 125, 80 S. E. 235.

Mandamus and Mandatory Injunction Distinguished. — Injunctions are simply ancillary proceedings and are of a continuing nature and involve the perpetuating of a determination. See Parker v. McPhail, 112 N. C. 502, 503, 16 S. E. 846. This principle was recognized and applied in Ledbetter v. Pin- ner, 120 N. C. 405, 27 S. E. 123, a case in which the validity of the judgment obtained was contested on the grounds that it was entered outside of the county in which the main action was instituted.

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CH. 1. CIVIL PROCEDURE—PROVISIONAL

§ 1-485

Good Faith and Reasonable Diligence Necessary. — Before injunctive relief will be granted it is necessary that the plaintiff show his good faith and reasonable diligence in instituting his action, Jones v. Commissioners, 107 N. C. 12, 9 S. E. 256, 15 L. Ed. 44.

Constitutional Provisions. — The constitutional prohibition of a trial by jury in all civil actions does not extend to issues of fact as hereofertoe understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of an order or order restraining provisional injunction. Heilig v. Stokes, 63 N. C. 612, 613.

III. GROUNDS OF RELIEF.

A. Character of Relief In General.

An injunction can only operate in personam and unless the plaintiff shows his good faith and reasonable diligence in instituting his action, Jones v. Commissioners, 107 N. C. 12, 9 S. E. 256, 15 L. Ed. 44.

Constitutional Provisions. — The constitutional prohibition of a trial by jury in all civil actions does not extend to issues of fact as hereofertoe understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of an order or order restraining provisional injunction. Heilig v. Stokes, 63 N. C. 612, 613.

Must Be an Adequate Remedy at Law.—The remedy at law, or in equity, or in both, must be adequate. Hendricks v. Wooten, 150 N. C. 295, 63 S. E. 1061.

Remedy Only in Foreign Courts. — Formerly a court of equity allowed an injunctive remedy to be obtained in a court of foreign jurisdiction. This rule has been modified and the court of equity is no longer allowed to confer an injunction on a party seeking to have a court of foreign jurisdiction exercise jurisdiction to restrain the negotiation of a note in the hands of a holder, a nonresident and beyond the borders of the state. See Walla Walla v. Walla Walla Water Co., 172 U. S. 7, 19 S. Ct. 77, 43 L. Ed. 341.

Must Be Some Interference. — There must be some interference, actual or threatened, with property or rights of a pecuniary nature, to give chancery jurisdiction to exercise its equitable powers of the court. See In re Debs, 158 U. S. 564, 583, 15 S. Ct. 900, 39 L. Ed. 1092.

B. Availability of Other Relief.

In General.—It is well established that when proper relief can otherwise be had there will be no injunction issued, and where a party can obtain his relief by a motion in the ordinary course of law he will not be entitled to proceed in the chancery court for an injunction. Faison v. McIlwaine, 72 N. C. 312, 313, and cases there cited.

Irreparable Injury.—The rule in regard to the granting of an injunction on the ground that the injury complained of is irreparable in its nature is a strict one. The plaintiff must clearly show that the injury is pecuniary in nature, and that it cannot be repaired, put back again, or atoned for in damages. Bond v. Wool, 107 N. C. 139, 12 S. E. 281; Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 127 N. C. 137, 37 S. E. 729; Sett v. McKesson v. Hennessee, 66 N. C. 630, 58 S. E. 793; See also, McKesson v. Hennessee, 66 N. C. 630, 58 S. E. 793; Griffin v. Goldsboro Water Co., 122 N. C. 206, 37 S. E. 598; Merrick v. Intramontaine Re Co., 64 N. C. 69, 71. A few of the leading cases illustrative of the principles herein before set forth are given in I. C. 1904-5, 227. See also, Note 1-425, 227.

Acreage Already Committed.—An injunction will not issue to restrain an act which has already been committed. Yount v. Setzer, 135 N. C. 213, 71 S. E. 289.

Specific Instances.—It is in a work of this nature impossible to state the facts and circumstances appearing in the numerous cases pertaining to the subject. A few of the leading cases illustrating the principles herein before set forth are given in Note 1-425, 227. Other cases, where the parties being in privity, the plaintiff being such party, and the land and its crops to be preserved, such as the cases in which the plaintiff is the owner of the land and the party to whom the crops are sold, are in order that the practitioner may have a key to the subject, Ed. Notes.

Wasteful or Wrongful Disposition of Property of Dissolved Corporation.—The court, upon the dissolution of a corporation, has full control over the property of such corporation, and if necessary will intervene to protect such property. When no harm thereby can be done, irrespective of the insolvency of the alleged trespasser. Norfolk So. R. Co. v. Rapid Transit Co., 192 N. C. 305, 141 S. E. 882.

Destruction of Trees. — Allegations that defendant is in the possession of timber or trees, or the right to cut and remove the same during a term of years, is claimed by the party to the action or not, the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term is suspended during the pendency of the action. (Rev., s. 808; 1901, c. 666, s. 1; 1903, c. 642; C. S. 845.)

Purposé of Section. — The primary object of this section is to throw a greater safeguard around the rights of the litigating parties and to preserve the timber upon the land in dispute, until the right of the respective parties can be adjudicated. Moore v. Fowl, 139 N. C. 51, 51 S. E. 796.

Constitutional Provisions. — Although the time for cutting the timber trees was extended with the appointment of a receiver, and since the enactment of this section, it is not necessary to allege the insolvency of the defendant. McKay v. Chapin, 120 N. C. 159, 26 S. E. 701.

§ 1-487. Timberlands, trial of title to. — In all actions to try title to timberlands and for trespass thereon for cutting timber trees, when the court finds as a fact that there is a bona fide contention on both sides based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees is finally determined in the action. In all cases where the title to any timber or trees, or the right to cut and remove the same during a term of years, is claimed by any party to such action, and the use of the soil or other estate in the land by another, whether party to the action or not, the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term is suspended during the pendency of the action. (Rev., s. 808; 1901, c. 666, s. 1; 1903, c. 642; C. S. 845.)

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Constitutional Provisions. — Although the time for cutting the timber trees was extended with the appointment of a receiver, and since the enactment of this section, it is now settled that the section does not interfere with any vested right within the meaning of the constitutional provision prohibiting such interference. Riley v. Neuse Lumber Co., 165 N. C. 391, 144 S. E. 344.

Plaintiff Must Show a Bona Fide Claim. — The plaintiff, in order to prevent a dissolution of the injunction obtained against the defendant, must show (1) a bona fide claim to the lands, and (2) that such claim is based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees is finally determined in the action. In all cases where the title to any timber or trees, or the right to cut and remove the same during a term of years, is claimed by any party to such action, and the use of the soil or other estate in the land by another, whether party to the action or not, the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term is suspended during the pendency of the action. (Rev., s. 808; 1901, c. 666, s. 1; 1903, c. 642; C. S. 845.)


§ 1-488. When timber may be cut.—In any action specified in § 1-487, when the judge finds as a fact that the contention of either party is not in good faith and is not based upon evidence constituting a prima facie title, upon motion of the other party, who may satisfy the court of the bona fides of his contention and who may produce evidence showing a prima facie title, the court may allow such party to cut the timber trees by giving bond as required by law. Nothing in this section affects the right of appeal, and when any party to such action has been enjoined, a sufficient bond must be required to cover all damages that may accrue to the party enjoined by reason of the injunction as now required by law. (Rev., s. 809; 1901, c. 666, ss. 2, 3; C. S. 846.)

Editor's Note.—This section shows clearly the legislative intent to preserve the power of the courts to require a bond of the party who succeeds in having the injunction dissolved, and who is then allowed to proceed to cut the timber without notice; but the exercise of this procedure is greatly limited by the provisions of this section, most of which are conditions precedent to its exercise.

Essential Elements. — Under this section the plaintiff must not only show (a) that his claim is made in good faith and (b) that he has a prima facie title thereto, but the court must be able to find as a fact, (c) that the claim of the adverse party is not in good faith. When relief is sought under this provision all these conditions must be complied with. Johnson v. Duvall, 135 N. C. 642, 47 S. E. 611.

Injunction Granted Where Contention Bona Fide. — This section was not intended to be a substitute for the preceding sections, and when the court fails to find, in the light of all the evidence, that there is not a bona fide contention, then it should grant an injunction under sections 1-486, 1-487. Kelly v. Enterprise Lumber Co., 157 N. C. 175, 63 S. E. 297.


§ 1-489. Time of issuing.—The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of such affidavit must be served with the injunction. (Rev., s. 809; 1901, c. 666, ss. 2, 3; C. S. 846.)

Editor's Note.—The 1943 amendment substituted the words "at the time of commencing the action, or at any time afterwards" for the words "when or at any time after commencing the action," formerly appearing in the second and third lines of this section.

Section Constructed Strictly. — This section has received a strict construction and a compliance with the procedural steps is mandatory, and is not subject to waiver by agreement of the parties. Taylor v. Boone, 172 N. C. 91, 89 S. E. 1055.

Requisites—(a) Affidavit. — Where there is a failure to serve a copy of the affidavit with the injunction, and the judge does not allow such service to be thereafter made, the injunction will be dissolved. Taylor v. Boone, 172 N. C. 91, 89 S. E. 1055.

Same—(b) Summons. — An injunction granted before the issuance of the summons in action is premature, since by the express provision of the section an injunction can only be granted at the commencement of the action, or sometime thereafter. (Rev., s. 809; 1901, c. 666, ss. 2, 3; C. S. 846.)

§ 1-490. Not issued for longer than twenty days without notice.—No restraining order, or order to stay proceedings, for a longer time than twenty days shall be granted by a judge out of court, except upon due notice to the adverse party; but the order shall continue and remain in force until vacated after notice, to be fixed by the court, of not less than two nor more than ten days. (Rev., s. 811; Code, s. 346; C. C. P., s. 345; 1905, c. 26; C. S. 848.)

See note under § 27-29.

Order Proceeding to Make an Injunction.—The Code does not change the mode of setting aside an irregular execution; it must still be done by a motion in the cause, and an injunction, where necessary, must be obtained in like manner. Foard v. Alexander, 64 N. C. 69, 71.

Effect of Issuance for More than Twenty Days without Notice.—An order to stay proceedings, made, without notice, by a judge out of court for a longer time than twenty days, is irregular and a demurrer to the complaint in the action in which such order was made may be treated as a motion to vacate. Foard v. Alexander, 64 N. C. 69.

§ 1-491. Issued after answer, only on notice.—An injunction shall not be allowed after the defendant has answered, except upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the judge granting or refusing the injunction. (Rev., s. 812; Code, s. 340; C. C. P., s. 191; C. S. 849.)

When Special Notice Required.—Special notice of motions for injunctions is only required when made or to be heard out of term; but in such cases, if the opposing party voluntarily appears, in person or by attorney, he will be ordinarily deemed to have waived notice. In cases other than these, the principle that one who has been duly made party to a pending action is bound to take notice of all motions, orders, etc., made during term time, applies with full force and no further notice is required. Hemphill v. Moore, 104 N. C. 378, 10 S. E. 313.

§ 1-492. Order to show cause.—If the judge deems it proper that the defendant, or any of several defendants, should be heard before granting an injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained. (Rev., s. 813; Code, s. 342; C. C. P., s. 193; C. S. 850.)

Service upon Corporation.—Ordinarily a corporation before the grant of injunction has a right to service of an order to show cause upon some officer or agent, but if the officers and agents keep themselves out of the way for the express purpose of avoiding such a service, it cannot justly complain if the service on its attorney is made the equivalent of that which its agents by their wrongful acts have made impossible. See Eureka Lake, etc., Canal Co. v. Yuba County, 116 U. S. 410, 418, 6 S. Ct. 429, 29 L. Ed. 671.

§ 1-493. What judges have jurisdiction.—The judges of the superior court have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings. Any judge of such court, having jurisdiction of the case, may issue a restraining order in any cause and anywhere in the state. Hamilton v. Tizard, 112 N. C. 589, 590, 17 S. E. 519.

Perpetual Injunction. — A perpetual injunction must be granted only in the county in which the cause is pending.
§ 1-494. Before what judge returnable.—All restraining orders and injunctions granted by any of the judges of the superior court except one holding a special term in any county, shall be made returnable before the resident judge of the district, or the judge assigned to the district, or holding by exchange the courts of the district where the civil action or special proceeding is pending, within twenty days from date of order. If the judge before whom the matter is returned fails, for any reason, to hear the motion and application, or to continue them to some other time and place, any judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the same to some other time and place. This removal continues in force the motion and application, if the court finally decides that the plaintiff in injunction give bond is mandatory, the provisions of the section is capable of being given. 

Restraining Order.—A restraining order for a period of twenty days can be made returnable anywhere in the state. Hamilton v. Icard, 112 N. C. 589, 590, 17 S. E. 519.

Failure of Judge to Hear Motion.—Where the judge to whom the motion is returnable fails to hear it, the judge of the adjoining district can hear it upon ten days notice to the parties. Hamilton v. Icard, 112 N. C. 589, 590, 17 S. E. 519.

Judge Holding Special Term.—A judge holding a special term cannot make a restraining order returnable before himself where the summons is returnable to a term of court beginning after the special term. Royal v. Thornton, 195 N. C. 263, 63 S. E. 1040.

Perpetual Injunctions.—See section 1-693.

Cited.—See note to section 1-491.


§ 1-495. Stipulation as to judge to hear.—By a stipulation in writing, signed by all the parties to an application for an injunction order, or their attorneys, to the effect that the matter may be heard before a judge designated in the stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an injunction order, shall, upon receipt of the stipulation forward it and all the papers to the judge designated, whose duty it then is to hear and decide the matter, and return all the papers to the court out of which they issued, the necessary process or express money to be furnished to the judge. (Rev., s. 337; 1883, c. 33; C. S. 853.)

Stipulation of Parties.—Agreement in writing by all parties to an application as to what judge of the superior court shall hear the motion is allowed under this section. Hamilton v. Icard, 112 N. C. 589, 17 S. E. 519; Crabtree v. Scheelkev, 119 N. C. 56, 58, 25 S. E. 707.
§ 1-497. Damages on dissolution.—A judgment dissolving an injunction carries with it judgment for damages against the party procuring it and the sureties on his undertaking without the requiring of malice or want of probable cause in procuring the injunction, which damages may be ascertained by a reference or otherwise, as the judge shall direct. North Carolina Gold, et al. v. Cow, 79 N. C. 48. See also, Nansemond Timber Co. v. Rountree, 122 N. C. 45, 29 S. E. 61; Crawford v. Pearson, 116 N. C. 2, 21 S. E. 561.


§ 1-498. Issued without notice; application to vacate.—If the injunction is granted without notice, the defendant, at any time before the trial, may apply, upon notice to be fixed by the court of not less than two nor more than ten days, to the judge having jurisdiction, to vacate or modify the same, if he is within the district and not in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon the affidavits on the part of the defendant, with or without answer. If no such application is made, the injunction continues in force until such application is made and determined by the judge, and a verified answer has the effect only of an affidavit. Blackwell Durham Tobacco Co. v. McElwain, 94 N. C. 429.

Answer Treated in Affidavit. — The answer under the present practice, in an application to vacate an injunction, may be served, but a verified affidavit by the plaintiff may introduce other affidavits to support the allegations in his complaint; such a verified answer is not conclusive but has only the effect of an affidavit. Blackwell Durham Tobacco Co. v. McElwain, 94 N. C. 429.

After the answer and all the affidavits have been filed, if it appears to the court that the plaintiff’s whole equity is denied and his case is fully met, the injunction will not be continued to the final hearing. (Rich v. Durham Tobacco Co., 81, 3 S. E. 749. See also, Cooper v. Cooper, 127 N. C. 490, 37 S. E. 492.

However, where it appears from the affidavits that there is probable cause or it can reasonably be seen that the plaintiff will be able to make out his case at the final hearing, then the injunction will be continued. Seip v. Wright, 172, 145, 30 S. E. 336.

Time within Discretion of Judge.—The time, when the affidavits of defendants should be filed and the granting of continuance in injunction cases, is largely within the discretion of the judge. Judge Shute v. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545.

§ 1-499. When opposing affidavits admitted.—If the application is made upon affidavits on the part of the defendant, the plaintiff may oppose the same by affidavits or other proof, in addition to those on which the injunction was granted. (Rev., s. 820; Code, s. 345; C. C. P., s. 196; C. S. 857.)

Original Affidavits Supported by Counter Affidavits.—When the defendant, in an application for a provisional remedy, makes opposing affidavits, it is competent for the plaintiff to support his original affidavits by others to the same effect and in reply to those offered by the defendants. Young v. Rollins, 85 N. C. 485.

Defective Affidavit Made Sufficient by Counter Affidavit.—Where the plaintiff’s first affidavit is insufficient in form, and objection is made thereto by the defendant, the reply affidavit by the plaintiff will cure the objectional consequence of the defects contained in the original affidavit. Clark v. Clark, 64 N. C. 150.

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

§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.—Whenever a plaintiff shall appeal from a judgment rendered at chambers, or in term, either vacating a restraining order theretofore granted, or denying a perpetual injunction in any case where such injunction is the principal relief sought by the plaintiff, and when by such appeal, it appears that vacating said restraining order or denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be had, so that the plaintiff will thereby be deprived of the benefits of any judgment of the supreme court, reversing the judgment of the lower court, then in such case the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of: Provided, the plaintiff shall forthwith execute and deposit with the clerk a written undertaking with sufficient surety, approved by the clerk or judge, in an amount to be fixed by the judge to indemnify the party enjoined against all loss, not exceeding an amount to be specified, which he may suffer on account of continuing such restraining order as aforesaid, in the event that the judgment of the lower court is affirmed by the supreme court. (1921, c. 88; C. S. 859(a).)

Discretion of Court Not Reviewable.—Where an appeal
§ 1-501. What judge appoints.—Any judge of the superior court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions. (Rev., 8, 146; Code, 379; C. C. P., 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; C. S. 850.)

Cross References.—As to corporate receivers, see sections 55-147 to 55-157. As to compensation of receivers, see annotations under sections 55-155 to 55-157. As to receiver of ward's estate, see annotations under sections 1-479, 1-485 to 1-493. As to receiver appointed in supplemental proceedings, see sections 1-496 to 1-498.

In General.—The provisions of this section and sections 1-485, 1-486, in express terms invest the court with very large and comprehensive powers to protect the rights and prevent the perpetration of frauds and wrongs in cases of emergency, in suits in equity, upon the subject-matter of the action, and to take charge of and protect the property in controversy both before and after judgment, by injunctions and through receivers, pending the litigation, as necessary to accomplish such ends. As to the courts in the exercise of these remedial agencies, and do not in any degree abridge the exercise of like general powers that appertain to courts of equity to grant the relief specified, or to grant perpetual injunctions in proper cases, and the like relief. Roper Lumber Co. v. Wallace, 93 N. C. 252, 57 S. E. 519. As to what judges have jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions, see sections 1-479, 1-485 to 1-493. As to receiver in supplemental proceedings, see sections 1-496 to 1-498.

Discretion.—A receiver is an independent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question, pending the suit, where it does not seem reasonable to the court that either party should do so. See Booth v. Clark, 17 How. 327, 331, 15 L. Ed. 164.

Purpose.—It is perfectly manifest that this section, with a view to prevent the inconvenience of parties, intended to fix the place where, rather than the persons before whom, such orders should be made returnable, and that the judges should be denominated in the order in which we find them because it was supposed that on one or the other of them would at all times be within the district of the action. Galbreath v. Everett, 84 N. C. 546, 549. Inherent Power.—The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdiction. Skinner v. Maxwell, 66 N. C. 45, 47.

Discretion of Judge.—The appointment of a receiver is not a matter of positive right, but rests in the sound legal discretion of the judge, who will take into consideration the nature of the property and the effect of granting or refusing such an application upon the material interests of the respective parties to the controversy. Whitehead v. Hale, 118 N. C. 601, 24 S. E. 560.

Same.—Necessary Number.—The court should not appoint more receivers than are necessary. Battery Park Bank v. Worth v. Piedmont Bank, 121 N. C. 343, 349, 28 S. E. 488. Necessity That Judge "Find the Facts."—It is the duty of the court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties. Venable v. Smith, 98 N. C. 253, 22 S. E. 97. Effect on Both Parties Considered.—It is the duty of the court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties. Venable v. Smith, 98 N. C. 253, 22 S. E. 97. Lewis v. Roger Lumber Co., 119 N. C. 11, 5 S. E. 19, 20.

Order without Prejudice.—Where it appears from verified pleadings that there is a bona fide controversy between the parties, the mortgagee's order temporarily restraining the foreclosure of the mortgage is properly continued to the final hearing, without prejudice to the right of the mortgagee to move for the appointment of a receiver. Bennett v. Mortgage Service Corp., 256 N. C. 902, 173 S. E. 22.

What Judge Appoints.—Ordinarily the motion for a receiver must be made before the resident judge of the district, the superior court to which the case is transferred by exchange, at the option of the mover. Corbin v. Berry, 83 N. C. 28; Worth v. Piedmont Bank, 121 N. C. 343, 347, 28 S. E. 488.

Or, at most, in analogy to the granting of restraining orders, if the motion for a temporary receiver is granted by any other judge than one of those just named, the order must be made returnable before the resident judge or the judges. Galbreath v. Everett, 84 N. C. 546; Hamilton v. Icard, 112 N. C. 589, 17 S. E. 519, Worth v. Piedmont Bank, 121 N. C. 343, 347, 28 S. E. 488.

Clerk Cannot Appoint.—The clerk cannot appoint a receiver as that power is reserved to the judge alone. Parks v. Spring, 64 N. C. 637, 639.

Operation and Effect of Appointment.—The utmost effect of an appointment of a receiver is to put the property in dispute into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled but not to change the title, or even the right of possession in the property. Quinn v. McGill, 145 U. S. 85, 97, 12 S. Ct. 787, 36 L. Ed. 632.

An Officer of Court.—A receiver is an officer of the court, and his possession of the property is the possession of the court. He holds it as a custodian until the rightful claimant is ascertained by the court, and then for such claimant. Battle v. Davis, 66 N. C. 252.

Powers and Duties.—A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed. He is the right arm of the jurisdiction invoked. Union Bank v. City Bank, 136 U. S. 223, 226, 10 S. Ct. 1013, 34 L. Ed. 341.

Powers and Duties.—A receiver is an officer of the court, and subject to its directions and orders. He has no power except such as are conferred upon him by the order of his appointment and the course and practice of the court. Stuart v. Boulware, 133 U. S. 78, 81, 10 S. Ct. 242, 33 L. Ed. 109.

Title Relates Back.—The title of the receiver dated back to the time of granting the order, even though preliminary conditions must be performed, and he remains out of possession pending such performance. See Worth v. Piedmont Bank, 121 N. C. 343, 349, 28 S. E. 488.

Place of Hearing.—The hearing to a receiver may be held outside of the county where the main action is pending. Parker v. McPhail, 112 N. C. 502, 504, 16 S. E. 848.

The interest of the owner is in no wise changed by the appointment of a receiver. The legal title and possession are held by him for the owner and the property is the property of the court. Nesbitt & Bros. v. Turrentine, 83 N. C. 536.

Necessary Allegations.—Where the appointment of a receiver is sought as an ancillary remedy, the plaintiffs must allege and show that they are entitled to the main relief, and must then show their equity entitling them to the ancillary relief in aid of the main relief. Witz, etc., Co. v. Gray, 116 N. C. 48, 20 S. E. 1019.

Security OMITTED.—An order appointing a receiver is not void, where it is required as an officer of the court, in order to secure the property in dispute. Nesbitt & Bros. v. Turrentine, 83 N. C. 536.

Matter of Record.—The appointment of receivers is matter of record, and should be shown by the record. Person v. Lear, 136 N. C. 504, 36 S. E. 35.

Conflict of Concurrent Jurisdictions.—The court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its rights to do so because it may not be the first court which is first "seized of jurisdiction." Moran v. Sturges, 154 U. S. 256, 274, 14 S. Ct. 1019, 38 L. Ed. 981.

Priority Worker Bank v. Appointed.—The test of jurisdiction in a case of two receivers being appointed is not the first issuing of the summons, nor the first preparation and verification of the papers, which are the acts of the parties, but which the court performs, and which court is first "seized of jurisdiction" by making an order upon legal proceedings exhibited before it. Worth v. Piedmont Bank, 121 N. C. 343, 349, 28 S. E. 488.

Same.—Same.—Fractions of a Day.—Where proper proceedings for the appointment of a receiver are begun in two different courts and a different receiver is appointed in each case, the court, in determining the priority of appointment and due equity, shall take notice of fractions of a day. Worth v. Piedmont Bank, 121 N. C. 343, 349, 28 S. E. 488.
§ 1-502

CH. 1. CIVIL PROCEDURE—PROVISIONAL

§ 1-502

Complaint Should Be Verified.—The practice of appointing a receiver upon an unverified complaint and without notice to creditors and other persons interested, is not consistent with justice. Fisher v. Trust Co., 138 N. C. 91, 50 S. E. 522.

Proof of Appointment of Foreign Receivers.—Persons suing as receivers of a foreign court should, on their appointment being denied, prove the same by a certified copy of the decree of appointment. Valentine and appointing them. Person v. Learcy, 127 N. C. 114, 37 S. E. 149, reversing on rehearing judgment in 126 N. C. 594, 36 S. E. 35.


§ 1-502. In what cases appointed.—A receiver may be appointed—

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In cases provided in chapter entitled Corporations, in the article Receivers; and in like cases, of the property within this state of foreign corporations.

The article Receivers, in the chapter entitled Corporations, is applicable, as near as may be, to receivers appointed hereunder. (Rev. s. 847; Code, c. 379; C. C. P., s. 215; 1876, c. 223; 1879, c. 63; 1881, c. 51; C. S. 860.)

In General.—This section specifies certain cases in which a receiver may be appointed, but does not materially alter the equitable jurisdiction of our courts upon this subject. Skinner v. Maxwell, 66 N. C. 45.

Where the plaintiff makes it properly to appear to the court that he is in imminent danger of loss by the defendant's insolvency, or that the property or its rents and profits will be destroyed, removed or otherwise disposed of by the defendant pending the action, or that the defendant is insolvent, and it must be sold to pay his debts, or that the defendant refuses to apply his property for its own benefit, a receiver may be appointed before judgment. Other instances pointed out by Walker, J. in Kelly v. McLamb, 189 N. C. 158, 108 S. E. 435.

Before Judgment.—Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action. McNair v. Pope, 90 N. C. 2 E. 54, citing Kunkler v. Fairley, 80 N. C. 14, 1879, 62, and cases there cited; Nesbit & Bro. v. Turrentine, 83 N. C. 536, and cases cited; Oldham v. Bank, 84 N. C. 304; Horton v. White, 84 N. C. 297; Roper Lumber Co. v. Wallace, 105 N. C. 195.

Where property is the subject of an action and is liable to clear equities in a party out of possession, the court may appoint a receiver when it seems just and necessary to keep the property in dispute from the control of either party until the controversy is determined. Skinner v. Maxwell, 66 N. C. 45, 48.

In order to appoint a receiver before judgment under this section, it must appear that claimant has an apparent right to property which is the subject of the action and the property or the rents and profits are in danger of being lost, Witty v. Logan, 116 N. C. 48, 29 S. E. 1039; Pearson v. Edwell, 116 N. C. 595, 21 S. E. 305; and it is generally necessary to show that the party in possession is insolvent. Ellington v. Currie, 191 N. C. 610, 137 S. E. 809. In re Penny, 10 F. Supp. 638, 640.

Where an executor's petition to sell lands alleges merely that personality is insufficient to pay debts, plaintiff execut-
fendants in an action to foreclose a mortgage; the property conveyed thereby to pass to the defendant and the mortgagor in possession was insolvent; the defendant denied an alleged payment of the debt and the existence of assets in his hands applicable thereto: Held, that in such case it was competent for the court to appoint a receiver to secure the rents and profits pending the litigation. Ten Broeck v. Orchard, 74 N. C. 499; Rollins v. Presnell, 71 N. C. 467, cited and approved. Kerchner v. Fairley, 80 N. C. 24.

Where lands were devised to two persons, both of whom were appointed executors, charged with the payment of certain debts, and the conveyance of the land under a deed subsequent in date to the executors, it appeared there was some danger of waste of the property, and the solvency of the estate was doubtful: Held, to be a proper case for the appointment of a receiver. Stith v. Jones, 101 N. C. 905.

General Allegations Insufficient. — A receiver will not be appointed pendente lite, on a general allegation that loss or material injury is threatened, but the facts must be stated and are in danger of being lost, or materially injured, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of property, and not merely its value. See Davis v. Grav, 16 Wall. 203, 217, 21 L. Ed. 447. See also, Southern Flour Co. v. McIver, 109 N. C. 120, 24 S. E. 360.

In the absence of a general statement of the facts, the appointment of a receiver is an equitable remedy and the provisions of this and the following sections require an allegation of fraud or of the happening of certain conditions so as to prevent the courts sitting in their equity jurisdiction from administering the equities to which the mortgagor is entitled under the terms of this section.

Cited in Harris v. Hilliard, 221 N. C. 329, 20 S. E. (2d) 278.

§ 1-503. Appointment refused on bond's being given. — In all cases where there is an application for the appointment of a receiver, upon the ground that the property or its rents and profits are in danger of being lost, or materially injured or impaired, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of a money demand, the judge before whom the application is made or pending shall have the discretionory power to refuse the appointment of a receiver if the party against whom such relief is asked, whether a person, partnership or corporation, tenders to the court an undertaking payable to the adverse party in an amount double the sum demanded by the plaintiff, with at least two sufficient and duly justified sureties, conditioned for the payment of such amount as may be recovered in the action, and summary judgment may be taken upon the undertaking. In the progress of the action the court may in its discretion require additional sureties on such undertaking.

(Rev., s. 848; 1885, c. 94; C. S. 861.)

In General. — Upon application for a receiver it is proper to allow a defendant to continue in possession of property upon giving a sufficient bond to protect the other claimants. Frank v. Robinson, 96 N. C. 26, 1 S. E. 781. See also, Kron v. Smith, 96 N. C. 386, 2 S. E. 467; Godwin v. Watford, 107 N. C. 168, 11 S. E. 1051.

Where there is danger of loss of rents and profits, instead of appointing an injunction, it is proper to allow the defendant to execute a bond to secure the rents and profits and such damages as may be adjudged the plaintiff, and require an account to be taken. 2 S. E. 19. See also, Roger Lumber Co. v. Wallace, 93 N. C. 22; Lewis v. Roper Lumber Co., 99 N. C. 11, 5 S. E. 19; Ousby v. Neal, 99 N. C. 146, 5 S. E. 901.

In the discretion of the court, it may be proper in directing a receiver to take possession and control of the mines, and machinery for operating the same, without giving the defendant an opportunity to file a bond to the contrary, that the court might subsequently direct. Stith v. Jones, 101 N. C. 360, 8 S. E. 151.

Section 1-111 Does Not Apply. — Section 1-111, requiring a defendant in an action to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. Kron v. Dennis, 90 N. C. 327; Durant v. Crowell, 97 N. C. 367.
§ 1-504. Bankruptcy of Defendant.—Where plaintiff in an action in the superior court or any other court in North Carolina shall have taken the custody of any property of the defendant, plaintiff, which was admitted by the pleading or the examination of a party to the possession of the defendant, and the property is held by him as trustee for another party, or subject to the further direction of the judge, the property shall be held by him as trustee for another party, or subject to the further direction of the judge.

§ 1-505. Sale of property in hands of receiver.—Any sale made by a receiver may be confirmed outside of the county in which said action is pending, either by the resident judge or the judge assigned to hold any of the courts of the district in which said sale is made, upon proof of written notice to each creditor showing that notice was mailed to each creditor at his last known post-office address shall be sufficient proof of notice to said creditors. (1931, c. 123, s. 2; C. S. 863.)

Cross References.—As to giving bond in surety company, see sections 109-16 and 109-17. As to clerk's bond liable when clerk appointed receiver, see annotations under section 33-53.

Effect of Failure to Require Bond.—An order appointing a receiver is not void by reason of omission to require adequate security. Nesbitt & Bros. v. Turrentine, 83 N. C. 936.

Breach.—Where the receiver's delinquency is manifest, and he fails to comply with the order of the court in respect to the fund, such failure is a breach of the bond, upon which suit may be brought by leave of the court. Bank v. Creditors, 86 N. C. 323.

Same.—Burden toAscertain.—A receiver and his surety cannot be sued upon the bond for an alleged breach of his trust, before a default is ascertained—the proper practice being to apply to the court for a rule on the receiver to show cause why he has not discharged his trust, before a default is ascertained—the proper practice being to apply to the court for a rule on the receiver to show cause why he has not discharged his trust. Waters v. Melson, 112 N. C. 89, 716 S. E. 918.

Judgment.—The court will not, by order in a cause in which a receiver has been appointed, direct a judgment to be entered against him and his sureties. The proper practice is upon a report finding the amount due by the receiver, and upon his failing to pay the same, for the court to grant leave to sue upon the bond. Atkinson v. Smith, 89 N. C. 72.

Action against Sureties.—The liability of sureties on a receiver's bond can only be enforced by independent suit against them and not through the cause. Black v. Gentery, 119 N. C. 502, 26 S. E. 43.

Same.—Receicer Not a Party.—Where judgment has been recovered against the receiver and not against the sureties on his bond. Black v. Gentery, 119 N. C. 502, 26 S. E. 43.

§ 1-506. Confirmation of sales outside county of action; notice to creditors.—Any sale made by a receiver may be confirmed outside of the county in which said action is pending, either by the resident judge or the judge assigned to hold any of the courts of the district in which said sale is made, upon proof of written notice to each creditor who has filed his claim with said receiver of at least ten days prior to the date of confirmation. The said notice shall specify the time and place when application for confirmation shall be made, and an affidavit of the receiver showing that notice was mailed to each creditor at his last known post-office address shall be sufficient proof of notice to said creditors. (1931, c. 123, s. 2; C. S. 867.)

Editor's Note.—Public Laws 1931, c. 267, purported to amend this section by inserting the word "by" in the first line of this section, although the published section already contained such word.

§ 1-507. Sale of sales made outside county of action.—All receiver's sales made prior to March 16, 1931, where orders were made and confirmation decreed or where either orders were made or confirmation decreed outside the county in which such sales were made, a receiver showing that no judge or the judge assigned to hold the courts of the district are hereby validated, ratified and confirmed. (1931, c. 123, s. 3.)

Art. 39. Deposit or Delivery of Money or Other Property.

§ 1-508. Ordered paid into court.—When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs to him or to another party, the judge may order it deposited in court, or delivered to such party with or without security, subject to the further direction of the judge. (Rev., s. 850; Code, s. 380; C. C. P., s. 215; C. S. 863.)

Property Entitled May Retain.—The rule is quite well settled that, unless in case of threatened irreparable damage or loss of the fund, it will be suffered to remain in the hands of the party who in law is entitled to its custody and care. Thompson v. Cross, 23 N. C. 121; Levenson & Co. v. Elson, 88 N. C. 183, 184.

When Court Will Retain.—When a disputed fund is in possession and under the control of the court, and the rights of a claimant is doubtful, it will be retained until the determination of the controversy, when it can be ascertained to whom it belongs. Morris v. Willard, 84 N. C. 293, and cases there cited; Ponton v. McAdoo, 71 N. C. 101; Levenson & Co. v. Elson, 88 N. C. 183, 184.

§ 1-509. Ordered seized by sheriff.—When, in the exercise of his authority, a judge has ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the judge, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the judge. (Rev., s. 851; Code, s. 381; C. C. P., s. 215; C. S. 894.)

§ 1-510. Defendant ordered to satisfy admitted sum.—When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order as it en-
forces a judgment or provisional remedy. (Rev., s. 852; Code, s. 382; C. C. F., s. 215; C. S. 865.)

Claim Not Denied.—Where the complaint in an action on two notes set out each note as a separate cause of action, the defendant answered as to one only, it was error to refuse judgment on the note to which no defense was made, and provision should have been given on the one note and the cause continued as to the other. Curran v. Kerchner, 117 N. C. 264, 23 S. E. 172.

Where in an action on a note the defendants admit liability in a certain part thereof but deny liability for the balance, Held, an order directing that plaintiff recover the amount admitted to be due without prejudice to plaintiff's right to litigate the balance of the note is authorized by this section. Meadows Fert. Co. v. Farmers Trading Co., 203 N. C. 261, 165 S. E. 694.

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

Art. 40. Mandamus.

§ 1-511. Begun by summons and verified complaint.—All applications for writs of mandamus must be made by summons and complaint, which must be duly verified. (Rev., s. 822; Code, s. 622; 1871-2, c. 75; C. S. 866.)

I. Historical.

II. Nature.

III. When Mandamus Will Lie.

A. General Rules.

B. Illustrations of C. Illustrations of Mandamus as Proper Remedy. Mandamus as Improper Remedy.

Cross Reference. As to mandamus to aid relator in civil action to try title to office, see section 1-528.

I. HISTORICAL.

In England mandamus was a prerogative writ, when no other method of redress, with many refinements issuing only at the pleasure of the court. By statute 9 Anne, chap. 20, the remedy was made one of right, and the general rules of pleading and practice were made applicable to mandamus as in other personal actions. At common law the return to a writ of mandamus could not be traversed, and if the matters set forth were sufficient in law, the defendant had judgment to go without day. If the return was false, the relator might litigate the issue of the note is authorized by this section. Meadows Fert. Co. v. Farmers Trading Co., 203 N. C. 261, 165 S. E. 694.

II. NATURE.

Judicial Writ.—The writ of mandamus is a judicial writ, a part of the recognized course of legal proceedings. See Thompson v. Allen County, 115 U. S. 550, 558, 60 S. Ct. 149, 29 L. Ed. 475.

Order of Right.—There is no further contention that the appellate court has jurisdiction to consider the order of right, and this provision was properly taken. In such case judgment should have been given on the one note and the cause continued as to the other. Curran v. Kerchner, 117 N. C. 264, 23 S. E. 172.

where the fact required to be done is imposed by law, is merely permissive, and the remedy is essentially and exclusively a remedy, this writ should not be denied, if it is the proper remedy. Edgerton v. Kirby, 156 N. C. 347, 47 S. E. 355.

Mandamus Will Not Control Discretion of Officers.—It may be said, generally, that if a public officer fails to perform his legal duty to the public he cannot compel him to do so, if it is a mandatory one, but not to control the exercise of a discretion given to him, for it is the nature of a discretion in certain persons that they are to decide in a particular way or review their judgment, but it does not lie where judgment and discretion are to be exercised.

In Tapping on Mandamus (Ed. 1853), at star pages 14 and 41, it is stated generally that mandamus will not lie to command the exercise of a discretionary or voluntary act, or right, of what kind soever; so neither does it lie to influence or control the exercise of such a discretionary act,
power or right. It must, however, be clearly understood
that, although there may be a discretionary power, yet if
they will not act nor consider the matter, the court will by man-
damus command him to put himself in motion to do it, that
exercise a considerate discretion. Barnes v. Commissioners,
§ 1-512
A mandamus by the statute of Anne, chap. 28, is an effectual remedy; First, for refusal of ad-
mission to a person interested to have a wrongful removal where a person is legally possessed,
To Compel the Performance of a Duty. — In Person v.
Doughton, 186 N. C. 723, 120 S. E. 481, Justice Stacy says:
"Mandamus lies only to compel a party to do that which it
is his duty to do without. It confers no new authority.
The party seeking the writ must have obtained a clear
legal right to perform it, and the party to be coerced must be under
a legal obligation to perform the act sought to be enforced."
Lenoir County v. Taylor, 190 N. C. 336, 342, 130 S. E. 25.
The purpose of this writ of mandamus is to require some
superior court, officer, corporation or person to do some par-
ticular thing which appertains to their office or duty, and it
must be of an absolute nature, and neither the party
agreed another and complete specific remedy. Burton v.
Doughton, 115 N. C. 166, 168, 20 S. E. 443.
It is a proceeding to compel a defendant to perform a duty,
whether he be a superior court, official, corporation or per-
son on the ground that the relator has a present, clear,
legal right to the thing claimed, and that it is the duty of
the defendants to render it to him. Brown v. Turner, 70 N. C.
Lyon v. Commissioners, 120 N. C. 237, 243, 26 S. E. 929.
The writ of mandamus is a remedy to compel the perform-
ance of a duty required by law, where the one seeking re-
lief is a party to the proceeding, and the other party
cannot be compelled by law to do the act claimed.
See Bayard v. United States, 127 U. S.
246, 250, 8 S. Ct. 1223, 32 L. Ed. 116.
When Office is Vacant.—When an office is vacant by re-
ason of a motion, the remedy is mandamus. Doyle v.
Raleigh, 89 N. C. 133. Lyon v. Commissioners, 120 N. C.
237, 242, 26 S. E. 929.
Ex-Sheriff.—A mandamus lies only for one who
has a specific legal right, and who is without any other
adequate legal remedy. 1 Chitty on Gen. Pr., 790; State v.
Justices, 24 N. C. 430. Edgerton v. Kirby, 156 N. C. 347, 351,
72 S. E. 360. Barnes v. Commissioners, 135 N. C. 27, 47
S. E. 737; Lyon v. Commissioners, 120 N. C. 237, 244, 26 S.
B. Illustrations of Mandamus as Proper Remedy.
For further cases when mandamus is the proper remedy,
see annotations under section 1-515.
To Pay as Lawfully Ordered. — Upon refusal of a county treasurer to pay from the public
funds of a county an order made on him by a board of audit
and finance for the payment of moneys authorized and pre-
scribed for a particular purpose, mandamus is a proper
remedy. Southern Audit Co. v. McKensie, 147 N. C. 461, 61 S.
E. 283. See Martin v. Clark, 135 N. C. 178, 180, 47 S. E. 397.
Same—Knowledge as to Validity—It is not within the
power of a county treasurer to pay from the public funds of a
proper order when he has funds sufficient and applicable,
and his knowledge as to whether they were due to the one
to whom payment was ordered is immaterial in proceedings
for mandamus. Doyle v. Raleigh, 89 N. C. 163; v. McKensie,
147 N. C. 461, 61 S. E. 283; Martin v. Clark, 135 N. C.
178, 47 S. E. 397.
State—Ex-Sheriff.—A mandamus may be compelled by mandamus to deposit public funds in his
hands in the proper depository. Bearden v. Fullam, 129 N.
C. 477, 40 S. E. 204.
Ex-Sheriff to Give up County Property. — A mandamus at the suit of the county commissioners will lie to
compel a sheriff wrongfully holding over from a preceding
term to turn over the county property pertaining to his of-
fice, if he had been duly appointed by the court and de-
ducted therein. Lenoir County v. Taylor, 190 N. C. 336, 130 S.
E. 25.
Commissioners—Locating County Site.—Where discretion is given to commissioners in selecting and locating
a site for the seat of a county, and it was sought
by mandamus by commissioners to change the location already
settled on, the court held the mandamus had neglected or refused to
execute the power entrusted to them, and cer-
tainly might call upon them to show why they had been
so negligent, and upon insufficient return might have issued a
peremptory mandamus. Here all we would do would be
to command them to select the site for the permanent seat
of justice for the county according to law, which under their
power they are required to do. Doxey v. Commissioners,
257; Barnes v. Commissioners, 135 N. C. 27, 38, 47 S. E. 737.
See also Young v. Jeffreys, 20 N. C. at p. 357, State
v. Moore, 46 N. C. at p. 276, 279; Taylor v. Comm'n's
141; 115, N. C. 166, 20 S. E. 443; Loughran v. Judges,
R. Co., v. Jenkins, 68 N. C. 502, 504; County Board v. State Board,
106 N. C. 81, 10 S. E. 1002.
C. Illustrations of Mandamus as Improper Remedy.
Granting Liquor License.—Since the justices have a dis-
cretion, under circumstances, to refuse a liquor license to a
person, although he may have a clear legal right to obtain
mandamus. For it is the nature of a discretion in certain
persons that they are to judge for themselves, and therefore
no power can require them to decide in a particular way,
except in cases where there is no discretion for them to
proceed in the nature of an appeal, since the judgment of
the justices would not then be their own, but that of the
court under whose mandate they gave it. Barnes v.
Commissioners, 135 N. C. 27, 34, 47 S. E. 737.
Certificate by Board of Examiners.—The courts cannot by
a mandamus compel the board of dental examiners to certify
corruptly to what they have declared to be the truth. The board refused to examine the applicant, upon his
compliance with the regulations, the court could by mandamus
compel them to examine him, but not to issue him a cer-
tificate, when quite preliminary to his examination, it was
that the applicant shall be found proficient and competent
by examining board, is lacking. Burton v. Furlan, 115 N.
C. 166, 20 S. E. 443; Loughran v. Hickory, 129 N. C.
261, 40 S. E. 46; Bearden v. Fullam, 129 N. C. 477, 40 S.
E. 204.
J udgments upon School Order.—Orders rendered upon
school orders against the county commissioners will not be
enforced by mandamus, when not for necessary expenses
for the purpose of determining whether the conclusions drawn
from the evidence of fact upon which the judgment of the
school board was based for proceeding in which to try the validity of such election or
commission to admit another, but that quo warranto is the
remedy. Lyon v. Commissioners, 120 N. C. 237, 250, 26 S.
E. 929.
High, in his Extraordinary Legal Remedies, after discussing
mandamus, concludes under this head, sec. 70: "When the
writ is sought to compel the restoration of one claiming
the right to an office, it is not sufficient for him to show
that he is the officer de facto, but it is also incumbent upon
him to show a clear legal right, and, failing in this, he
is not entitled to the peremptory writ." I Chit. Gen. Pr.,
290, 291; Worthy v. N. C. State Board of Education; Board
of Commissioners, 120 N. C. 237, 243, 26 S. E. 929.
As a Writ of Error.—Mandamus cannot be used as a
writ of error to reverse and review erroneous judgments of a
subordinate tribunal (in that case a board of health), and the
court "will not and cannot look into the evidence of
fact upon which the judgment of the board was based for
proceeding in which to try the validity of such election or
commission to admit another, but that quo warranto is the
remedy. Lyon v. Commissioners, 120 N. C. 237, 250, 26 S.
E. 929."
if any, remains unpaid, what resources, if any, are available for the satisfaction of the judgment, including the actual value of all property sought to be subjected to additional taxation and the necessity for the issuance of such writ. (Rev., s. 928; Code, s. 623; 1871-2, c. 75, s. 2; 1933, c. 349; C. S. 867.)

Editor's Note.—By Public Laws 1933, c. 349, the proviso, relating to mandamus against local units to enforce collection of judgments, was added.

The 1933 amendment to this section is constitutional, since the provisions of the statute adding contracts to the list of judgments, was added. (Const. Art. 1, sec. 10; N. C. Const., Art. 1, sec. 17, the effect of the statute being merely to alter the method of procedure in which there can be no vested right. Sovereign Camp, W. O. W. v. Board of Com'rs, 208 N. C. 433, 181 S. E. 339.

Construed with Following Section.—This and the following sections divide the field of application for writs of mandamus between them and must be considered in pari materia. Brown v. Board of Com'rs, 222 N. C. 402, 404, 23 S. E. (2d) 315.

Necessity for Judgment Prior to Action to Enforce Money Demand.—Where plaintiff alleged ownership of certain county bonds, and sought mandamus to compel the county to levy taxes sufficient to pay the same, the purpose of the statute might not be satisfied by uniting a cause of action for the recovery of the money and a petition to the judge at chambers to determine the same, as in the action which has been denied to the plaintiff. Belmont & Co. v. Reilly, 71 N. C. 260.

Return of Summons.—If the summons is made returnable before the judge at chambers, when it should have been made returnable in vacuo, the action should not be dismissed, but a transfer to the proper docket made. Brown v. Board of Com'rs, 222 N. C. 407, 23 S. E. (2d) 315.

Examples of a Money Demand.—An application by a holder of bonds regularly appointed, and who have qualified to act in that capacity according to the terms of valid statutes, to compel a public officer to deposit public funds in the proper place. Bearden v. Fullam, 129 N. C. 497, 43 S. E. 304.

An action to have a writ of mandamus issue compelling a board of county commissioners to pay, from the general fund of the county in accordance with a legislative act, the salary of a county officer, is not such a "money demand" as to require the summons, pleadings and practice to be the same as to law and fact. Brown v. Board of Com'rs, 222 N. C. 402, 23 S. E. (2d) 315.

An action to enforce the turning over of public funds by the ex-treasurer of the county to the present financial agent regularly appointed, and who have qualified to act in that capacity according to the terms of valid statutes directly applicable, §§ 155-16, 128-10, 14-231, is not in strictness "a money demand." under this section, but comes under section 1-513. Tyrrell County v. Holloway, 187 N. C. 168 S. E. 337.

Waiver by Municipality.—The provisions of this section requiring that in an application for a writ to compel the turning over of public funds by a municipal corporation the complaint should show that the claim or debt has been reduced to final judgment and should show what resources, if any, are available for the satisfaction of the judgment, and the actual value of all property sought to be subjected to additional taxation, and the necessity for the issuance of the writ are provisions for the protection of municipalities, which may be waived by it, and where the municipality does not object thereto and agrees that the issues of fact and of law be submitted to the court, it waives the provisions of this section. Dry v. Board of Drainage Com'rs, 218 N. C. 356, 11 S. E. (2d) 145.

§ 1-513. For other relief returnable in vacation; issues of fact.—When the plaintiff seeks relief other than the enforcement of a money demand, the summons must be made returnable before the superior court of the proper county, or in term at a day specified in the summons, not less than ten days after the service of the summons and complaint upon the defendant; at which time the court, except for good cause shown, shall hear and determine the action, both as to law and fact. However, when an issue of fact is raised by the pleadings, it is the duty of the court, upon the motion of either party, to continue the action until the issue of fact can be decided by a jury at the next regular term of the court. (Rev., s. 824; Code, s. 623; 1871-2, c. 75, s. 3; C. S. 868.)

Cross References.—As to jurisdiction of court in vacation or at term, see § 7-65. As to judgments rendered in vacation, see § 1-519. As to proceeding in summons generally, see section 1-89, and notes thereto.

Demand and Refusal Necessary.—A proceeding in mandamus may be made returnable before the judge at chambers, but it cannot be sustained without demand and refusal, or what is equivalent to a refusal. Alexander v. Commissioners, 67 N. C. 303. Horne v. Commissioners, 122 N. C. 469, 470, 39 S. E. 591.

Hearing at Term or Chambers.—Tracing the origin of this and the preceding section, it was probably the intention of the law to provide for the hearing at term of cases which, upon the face, might require a jury trial, and those which might involve questions of law only, at chambers—with a saving provision that where issues of fact are raised and a jury trial demanded, the case might be transferred to the civil issue docket in order that these issues might be determined by a jury. Brown v. Board of Com'rs, 222 N. C. 402, 23 S. E. (2d) 315. See notes to preceding section.

Nonassent Motion for Jury Trial.—Where neither party move for a trial jury of an issue of fact raised by the pleadings under this section, the issue may be determined by the court. Cannon v. Wiscassett Mills Co., 193 N. C. 119, 126, 141 S. E. 344.

Payment of Dividends—Remand for Proper Procedure.—When proceedings in mandamus have been instituted by stockholders of a private corporation to compel the distribution of a surplus ascertained in accordance with the provisions of § 55-115, before the judge holding the terms of court of the district, and the judge has failed to determine the payment of the dividends without evidence of the actual cash value of the assets or taking into his consideration a proper deduction for the depreciation of the plant, the case will be remanded to him to be proceeded with according to law. Cannon v. Wiscassett Mills Co., 195 N. C. 119, 141 S. E. 344.

When There Are Issues of Fact.—If a case is before the judge at chambers, and there are issues of fact appearing upon the pleadings, the cause should not be dismissed, but should be transferred to term for trial before a jury, just as the clerk might so transfer it. For, it would be strange to dismiss an action for a money demand, already before the court, and to compel the clerk or the judge at chambers, and tell the plaintiff to come back into the same court at term before the same judge, and the same clerk by service of another summons.

Where Only Evidentiary Matters Raised.—When the answer
§ 1-514. Writs of sci. fa. and quo warranto abolished. —The writs of scire facias and of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this article. (Rev., s. 826; Code, s. 603; C. C. P., s. 362; R. C., c. 26, ss. 5, 25; C. S. 869.)

Quo Warranto—In General. —Although the proceeding by information in the nature of the writ of quo warranto has been abolished, it is no remedy to be pursued whenever the controverting party requests judgment as to the validity of an election or the right to hold a public office, is by an action in the nature of a writ of quo warranto. It is not merely an action to redress the grievances of a private person, but the public has an interest in the question which the Legislature seems to have considered paramount to that of the private rights of the persons aggrieved. Hence, remedial and remedial actions must be brought by the Attorney-General in the name of the people of the state, and upon his own information without the relation of a private person when the person aggrieved does not seek redress; and when the claimant does seek redress, he must be joined in the action, but still it must be brought by the Attorney-General in the name of the people. Such is the construction which has been given to this section by the courts. Patterson v. Hubbs, 65 N. C. 119; Hargrove v. Hunt, 71 N. C. 24; People v. Hilliard, 72 N. C. 169; People v. McKee, 68 N. C. 429; Brown v. Turner, 70 N. C. 91; Saunders v. Gatling, 81 N. C. 298, 301.

Same—Historical. —Questions as to the title and possession of offices at common law were determined by the writ of quo warranto. It was originally a high prerogative writ issued out of chancery, and was used by the Crown of Great Britain unjustly and oppressively upon its subjects, until it was modified by statue. It was still retained for judicial purposes, and were called the statutes quo warranto; and then, after the justices in eyre were displaced by the judges of the superior courts, it fell into disuse, and the information in the nature of a writ of quo warranto, or an information or proceeding in the nature of a writ of right by the King against one who usurped or claimed franchises or liberties, to determine after the judgment of the court; and then they may be compelled to proceed in the discharge of their duties. As the mode of redressing a private party's right by a writ of quo warranto, or an information or proceeding in the nature of scire facias, and for unauthorized usurpations and continuance of the former suit. Binford v. Alston, 15 N. C. 351. McDowell v. Asbury, 66 N. C. 144, 447. Applied in Stephens v. Dowell, 208 N. C. 555, 181 S. E. 629; Swaringen v. Poplin, 211 N. C. 700, 191 S. E. 746. Cited in Bouldin v. Davis, 197 N. C. 731, 150 S. E. 507.

§ 1-515. Action by attorney-general.—An action may be brought by the attorney-general in the name of the state, upon his own information or upon the complaint of a private party, against the parties offending, in the following cases:
1. When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state, that any officer in a corporation created by the authority of this state; or
2. When a public officer, civil or military, has done or suffered an act which, by law, makes a forfeiture of his office.

3. When any person, natural or corporate, has or claims to have or hold any rights or franchises by reason of a grant or otherwise, in violation of the provisions of § 146-14. (Rev., s. 827; Code, s. 607; C. C. P., s. 366; 1911, cc. 195, 201; C. S. 870.)

Cross References.—As to actions in the nature of quo warranto against corporations, by the attorney-general, see section 55-136. As to actions by attorney general in the name of the state to vacate land grants, see section 146-69.

Same—General. —This and the subsequent sections provide for the fullest relief to the rightful claimant, against an unlawful intrusion, and thereby dispenses with the need of recourse to another process, unless those required to intrude are still retained in the discharge of the duties of their offices by the judgment of the court; and then they may be compelled to proceed in the discharge of their duties. As the mode of redressing a private party's right by a writ of quo warranto, or an information or proceeding in the nature of scire facias, and for unauthorized usurpations and continuance of the former suit. Binford v. Alston, 15 N. C. 351. McDowell v. Asbury, 66 N. C. 144, 447. Applied in Stephens v. Dowell, 208 N. C. 555, 181 S. E. 629; Swaringen v. Poplin, 211 N. C. 700, 191 S. E. 746. Cited in Bouldin v. Davis, 197 N. C. 731, 150 S. E. 507.

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claiming the office, the issue between them being the right to its favor, Love v. Vann, 111 N. C. 369, 16 S. E. 420; Ellison v. Raleigh, 89 N. C. 125, 129.

Interpleader by Judgment Creditor.—Under sections 1-69 and 1-73, a court has power to allow a judgment creditor of a defendant in a suit to bring in a quo warranto by which the nature of the office of that defendant is tried, but not to pass upon the validity of an overruling of authority both in this state and in England. High on Ex. Leg. Rem., Secs. 49, 51 and 77; Ex Parte Dauga, 28 N. C. 155; State v. Hardie, 23 N. C. 325, 328.

Determining Title to Public Office.—Quo Warranto is the remedy in England and this country by which the title to the office of the defendant is tried, and this is the appropriate remedy to be tried before a judge and jury. Cozart v. Fleming, 123 N. C. 547, 548, 31 S. E. 822.

Same.—Holding Two Offices.—A citizen and tax-payer of a county is entitled to bring an action in the nature of quo warranto to prevent a person from holding the office of county assessor of such county at the same time. State v. Thompson, 122 N. C. 493, 29 S. E. 720; State v. Vann, 118 N. C. 3, 23 S. E. 923; State v. Smith, 117 N. C. 369, 16 S. E. 420.

Determining Title to Public Office.—One of the chief purposes of quo warranto or an information in the nature of quo warranto is to try the title to an office. This is the method of proceeding in suits between rival claimants when one is in possession of the office under a favor of the board of county canvassers or other officers of the courts. Swearingen v. Poplin, 211 N. C. 703, 702, 191 S. E. 376, citing Hankrader v. Lawrence, 193 N. C. 441, 138 S. E. 35.

Same.— Allegation of Illegality.—Usually in such suits there is an allegation that the defendant has usurped and is illegally exercising the duties of the office, but section 1-516 does not prescribe the nature of such averment. Cozart v. Fleming, 123 N. C. 547, 548, 31 S. E. 822.

Same.— Mandamus and Injunction Improper.—It is not permissible to try the title to an office by injunction, nor by mandamus—a civil action in the nature of quo warranto, as that purpose could not be tried before a judge and jury. Cozart v. Fleming, 123 N. C. 547, 548, 31 S. E. 822; Ellison v. Raleigh, 89 N. C. 125, 131; Lyon v. Board, 120 N. C. 744, 29 S. E. 772. In High on Extraordinary Remedies, it is said that "in cases where relief has been sought to determine disputed questions of title to and possession of public offices, the courts have almost uniformly refused to lend their aid by mandamus, as evidence to certify or correct the election returns when impeached, and that on a quo warranto the ballot boxes brought into courts. In Broughton v. Young, 119 N. C. 915, 27 S. E. 277, it was held that the certificate of election is prima facie evidence in favor of the holder, and in every proceeding except those designed to try the right of the duly elected officer to have the action of the people carried out in a proper source, is prima facie evidence of the result of an election by the clerk, in the manner required by law, and that no action in the nature of a quo warranto proceeding. Cozart v. Fleming, 123 N. C. 547, 548, 31 S. E. 822, citing Swain v. McRae, 81 N. C. 111; Gatling v. Boone, 98 N. C. 573, 26 S. E. 720.

Same.—Proper Certificate Ordinarily Conclusive.—"The certificate of election of an officer, or his commission coming from the proper source, is prima facie evidence in favor of the holder, and in every proceeding except those designed to try the title of such holder it is conclusive; but in quo warranto the court will go behind the certificate or commissions and inquire into the validity of the acts and do equity for the present and decide the legal rights of the parties upon full investigation of the facts." Dillon's Work on Municipal Corporations, Vol. 2, at sec. 892. Lyon v. Board, 120 N. C. 744, 29 S. E. 772.

Same.—Ballot Boxes Brought into Courts.—In Broughton v. Young, 119 N. C. 915, 27 S. E. 277, it was held that the certificate of election is prima facie evidence in favor of the holder, and in every proceeding except those designed to try the title of such holder it is conclusive; but in quo warranto the court will go behind the certificate or commissions and inquire into the validity of the acts and do equity for the present and decide the legal rights of the parties upon full investigation of the facts." Dillon's Work on Municipal Corporations, Vol. 2, at sec. 892. Lyon v. Board, 120 N. C. 744, 29 S. E. 772.

The facts found by the referee as to the result of an election in proceeding in the nature of a quo warranto, and approved by the trial judge are not subject to appeal, and appeal to the trial judge, finds the absence of fraud, upon competent evidence. State v. Jackson, 183 N. C. 695, 110 S. E. 593.

Quo Warranto Is Not Proper Remedy to Test Validity of Vote.—Quo warranto is the sole remedy to test the validity of a vote even though it is levied under the authority of a special or local law. Marbee v. Board of Com'r's, 210 N. C. 717, 188 S. E. 314.

Quo Warranto Is Not Proper Remedy to Test Validity of Vote.—Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a special or local law. Marbee v. Board of Com'r's, 210 N. C. 717, 188 S. E. 314.

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he shall grant leave that it may be brought in the name of the state, upon the relation of such applicant, upon the applicant tendering the attor- ney-general satisfactory security to indemnify the state against all costs and expenses which may accrue in consequence of the action. 

(Rev., s. 828; Code, s. 608; 1874-5, c. 76; 1881, c. 330; C. S. 871.)

As to mandatory dissolution of a corporation at the instance of private persons, see section 55-124.

Section Constitutional.—This section allowing the prosecution of an action in quo warranto in the name of the state to enjoin the usurpation of the office of a citizen to a public office is not, for that reason, un-constitutional. McCall v. Webb, 135 N. C. 356, 47 S. E. 802.

Security Must Be Given.—The section clearly provides that before an action may be instituted or maintained on the relation of a private citizen, such leave shall be obtained and that satisfactory security must be furnished, inden- huming the State against all costs and expenses which may accrue in consequence of bringing the action. Midgett v. Gray, 158 N. C. 133, 135, 73 S. E. 791.

Interest of Public Is Paramount.—In proceedings under this and § 1-514 to try title to a public office the interest of the public in the province of the state to protect the actions of the State in the name of the State against all costs and expenses which may accrue in consequence of bringing the action. Midgett v. Gray, 158 N. C. 133, 135, 73 S. E. 791.

Same—Second Suit after Voluntary Nonsuit.—Common-law and quo warranto actions and proceedings by infor- mation in the name thereof have been abolished by § 1-514 and the remedy in such matters is under the provisions of this section and when the relator has complied with these conditions and makes a voluntary nonsuit and within a year brings another action upon the same subject-matter against the same respondent, but fails to obtain permission to bring another action, the bond therefore or the bond entered on fore the judgment is signed, his delay is fatal and the action is properly dismissed, it being necessary that the provisions of the section be again compiled with before the commencement of a second action. Cooper v. Crisco, 201 N. C. 739, 740, 161 S. E. 310.

Same—Effect of Section 1-516.—This view that leave is es- sential is strengthened by the subsequent section 1-518, which provides that even after leave is given and action com- menced, the same may, under certain conditions be with- drawn and, on certificate to that effect being properly filed, the judge may on motion dismiss the action. Midgett v. Gray, 158 N. C. 133, 135, 73 S. E. 791.

May Be Given After Commencement of Suit.—The court has held in State v. Withers, 121 N. C. 376, 28 S. E. 522, that it is not absolutely essential that the leave should be had be- fore the suit is commenced, provided it is obtained afterwards and supplied, but it must always be made to appear, pending the proceedings, that the leave of the Attorney-General has been given to prosecute the action. Midgett v. Gray, 158 N. C. 133, 135, 73 S. E. 791.

Upon Failure to Show Leave Action Dismissed.—It ap- pears that, by inadvertence, the record in this action of quo warranto to try title to an office, in which the defendant was held to have usurped and to have entered upon the office, was not preserved and, upon failure thereof the action may be dismissed. State v. Gray, 159 N. C. 443, 74 S. E. 1050.


§ 1-517. Solvent sureties required.—The at- torney-general, before granting leave to a private relator to bring a suit to try the title to an office, may require two sureties to the bond required by law to be filed to indemnify the state against costs and expenses, and require such sureties to justify, and may require such proof and evidence of the solvency of the sureties as is satisfactory to him. (Rev., s. 829; 1901, c. 595, s. 2; C. S. 872.)

§ 1-518. Leave withdrawn and action dismissed for insufficient bond.—When the attorney- general has granted leave to a private relator to bring an action in the name of the state to try the title to an office, and it afterwards is shown to the satisfaction of the attorney-general that the bond filed by the private relator is insuffi- cient, or that the sureties are insolvent, the at- torney-general may recall and revoke such leave, and upon a certificate of the withdrawal and revocation by the attorney-general to the clerk of the court of the county where the action is pend- ing, it is the duty of the presiding judge, upon motion of the defendant, to dismiss the action. (Rev., s. 830; 1891, c. 595; C. S. 873.)

§ 1-519. Arrest and bail of defendant usurping office.—When action is brought against a person for usurping an office, the attorney-general, in addition to the statement of the cause of action, may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has re- ceived fees or emoluments belonging to and by means of his usurpation of the office, an order shall be granted by a judge of the superior court for the arrest of the defendant, and holding him to bail; and thereupon he shall be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and li- abilities, as in other civil actions where the defend- ant is subject to arrest. (Rev., s. 833; Code, s. 609; C. C. P., s. 399; 1883, c. 102; C. S. 874.)

Cross Reference.—As to arrest in civil actions, see §§1-499 to 1-519.

§ 1-520. Several claims tried in one action.—Where persons or franchises are to be entitled to the same office or franchise, one action may be brought against all of them, in order to try their respective rights to the office or franchise. (Rev., s. 832; Code, s. 614; C. C. P., s. 374; C. S. 873.)

§ 1-521. Trials expedited.—All actions to try the title or right to any state, county or municipal office stand for trial at the return term of the sum- mons, if a copy of the complaint was served with the summons at least thirty days before the return day thereof; and it is the duty of the judges to ex- pedite the trial of these actions, and to give the same precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action. (Rev., s. 833; Code, s. 616; 1901, c. 42; 1874-5, c. 173; C. S. 876.)

§ 1-522. Time for bringing action.—All actions brought by a private relator, upon the leave of the attorney-general, to try the title to an office must be brought, and a copy of the complaint served on the defendant, within ninety days after his in- duction into the office to which the title is to be tried; and when it appears from the papers in the cause, or is otherwise shown to the satisfaction of the court, that the summons and complaint have not been served within ninety days, it is the duty of the judge upon motion of defendant to dismiss the action at any time before the trial, at the cost of the plaintiff. (Rev., s. 834; 1901, c. 519; 1903, c. 556; C. S. 877.)

When Section Does Not Apply.—This provision requiring
a private relator, upon leave of the attorney general, to bring his action within ninety days after the induction of the defendant into the contested office, does not apply where the alleged intruder has occupied the office more than ninety days before the plaintiff's cause of action accrued, or where the plaintiff or his attorney of record, to the discretion of the judge, to be void upon condition that the defendant pays to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover. (Rev., s. 835; 1895, c. 105; C. S. 878.)

§ 1-524. Possession of office not disturbed pending trial.—In any civil action pending in any of the courts of this state in which the title to an office is involved, the defendant being in the possession of the office and discharging the duties thereof shall continue therein pending the action, and no judge shall make a restraining order interfering with or enjoining such officer in the premises. The officer shall, notwithstanding any such order, continue to exercise the duties of the office pending the litigation, and receive the emoluments thereof. (Rev., s. 836; 1899, c. 39; C. S. 879.)

Purpose of the Section.—An injunction to prevent the exercise of a public office would produce general inconvenience; for instance, an injunction against one who it is alleged has usurped the office of the clerk of a court, forbidding him to discharge the duties of the office, would stop all judicial proceedings and the public would be made to suffer by this mode of contesting the right to the office and to the emoluments thereof. Hence, in this and the like cases, the appropriate remedy is by an action in the nature of a quo warranto, not an injunction. Patterson v. Hubbs, 65 N. C. 119, 121.

Title Should Be Determined First.—Individuals claiming to be the board of trustees of a school district de jure may not enjoin those in possession under a colorable claim of right as such board from the performance of their duties as such, and require the defendant to turn over to them the school buildings, etc., and thus determine collaterally the question of title, nor would remedy by injunction be permitted in quo warranto proceedings, where the title to office is directly involved, but the parties should first try out the question of title in an action brought directly for the purpose. Rogers v. Powell, 174 N. C. 388, 93 S. E. 917.

Stated in Osborne v. Canton, 219 N. C. 139, 15 S. E. (2d) 265.

§ 1-525. Judgment by default and inquiry on failure of defendant to give bond.—At any time after a proper verified complaint is filed alleging facts sufficient to entitle plaintiff to the office, whether this complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days notice to the defendant or his attorney of record, move before the judge resident in or riding the district, at chambers, to require the defendant to give the undertaking specified in § 1-523. It is the duty of the judge to require the defendant to give the undertaking within ten days, and if it is not so given, the judge shall render judgment in favor of plaintiff and against defendant for the recovery of the office and the costs, and a judgment by default and inquiry to be executed at a term for damages, including loss of fees and salary. Upon the filing of the judgment for the recovery of such office with the clerk, it is his duty to issue and the sheriff's duty to serve the necessary process to put the plaintiff into possession of the office. If the defendant shall give the undertaking, the court, if judgment is rendered for plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary. Nothing herein prevents the judge's extending, for cause, the time in which to give the undertaking. (Rev., s. 837; 1899, c. 49; 1895, c. 105, s. 2; C. S. 880.)

As to effect of this section on an independent suit for damages, see editor's note under section 1-530.

§ 1-526. Service of summons and complaint.—The service of the summons and complaint as hereinbefore provided may be made by leaving a copy at the last residence or business office of the defendant or defendants, and service so made shall be deemed a legal service. (Rev., s. 838; 1899, c. 126; C. S. 881.)

If the copy of summons left at defendant's residence be not essentially a true copy of the original, there was no valid service, for only by virtue of this section, is substituted service allowable in this way. McLeod v. Pearson, 208 N. C. 539, 540, 181 S. E. 753.

If the copy of summons left at defendant's residence be a true copy of the original, then it would be insufficient under the statute, for only by virtue of this section, is substituted service allowable in this way. McLeod v. Pearson, 208 N. C. 539, 540, 181 S. E. 753.

§ 1-527. Judgment in such actions.—In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as justice requires. When the defendant, whether a natural person or corporation, against whom the action has been brought, is adjudged guilty of usurping or interfering with or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that the defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against him. The court may also, in its discretion, fine the defendant a sum not exceeding two thousand dollars. (Rev., ss. 839, 840; Code, ss. 610, 615; R. C., c. 95; C. C. P., ss. 370, 375; Const., Art. IX, s. 5; C. S. 882.)

Discretion of Court as to Fine.—Where the defendant went into office under the authority of an unconstitutional appointment by the general assembly, the court presumed that there was no criminal intent and did not impose the fine. Nichols v. McKee, 68 N. C. 429, 440.

§ 1-528. Mandamus to aid relator.—In any civil action brought to try the title or right to hold any office, when the judgment of the court is in favor of the relator in the action, it is the duty of the court to issue a writ of mandamus or such other process as is necessary and proper to carry the judgment into effect, and to induct the party entitled into office. (Rev., s. 841; 1885, c. 406, s. 1; C. S. 883.)

As to mandamus in general, see sections 1-511 to 1-533.

§ 1-529. Appeal; bonds of parties.—No appeal by the defendant to the supreme court from the judgment of the superior court in such action shall stay the execution of the judgment, unless a justified undertaking is executed on the part of the appellant by one or more sureties, in a sum to be fixed by the court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all money whatsoever received by the appellant by virtue or under color
§ 1-530. Relator inducted into office; duty.—
If the judgment is rendered in favor of the relator, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office, it is his duty, immediately thereafter, to demand from the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he has been excluded. (Rev., ss. 842, 844; Code, ss. 611, 613; C. C. P., ss. 371, 373; C. S. 885.)

Editor's Note.—It was held, under this section, that compensatory damages for the loss of the fees and emoluments of the office could be recovered from the intruder who had received the same, in an action brought after the rendition of the judgment for money. Swain v. McRae, 80 N. C. 112; State v. Jones, 80 N. C. 127; State v. Tate, 70 N. C. 161.

In McCall v. Webb, 133 N. C. 356, 37 S. E. 802, the question as to the recovery of damages in an independent action after taking the oath and the court discussed the effect of section 1-252 as amended in 1895 and 1899. The court said: these amendments in regard to the method of recovering damages in such cases do not provide for a cumulative remedy, but it was intended by them to substitute the remedy by inquiry in the action brought to recover the office for the former remedy by separate action on the undertaking, when the judgment is reversed. The Code; and besides the amendments are inconsistent with the provisions of section 1-233, and the latter is therefore repealed by them.


Person Entitled Has Property.—A person who is rightfully entitled to an office, although not in the actual possession thereof, and may maintain an action for money had and received against a mere intruder who may perform the duties of such office for a time and receive the fees arising therefrom; and such intruder can neither retain any part of the fees as a compensation for his services nor take upon himself the execution of the office which another wrongfully claims and withholds shall not be required, as a condition precedent to an action to try title to that office, to do the vain thing of going through the formality of complying with the requirements for induction into the office. Osborne v. Canton, 219 N. C. 139, 13 S. E. (2d) 265.

§ 1-531. Refusal to surrender official papers misdemeanor.—If a person against whom a judgment has been rendered in an action brought to recover a public office shall fail or refuse to turn over, on demand, to the person adjudged to be entitled to such office, all papers, documents and books belonging to such office, he shall be guilty of a misdemeanor. (Rev., ss. 3601; Code, ss. 612; C. C. P., 372; C. S. 886.)

§ 1-532. Action to recover property forfeited to state.—When any property, real or personal, is forfeited to the state, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in any superior court. (Rev., ss. 845; Code, ss. 621; C. C. P., ss. 381; C. S. 887.)

Art. 42. Waste.

§ 1-533. Remedy and judgment.—Wrongs, remediable by the old action of waste, are subjects of action as other wrongs; and the judgment may be for damages, forfeiture of the estate of the party offending, and eviction from the premises. (Rev., ss. 853; Code, ss. 624; C. C. P., ss. 383; C. S. 888.)

Editor's Note.—In England the clearing of land by a life-tenant was waste. In Shire v. Wilcox, 21 N. C. 631 the court says "While our ancestors brought over to this country the principles of common law, these were nevertheless accommodated to their new condition. It would have been absurd to hold that the clearing of the forest, so as to fit it for the habitation and use of man, was waste." And in King v. Miller, 99 N. C. 583, 6 S. E. 660, the court says "While in its essential elements waste is the same in this country and in England ... yet in respect to acts which constitute waste, the rule that governs in a new and unopened land cannot be the same as that which is applicable in a settled state." Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

Definition.—Waste is a spoiling or destroying of the estate, with respect to the land, trees, or timber, to be commuted to their new condition. It would have been absurd to hold that the clearing of the forest, so as to fit it for the habitation and use of man, was waste." And in King v. Miller, 99 N. C. 583, 6 S. E. 660, the court says "While in its essential elements waste is the same in this country and in England ... yet in respect to acts which constitute waste, the rule that governs in a new and unopened land cannot be the same as that which is applicable in a settled state." Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

Nature of Action.—An action for wrongs in the nature of waste is not necessarily an action "for penalties," or "for damages merely vindictive"; on the contrary, the action is generally used to recover actual and substantial damages. And that an action survives when such is its purpose, either to or against the personal representative, is well established. Butner v. Keelton, 51 N. C. 60; Rippey v. Miller, 33 N. C. 427; Collier v. Arrington, 61 N. C. 355; Peeples v. N. C. R. Co., 63 N. C. 238; Shuler v. Millsaps, 71 N. C. 297; Shields v. Lawrence, 72 N. C. 43, 44.

Discretion of Jury.—It must be left, in large measure, to the discretion of the jury to say whether the destruction of timber, or giving up a cultivated field and permitting bushes to grow and take possession of it, in the light of the evidence in the case, has proved a lasting injury to the inheritance; but the acts done or permitted which constitute such injury differ according to the condition of the estate. Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

To Determine Liability.—In ascertaining whether a given act constitutes waste, the court has power to determine from the evidence in the case, has proved a lasting injury to the inheritance. Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

Cited in Batten v. Corporation Commission, 199 N. C. 460, 154 S. E. 748.

§ 1-534. For and against whom action lies.—In all cases of waste, an action lies in the superior court at the instance of him in whom the right is, against all persons committing the waste, as well
§ 1-535. Tenant in possession liable.—Where a tenant for term of life as tenant for term of years and guardians. (Rev., s. 854; Code, s. 625; R. C., c. 116, s. 4; 32 Hen. 111, c. 233; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; C. S. 889.)

§ 1-536. Action by tenant against cotenant.—Where a joint tenant or a tenant in common commits waste, an action lies against him at the instance of his cotenant or joint tenant. (Rev., s. 856; Code, s. 627; R. C., c. 116, s. 4; 13 Edw. I, c. 227; C. S. 891.)

§ 1-537. Action by heirs.—Every heir may bring action for waste committed on lands, tenements, or hereditaments of his own inheritance, as well as on the time of his ancestor as in his own. (Rev., s. 857; Code, s. 628; R. C., c. 116, s. 5; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; C. S. 892.)

Heirs Cannot Set up Damages for Waste as Counterclaim.—In a suit by a widow against the heirs as her co-tenants, where the payments allowed to her as dower and a charge on the land, the heirs cannot set up by way of counterclaim damages for waste. The suit must proceed under the statute. Hybart v. Jones, 130 N. C. 227, 41 S. E. 291.

§ 1-538. Action by tenants in dower, or other life tenant, who, by negligence, permit waste or injury to the inheritance, whether voluntary or permissive, subjects himself to liability to pay the actual damages, or treble damages, at the discretion of the court, for the failure to pay the actual damages, with interest, within 60 days after the occurrence of the waste, or until it is fixed by the court, if he should in the meantime fail to pay the damages recovered of him. Sherrill v. Connor, 107 N. C. 630, 637, 12 S. E. 588.

Section Changes Former Law.—This section is substantially the same as the law in force before the enactment of the Code except for two important changes. The word “may” has been substituted for “shall” by amendment in the Code, and, by a qualification added to it, the judgment for the place wasted must be conditional, and can take effect only upon the failure of the defendant to pay the actual damages before a day certain. So that it is left within the sound discretion of the judge who tries the action to determine whether he will give treble or single damages, as well as to fix a day after which a writ of possession may issue for the place wasted, if the damage allowed shall not have been in the meantime actually paid. The old statute was, manifestly, amended when the Code was enacted, for the purpose of providing a remedial action directly in the Court of General Sessions. The Code contains a provision in reference to the amount of the judgment, and fixing the period of time for the payment of the place wasted on failure to pay the amount recovered. Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

Prospective Damages Not Allowed.—The court cannot allow the inheritance to sustain further injury after the damages have been allowed, and on appeal the court will not allow the inheritance to sustain further injury after the damages have been allowed. Sherrill v. Connor, 107 N. C. 630, 637, 12 S. E. 588.

Where Damages Insignificant.—In an action for waste, where the jury find insignificant damages, judgment will be arrested. Sherrill v. Sheppard, 3 N. C. 382.

Judgment for Damages Only.—It is not error for the judgment in an action of waste to be for the damages only, and not also for the place wasted. Bright v. Wilson, 1 N. C. 251.

New Action for Subsequent Injury.—If the life-tenant should allow the inheritance to sustain further injury after the time of trial, damage may be recovered in another action. Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

Appeal.—This section says the court may give judgment for treble damages and the place wasted, and on appeal the court will not make such discretionary power obligatory. Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

Art. 43. Nuisance.

§ 1-539. Remedy for nuisance.—Injuries remediable by the old writ of nuisance are subjects of action as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both. (Rev., s. 825; Code, s. 630; C. C. P., s. 387; C. S. 894.)

Cross Reference.—As to injunction against nuisance, see sec. 1-485 and annotations thereunder.

Editor's Note.—Nuisances consist of two general classes,
public and private. A public nuisance exists when a right or privilege, common to all the citizens of the community, is interfered with, even though no actual damage to any individual is caused. In such cases in order to maintain a civil action under this section the plaintiff must show special privilege, common to all the citizens of the community, and he need not show that his particular damage differs in kind and degree from that of the other individuals affected. See McManus v. Southern Ry. Co., 150 N. C. 655, 660, 64 S. E. 766.

When the alleged nuisance would constitute a private wrong, by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. See Farmer, etc., v. R. R., 117 N. C. 139, 150, 52 S. E. 43; Pruitt v. Bethell, 174 N. C. 454, 457, 93 S. E. 945.

That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupancy physically uncomfortable to him. See Baltimore, etc., v. Fifth Church, 108 U. S. 317, 329, 3 S. Ct. 719, 27 L. Ed. 739.

An Adequate Remedy.—Where a nuisance has been established, working harm to the rights of an individual citizen, the law of our state is searching and adequate to afford a remedy redress, both by remedial and preventive remedies, as will be readily seen by reference to numerous decisions of the court on the subject. Cherry v. Williams, 112 N. C. 267, 16 S. E. 276; Reutbun v. McManus, 135 N. C. 328, 67 S. E. 761; Raleigh v. Hunter, 16 N. C. 12; Bell v. Blount, 11 N. C. 384; McManus v. Southern Ry. Co., 150 N. C. 655, 661, 64 S. E. 766.

Purpose of Damages.—Damages in nuisance should be such as to lead to the abatement of the nuisance. Bradley v. Amis, 3 N. C. 399.

Applicable Damages Must Be Suffered.—To sustain an action for a nuisance, public or private, which does not involve the physical invasion of the property of another, it is always required to be shown that some appreciable damage has been suffered, or that some serious or irremediable injury is threatened, and unless this is made to appear a right to nominal damages does not arise. See McManus v. Southern Ry. Co., 150 N. C. 655, 660, 64 S. E. 766.

When Special Damage Necessary.—No person can maintain an action (on a public nuisance) unless he sustains a special damage therefrom differing from that sustained by the rest of the public. McManus v. Southern Ry. Co., 150 N. C. 655, 661, 64 S. E. 766.

But an action by an individual to abate a nuisance cannot be successfully resisted on the ground that no special damage to the plaintiff has been shown, when it appears that the nuisance complained of was the fact that the defendant caused water to flood adjoining lands, which bred fever carrying mosquitoes, thereby, inflicting sickness on the plaintiff and his family, as well as others in the community, and causing the plaintiffs sickness from the same cause. Pruitt v. Bethell, 174 N. C. 454, 93 S. E. 945.

Diminution of Damage.—In an action for damages from a permanent nuisance, the suit being in the nature of a proceeding to condemn the plaintiff's property, it was held, that the court, in construing the contract of the establishment of the nuisance may be set off in diminution of damages. Brown v. Virginia-Carolina Chemical Co., 162 N. C. 83, 77 S. E. 1102.

Injunction Lies.—One suffering peculiar damages from a public nuisance, and not generally complained of, is entitled to an injunction. Reutbun v. Sww. Co., 135 N. C. 328, 87 S. E. 761.

Same.—No Permanent Damages.—Permanently damages for the depreciation of property can not be recovered. The owners may enjoin commission of the acts constituting the nuisance, but temporary damages as their property has sustained thereby, Taylor v. Seaboard, etc., Railroad, 145 N. C. 400, 59 S. E. 129.

Proximate Cause.—In order to recover damages the maintenance of a public nuisance must be the proximate cause of the injuries. McGlue v. Norfolk, etc., R. Co., 147 N. C. 142, 60 S. E. 912.
§ 1-540 CH. 1.


There must be a meeting of minds upon every feature and undue influence, in good faith, deliberately and understandingly. Hennessy v. Bacon, 137 U. S. 78, 11 S. Ct. 17, 34 L. Ed. 496.

In negotiating for a settlement, or facts from which such an agreement might be inferred, Swift, etc., Co. v. United States, 111 U. S. 22, 4 S. Ct. 244, 28 L. Ed. 34.

In order to be thus conclusive, however, there must have been a full and complete discharge of the debt. Held, that there was a sufficient consideration to support the agreement and that the debt was discharged from his obligation. Jones v. Wilson, 104 N. C. 9, 10 S. E. 79.

Where the plaintiff agrees to receive a lesser amount in satisfaction of the debt, the lesser amount to include advertising the amount of which was to be agreed upon by the creditor and the debtor, the creditor having refused to state the amount of advertising he would take, does not in any way invalidate the compromise. Ramsey v. Browder, 136 N. C. 251, 48 S. E. 651.

When the sum paid under an indemnity insurance policy is the only sum due at the time, the language of the receipt, if withdrawn by the plaintiff, pending the litigation, will not constitute the execution of a discharge. Cashier Supply Co. v. Down, 146 N. C. 191, 195, 59 S. E. 685.

When the creditor is entitled to restitution. When one pays a certain sum upon a contested debt in compromise thereof in case it shall afterwards be established, a finding by the jury that it never existed will entitle the payer to a restitution for the money advanced by him. Fickey v. Merrim- mond, 79 N. C. 585.

When the creditor is entitled to restitution. When an order to pay a claim certain in full settlement of a claim in dispute, followed by immediate payment by the debtor, constitutes a valid compromise in full satisfaction of the claim. Pruden v. R. R. Co., 121 N. C. 509, 28 S. E. 149.

III. EFFECT OF COMPROMISE.

A valid compromise and settlement extinguishes the cause of action, and where a party is willing to yield something for the sake of a settlement, he cannot maintain afterwards, that it was voluntarily surrendered. See Boffinger v. Tayes, 120 U. S. 198, 265, 7 S. Ct. 529, 30 L. Ed. 699.

Checks Accepted as Settlement in Full. When an employee was discharged and received and cashed a check for $125, on which was written, “In full for services,” which amount was less than claimed, he cannot recover more, although he attempted to qualify his acceptance of the proceeds of the check by writing on the back above his signature, the words, “Accepted for one month’s services.” Kerr v. Sanders, 122 N. C. 635, 29 S. E. 943.

IV. APPLICATION OF SECTION

Incorporated in Contract. Where agreements to receive a part in lieu of the whole debt due have been made since the enactment of this section, they are deemed to have been entered into in full contemplation of its policy, and though it had been incorporated into the contract, Bank v. Commissioners, 116 N. C. 359, 363, 21 S. E. 410; Koone v. Russell, 103 N. C. 179, 9 S. E. 316.

Must Be Compromise. The section is not applicable where the payment is not intended as a compromise of the whole, or any part of the debt, but as a payment in full. Smith v. Russell, 129 N. C. 99, 59 S. E. 593.

When Creditor Remitted to Original Rights. If the debtor, as in Hunt v. Wheeler, 116 N. C. 422, 425, 21 S. E. 915, repudiates the agreement or unreasonably delays to execute the creditor’s other rights, he may with his consent, assign the right to demand acceptance of the payment of the sum agreed to be paid under the new contract, for payment of the sum agreed to be paid under the original contract, for payment of the sum agreed to be paid under the new contract, for payment of the sum agreed to be paid under the new contract, for payment of the sum agreed to be paid under the new contract, for payment of the sum agreed to be paid under the new contract, for payment of the sum agreed to be paid under the new contract, for payment of the sum agreed to be paid under the new contract, for payment of the sum agreed to be paid under the new contract, for payment of the sum agreed to be paid under the new contract, for payment of the sum agreed to be paid under the new contract, for payment of the

Slight Irregularities Do Not Vitiates. When a plea in abatement is not timely tendered, the court has the right to demand that it be received and applied in discharge of his obligation to make any further payment. Boykin v. Buie, 109 N. C. 501, 503, 13 S. E. 979.

When Payer is Entitled to Restitution. When one pays a certain sum upon a contested debt in compromise thereof in case it shall afterwards be established, a finding by the jury that it never existed will entitle the payer to a restitution for the money advanced by him. Fickey v. Merrim- mond, 79 N. C. 585.

Principal Bound by Acts of Agent. A principal may not rely upon the acts of his agent in compromising a debt due, and receive the benefit of the consideration therefor. Cashier Supply Co. v. Down, 146 N. C. 191, 195, 59 S. E. 685.

When the sum paid under an indemnity insurance policy is the only sum due at the time, the language of the receipt, if withdrawn by the plaintiff, pending the litigation, will not constitute the execution of a discharge of the claim in dispute. Moore v. Casualty Co., 150 N. C. 153, 154, 63 S. E. 775.

When one of several makers of a note agree with the payee to compromise the debt due, and receive the benefit of the consideration therefor. Cashier Supply Co. v. Down, 146 N. C. 191, 195, 59 S. E. 685.

Where one of several makers of a note agree with the payee to compromise the debt due, and receive the benefit of the consideration therefor. Cashier Supply Co. v. Down, 146 N. C. 191, 195, 59 S. E. 685.
V. PROCEDURE.

Discretion of Court.—Where, among other defenses to an action, the defendant pleads accord and satisfaction, the discretionary power of the trial judge in submitting this issue to the jury before submitting it for the jury's determination should not be considered for error unless the issue is not properly included in the case alleged, or unless the court, after considering the evidence and the argument of counsel in favor of the plaintiff, decides that the issue should be submitted to the jury for its determination. See Dakota County v. Glidden, 113 U. S. 222, 5 S. Ct. 572, 28 L. Ed. 681.

Compromise Pending Writ of Error.—Where there has been a decision in the lower court, a valid compromise of the matter in dispute may be made while a writ of error is pending. See Dakota County v. Glidden, 113 U. S. 222, 28 L. Ed. 681.

§ 1-541. Judgment.—The defendant, at any time before the trial or verdict, may serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, or therein referred to, if the action had been brought to recover the specific property tendered, unless the offer had also included with the proposed delivery of articles tendered in kind a proposal to pay an amount as damages for detention not less than that ultimately assessed by the jury. Citing Stephens v. Koerce, 103 N. C. 266, 269, 9 S. E. 315. Wood's Mayne on Damages, secs. 520, 521.

Unaccepted Tender of Judgment.—The purpose of the section is to be secured by holding according to its language that a tender of judgment unaccepted "cannot be given in evidence," and can only be used after verdict before the judge, to enable him to adjudge who shall pay the costs. See Dakota Grocery Co. v. Taylor, 162 N. C. 369, 371, 78 S. E. 276.

In Blanton Grocery Co. v. Taylor, 162 N. C. 307, 313, 78 S. E. 276, it was held: "Where, during the trial, the tender of judgment is made and rejected, it is not admitted as evidence; and while this provision is primarily for the protection of the plaintiff, the statute is a part of the wholesome scheme devised to encourage compromises and settlements, before and after action commenced."

When a defendant has tendered judgment for a smaller amount on another and different liability from that alleged in the complaint, and plaintiff does not accept as provided by this section, the tender is thereby withdrawn, and upon judgment thereon the plaintiff cannot recover costs, but the plaintiff is entitled to judgment for the amount tendered, there being no admission of liability in any amount upon the cause alleged. Dugget v. Co. v. Terry, 213 N. C. 533, 196 S. E. 621.

Tender Sufficient to Stop Costs.—A tender of payment under the section, to stop the costs and the accrual of interest on a judgment subsequently rendered, must be in writing, signed by the party making it, and contain an offer of settlement of the amount tendered. See sec. 1-541, and annotations thereto.

§ 1-542. Conditional tender of judgment for damages.—In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fails in his defense, the damages be assessed at a specified sum; and if the plaintiff signifies his acceptance thereof in writing, ten days before the trial, and on the trial there is a verdict, the damages shall be assessed accordingly. If the plaintiff does not accept the offer, he must prove his damages, as if it had not been made, and may not introduce it in evidence. If the damages assessed in his favor do not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defense in respect to the question of damages. This expense shall be ascertained at the trial. (Rev., ss. 861, 862; Code, ss. 875, 876; C. C. P., ss. 329, 330; C. S. 897.)

As to costs, see sec. 1-541, and annotations thereto.

Tender Should Accompany Answer.—A tender may accompany an answer, and以此省略了其 Proper—plain text representation.
Agreement as Evidence Fixing Damages.—Where, pending an action to recover for damages done to a lot of tobacco with reference to arbitration in cases where a parol agreement on the subject matter would be enforceable, and an award reached under the parol agreement to arbitrate will not be invalidated, if in such action the court shall refuse to take notice of the contract and procedure prescribed by the statute. Copney v. Parks, 212 N. C. 217, 193 S. E. 21.

§ 1-543. Disclaimer of title in trespass; tender of judgment.—In actions of trespass upon real estate, the defendant in his answer may disclaim any title or claim to the lands on which the trespass is alleged by the complaint to be done, may allege that the trespass was by negligence or involuntary, and may make a tender or offer of sufficient amends for the trespass. If the plaintiff controverts such answer or a part thereof, and at the trial verdict is found for the defendant, or if the plaintiff is nonsuited, he is barred from maintaining a suit for trespass. If the plaintiff either enters judgment or cannot be taxed with any costs relating to that part of the suit, he should enter a disclaimer; and when he does so, he is permitted, not to sacrifice justice. Pursuing this policy, arbitration has always been encouraged. See the Editor’s Note to sec. 1-188.

Applicability to Agreement Respecting Future Controversies.—Attention is called to the fact that this section limits the agreement and the arbitration to controversies arising out of the agreement to arbitrate “to any controversy existing between the parties at the time of the agreement to submit”. These terms do not expressly extend to and include agreements to submit controversies arising after the expiration or rescission of the agreement; but an agreement to arbitrate, it is the policy of the law to encourage the settlement of litigation or controversy with as much speed and as little expense as the exigencies of the case will allow. The question of whether the court shall assume jurisdiction over the contract generally; if it does, it is invalid. See Swaim v. Swaim, 14 N. C. 24.

The following North Carolina cases discuss the rule and illustrate the application of it as to future disputes.

“The original doctrine, with its modifications, is well summed up by Justice Manning in Kelly v. Trimmont Lodge, 150 N. C. 97, 153 S. E. 257: ‘It is essential to the doctrine that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties as to disputes arising out of other than the present controversy, in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage to the settlement under public policy and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer.’" Citing Mfg. Co. v. Assur. Co., 196 N. C. 28, 19 S. E. 87.
§ 1-544 CH.

That an agreement to submit to arbitration the single question of the amount of loss by fire is valid. Nelson v. Atlantic R. Co., 157 N. C. 194, 201, 72 S. E. 998. Although an agreement to arbitrate the entire controversy is not enforceable, and prior to this agreement it fails to so, and enters upon the arbitration, and an award is made, he is bound. Nelson v. Atlantic Coast Line R. Co., 157 N. C. 194, 202, 72 S. E. 998; Williams v. Mfg. Co., 154 N. C. 205, 206, 70 S. E. 250.

The law of this state is in accord with the law of the majority of the American States (See 5 C. J. pp. 43 et seq., connected § 72), but it may be of interest to note that a very recent school of thought has given rise to the doctrine that all contracts to arbitrate future controversies are valid and enforceable. This is made statutory in several jurisdictions including New York (passing the first of such statutes in 1920), New Jersey, Massachusetts, Oregon, California and the Federal Government. See the discussion in the Handbook, cited supra in this note.

Arbitration statutes usually prohibit, either expressly or by necessary implication, such controversies. While it is a rule of common law that all contracts to arbitrate future controversies are valid and enforceable, this is broad enough to include disputes concerning the title to freehold estates in land, it is doubtful whether statutes of many of the states expressly prohibit their submission. It has been said by some of the standard authorities that arbitration statutes usually prohibit, either expressly or by necessary implication, such controversies. While it is a rule of contracts, that an agreement made by an infant was not bind the infant by a submission to arbitration, even the submission was made the rule of the court. Millsaps v. Estes, 137 N. C. 535, 536, 50 S. E. 227.

A party having this capacity cannot act through an agent or attorney in the same manner as was always possible before the admission of to the bar. The consideration supporting the contract of arbitration is the mutual promises and this is sufficient. See Mayo v. Gardner, 70 N. C. 359.

May an Award be Set Aside.—This section provides that "Two or more parties may agree." It does not specify whether the parties may do so by their general agents or by their attorneys. Prior to this act it was held under prior law that the attorneys might make such an agreement and this without the consent of the clients (Millsaps v. Estes, 134 N. C. 486, 46 S. E. 988, and citations); it would seem that a party could have made the contract with agents in the same manner that any other contract could have been made. It is to be presumed that the word "parties" as here used is given the meaning ordinarily ascribed to the word "parties" in law, and that the same latitude will be given the parties in making the agreement that they have always had. As has always been the case, administrators (see sec. 28-111, and McLeod v. Graham, 52 N. C. 504), arbitrators and other representatives may no doubt represent the estates of the parties or their wards, custei que trusts, etc., in this capacity.

It was held prior to this section, following the ordinary rule of contracts, that an agreement made by an infant was voidable. It was also held that a guardian ad litem could not bind the infant by a submission to arbitration, even though the submission was made the rule of the court. See Crissman v. Crissman, 27 N. C. 498.

Necessity of Controversy Being Litigated.—It is not necessary, it would seem, that the controversy be pending in a court before it can be arbitrated, for any existing dispute over a controversy which has been litigated. It would seem that all disputes which could be in writing and others did not, depending upon whether they fell within the statute. See Fort v. Allen, 110 N. C. 183, 189, 14 S. E. 685; Crissman v. Crissman, 27 N. C. 498.

Power to Revoke.—Since the word "submission" means an agreement to refer the dispute to the arbitrators, it does not seem to be in writing and others did not, depending upon whether they fell within the statute. See Fort v. Allen, 110 N. C. 183, 189, 14 S. E. 685; Crissman v. Crissman, 27 N. C. 498.

Effect of Death of Party.—While prior to this act the death of one of the parties before the award automatically revoked the contract to arbitrate, (see Whitfield v. Whitfield, 30 N. C. 161; Williams v. Branch, 27 N. C. 335, 336, 70 S. E. 357; see Fort v. Allen, 110 N. C. 183, 189, 14 S. E. 685, Crissman v. Crissman, 27 N. C. 497), this section changes the rule so that now the effect of such death upon contract is the same as it is upon ordinary contracts. See also Fort v. Allen, 110 N. C. 183, 189, 14 S. E. 685, Crissman v. Crissman, 27 N. C. 497.

Number of Arbitrators.—Notwithstanding that section 1-547 provides that in case the agreement fails to prescribe a method for appointment of the arbitrators, the court shall appoint, it is sufficient to say that if the number of arbitrators the parties may appoint in the absence of an agreement to that effect, quere.

§ 1-544 CIVIL PROCEDURE—INCIDENTAL

Effect of Submission.—It is enough that the parties agree to submit the controversy to arbitration. It is not necessary that they agree to arbitrate future controversies; and the submission of a dispute to arbitration is a contract, it is reasonable to suppose that the framers of this statute intended to leave it unchanged.

Thus, the parties thereto must have the legal capacity to enter into the contract and the capacity to arbitrate, or, otherwise they cannot. While there are no decisions, as yet, construing this statute, there has always been the general rule and it is but reasonable to suppose that the framers of this statute intended to leave it unchanged.

A party having this capacity cannot act through an agent or attorney in the same manner as was always possible before the admission of to the bar. The consideration supporting the contract of arbitration is the mutual promises and this is sufficient. See Mayo v. Gardner, 70 N. C. 359.

May an Award be Set Aside.—This section provides that "Two or more parties may agree." It does not specify whether the parties may do so by their general agents or by their attorneys. Prior to this act it was held under prior law that the attorneys might make such an agreement and this without the consent of the clients (Millsaps v. Estes, 134 N. C. 486, 46 S. E. 988, and citations); it would seem that a party could have made the contract with agents in the same manner that any other contract could have been made. It is to be presumed that the word "parties" as here used is given the meaning ordinarily ascribed to the word "parties" in law, and that the same latitude will be given the parties in making the agreement that they have always had. As has always been the case, administrators (see sec. 28-111, and McLeod v. Graham, 52 N. C. 504), arbitrators and other representatives may no doubt represent the estates of the parties or their wards, custei que trusts, etc., in this capacity.

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Number of Arbitrators.—Notwithstanding that section 1-547 provides that in case the agreement fails to prescribe a method for appointment of the arbitrators, the court shall appoint, it is sufficient to say that if the number of arbitrators the parties may appoint in the absence of an agreement to that effect, quere.
§ 1-545. Statement of questions in controversy.—The arbitration agreement must state the question or questions in controversy with sufficient definiteness to present one or more issues or questions upon which an award may be based. (1927, c. 94, s. 3.)

§ 1-546. "Court" defined.—The term "court" when used in this article means a court having jurisdiction of the parties and of the subject matter. (1927, c. 94, s. 2.)

§ 1-547. Cases where court may appoint arbitrator; number of arbitrators.—Upon the application in writing of any party to the arbitration agreement and upon notice to the other parties thereto, the court shall appoint an arbitrator or arbitrators in any of the following cases:

(a) When the arbitration agreement does not prescribe a method for the appointment of arbitrators, in which case the arbitration shall be by three arbitrators.

(b) When the arbitration agreement does prescribe a method for the appointment of arbitrators, and the arbitrators, or any of them, have not been appointed and the time within which they should have been appointed has expired.

(c) When any arbitrator fails or is otherwise unable to act, and his successor has not been appointed in the manner in which he was appointed.

Arbitrators appointed by the court shall have the same power as though their appointment had been made in accordance with the agreement to arbitrate. (1927, c. 94, s. 4.)

As to number of arbitrators generally, see note to sec. 1-544.

Editor's Note.—Prior to this act the appointments must have been made by the parties in pursuance of the agreement if the controversy was not pending. But if it were pending the appointment might have been made by the court with the consent of the parties. See the note under sec. 1-544.

§ 1-548. Notice of Appointment to Arbitrators.—There was no necessity that the arbitrators under the former law be informed of their appointment by a formal or written notice. It was sufficient if they were appointed, met and made the award. Zell v. Johnston, 76 N. C. 302. This probably extended to adjourned meetings, except that to submit the award was ever necessary. Zell v. Johnston, supra; 5 C. J. [§ 288] 123.

§ 1-549. Notice of time and place of hearing.—The arbitrators shall appoint a time and place for the hearing, and notify the parties thereof, and may adjourn the hearing from time to time as may be necessary, and, on application of either party, and for good cause, may postpone the hearing to a time not extending beyond the date fixed for making the award. (1927, c. 94, s. 6.)

Editor's Note.—It may be stated as a general rule that the parties have a right to a notice of the time and place of hearing if the judgment of the arbitrators may have been influenced or enlightened by evidence. Grimes v. Brown, 113 N. C. 154, 18 S. E. 87; Zell v. Johnston, 76 N. C. 302. This probably extended to adjourned meetings, except that no notice of a final meeting to make up and sign the award was ever necessary. Zell v. Johnston, supra; 5 C. J. [§ 288] 123.

§ 1-550. Hearing if party fails to appear.—If any party neglects to appear before the arbitrators after reasonable notice the arbitrators may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them. (1927, c. 94, s. 7.)

§ 1-551. Award within sixty days.—If the time within which the award shall be made is not fixed in the arbitration agreement, the award must be made within sixty days from the time of the appointment of the arbitrators, and an award made after the lapse of sixty days shall have no legal effect unless the parties extend the time in which said award may be made, which extension or ratification shall be in writing. (1927, c. 94, s. 8.)

Former Law.—Under the former law, the time given in which to submit the award was fixed either by the arbitration agreement or by those submitting the question by arbitration, and all parties are present or represented by counsel, the unsuccessful party may not wait until after the award has been made and then set up for the first time his contention that the award was of no effect because not made within sixty days after the submission, the provisions of this section being subject to waiver, and the award as rendered is binding on the parties. Andrews v. Jordan, 205 N. C. 618, 172 S. E. 319.

§ 1-552. Representation before arbitrators.—No one other than a party to said arbitration, or a person regularly employed by such party for other purposes, or a practicing attorney-at-law, shall be permitted by the arbitrator or arbitrators to represent before him or them any party to the arbitration. (1927, c. 94, s. 9.)

§ 1-553. Requirement of attendance of witnesses.—The arbitrator or arbitrators, or a majority of them, may require any person to attend before him or them as a witness, and to bring with him any book or writing or other evidence. The fees for such attendance shall be the same as the fees of witnesses in the Superior Court. Subpoenas shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrator or arbitrators, or a majority of them, and shall be served in the same manner as subpoenas to testify before a court of record in this State; if any person so summoned to testify shall refuse or neglect to obey such subpoenas, upon petition the court may compel the attendance of such person before the said arbitrator or arbitrators, or punish said person for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the courts of this State. (1927, c. 94, s. 10.)

Editor's Note.—At common law the arbitrators could not of themselves compel the attendance of witnesses. And when they heard evidence they were not compelled to administer oaths, though they could do so. (See Pierce v. Perkins, 17 N. C. 350; McCrae v. Robeson, 6 N. C. 127.) The mode of hearing testimony must have been fair and im-
§ 1-554. Depositions. — Depositions may be taken with or without a commission in the same manner and for the same reasons as provided by law for the taking of depositions in suits pending in the courts of record in this State. (1927, c. 94, s. 11.)

Editor's Note. — There was no method of taking depositions in arbitration proceedings at common law.

§ 1-555. Orders for preservation of property. — At any time before final determination of the arbitration the court may upon application of any party to the submission make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award. (1927, c. 94, s. 12.)

§ 1-556. Questions of law submitted to court; form of award.—The arbitrators may, on their own motion, and shall by request of a party to the arbitration,
(a) At any stage of the proceedings submit any question of law arising in the course of the hearing for the opinion of the court, stating the facts upon which the question arises, and such opinion when given shall be final and shall bind the arbitrators in the making of their award.
(b) State their final award in the form of a conclusion of fact for the opinion of the court on the questions of law arising on the hearing. (1927, c. 94, s. 13.)

§ 1-557. Award in writing and signed by arbitrators. — The award of the arbitrators, or a majority of them, shall be drawn up in writing and signed by the arbitrators or a majority of them; the award shall definitely deal with all matters of difference in the submission requiring settlement, but the arbitrators may, in their discretion, first make a partial award which shall be enforceable in the same manner as the final award; upon the making of an award, the arbitrators may, in their discretion, first make a partial award which shall be enforceable in the same manner as the final award; upon the making of an award, the arbitrators may, in their discretion, first make a partial award which shall be enforceable in the same manner as the final award; upon the making of an award, the arbitrators shall deliver a true copy thereof to each of the parties thereto, or their attorneys, without delay. (1927, c. 94, s. 14.)

Prior Law.—Necessity for Writing. — It would seem that under the prior law the award need be in writing only when required by the agreement or come within the general statutes of fraud. See Crisman v. Crissman, 27 N. C. 498, 503; Gaylord v. Gaylord, 48 N. C. 358, 369. See also S. J. C. §§ 260, 114.

Same.—Signature of Arbitrators. — In order for an award to be enforceable in this state, as evidence under the prior law it was necessary that it be signed by the arbitrators. Morrison v. Russell, 32 N. C. 273. The signature by persons other than the arbitrators has been held not to vitiate the award. Where a party has procured an award by a majority of the arbitrators. Carter v. Sams, 20 N. C. 321.

Same.—Dealing with All Matters Submitted. — It has always been necessary for arbitrators to pass on all the points particularly referred to them; Osborne v. Calvart, 86 N. C. 365; otherwise the award was entirely void. But if the submission covered all matters in difference without specifying them, the arbitrators could make an award of only such things as they had noticed, and the award was good. Walker v. Walker, 60 N. C. 255.

"The award on its face ought to show that the arbitrators have acted upon all the matters submitted." Crisp v. Love, 65 N. C. 256.

Same.—Matters Not Submitted. — Matters passed on by the arbitrators not submitted to them rendered the award void in the absence of waiver as by the voluntary introduction of evidence on matters not submitted. Robertson v. Marshall, 155 N. C. 167, 71 S. E. 67. The power of the arbitrators is derived from the submission and the award must be made in strict accordance with it, and must not go beyond what is embraced in it. Cullifer v. Gilliam, 31 N. C. 126; Cutler v. Cutler, 169 N. C. 482, 86 S. E. 301.

However, if the decision of submitted questions involved the decision of other questions, such decision was held to be within the submission if the decision of the latter was not error. Zell v. Johnston, 76 N. C. 302.

Same.—Copy and Delivery of Award. — Under the prior law it was not necessary, in the absence of agreement to that effect, that the award be copied for the use of the parties. Stallings v. Stallings, 100 S. C. 169, 94, s. 13.

The award of the arbitrators, or a majority of them, shall be drawn up in writing and signed. With full understanding as to its meaning a demand for a copy of the award was made at the time of rendition if the parties wanted it. See Crawford v. Orr, 84 N. C. 246; Morrison v. Russell, 32 N. C. 273.

Form of Award.—There has never been any requirement in this state as to the form of the award, this having been left to the choice of the arbitrators unless the agreement specified a form. Ball Thrash Co. v. McCormack, 172 N. C. 657, 90 S. E. 916.

Award Liberally Conformed. — Under the prior law it was held that the court will always intend everything in favor of an award and will give such construction to it that it may be supported if possible. Carter v. Sams, 20 N. C. 321.

§ 1-558. Time for application for confirmation. — At any time within three months after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is vacated, modified, or corrected, as provided in §§ 1-559 and 1-560. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof. (1927, c. 94, s. 15.)

Effect upon Prior Law. — This section provides the method of enforcing an award after it is made.

The practice in this state regarding the enforcement of this award depended upon whether or not the matter submitted to arbitration was pending in court; if it were, and the agreement was made in court, then the arbitrators reported the award to the court when it became a rule of the court if confirmed. If the controversy was pending but the agreement was made out of court, then the award had to be confirmed by the court. If the controversy was not pending when required by the agreement or come within the general statutes of fraud. See Crissman v. Crissman, 27 N. C. 498, 503; Gaylord v. Gaylord, 48 N. C. 358, 369. See also S. J. C. §§ 260, 114.

Same.—Signature of Arbitrators. — In order for an award to be enforceable in court only by a suit upon it as if a verdict of the jury irrespective of whether the cause was pending, and upon application to the court as prescribed, judgment is entered thereon.

§ 1-559. Order vacating award. — In any of the following cases the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration:
(a) Where the award was procured by corruption, fraud or other undue means.
(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
(c) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.
(d) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may, in its dis-
§ 1-560. Order modifying or correcting award.

In any of the following cases the court shall, after notice and hearing make an order modifying or correcting the award, upon the application of any party to the arbitration:

(a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them.

(c) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order must modify and correct the award, so as to effect the intent thereof. (1927, c. 94, s. 17.)

§ 1-561. Notice of motion to vacate, modify or correct award within three months.—Notice of a motion to vacate, modify or correct an award shall be served upon the adverse party, or his attorney, within three months after an award is filed or delivered, as prescribed by law for service of notice of a motion in civil actions. For the purposes of the motion any judge who might make an order to vacate the award, or, as a more direct way to the same end, will (in this state at least) enter judgment according to the award. (1927, c. 94, s. 18.)

§ 1-562. Judgment or decree entered.—Upon the granting of an order, confirming, modifying, correcting or vacating an award, judgment or decree shall be entered in conformity therewith. (1927, c. 94, s. 19.)

See editor's note under § 1-558 as to when judgment may have been entered under prior law.

§ 1-563. Papers to be filed on motion relating to award.—The party moving for an order confirming, modifying, correcting or vacating an award, shall at the time such motion is filed with the clerk, file, unless the same have theretofore been filed, the following papers with the clerk:

(a) The written contract or a verified copy thereof containing the agreement for the submission; the selection or appointment of the arbitrator or arbitrators, and each written extension of the time, if any within which to make the award.

(b) The award.

(c) Every notice, affidavit and other paper used upon an application to confirm, modify, correct or vacate the award, and each order made upon such an application.

The judgment or decree shall be entered (or docketed) as if it were rendered in an action. (1927, c. 94, s. 20.)

§ 1-564. Force and effect of judgment or decree.—The judgment or decree so entered (or docketed) shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to a judgment or decree; and it may be enforced, as if it had been rendered in the court in which it is entered. (1927, c. 94, s. 21.)

Force and Effect under Prior Law.—"Ordinarily, if their award be within their powers and unaffected by fraud, mistake, surprise or irregularity, the judge has no power over it except to make it a rule of court and enforce it according to the course of the court." Lusk v. Clayton, 70 N. C. 185, 188.

Same—Agreement to Become Rule of Court.—"An agreement that an award shall be a rule (or judgment) of Court is merely an agreement to confess judgment according to the award when it shall be made. If such agreement be made by persons having no suit in court respecting the matters referred, a court (in this state at least) will not compel performance of the agreement by attachment because the parties have not put themselves under its jurisdiction, but will leave them to their remedy by action on the agreement. Alexander v. Burton, 21 N. C. 406. If, however, such an agreement be made between the parties to a suit, the court having jurisdiction over the persons and the subject-matter will compel the parties by attachment to perform the agreement by conferring judgment according to the award, or, as a more direct way to the same end, will (in this state at least) enter judgment according to the award." Cunningham v. Howell, 23 N. C. 9; Lusk v. Clayton, 70 N. C. 185, 188.

Effect of Arbitrators Attempting to Decide by Law.—Where it appears that the arbitrators intended to decide according to law, if they clearly mistake the law, the judge may set aside the award, and perhaps in some circumstances give such judgment as they ought in law to have given. Lusk v. Clayton, 70 N. C. 185, 188.

§ 1-565. Appeal.—An appeal may be taken from the final judgment or decree entered. (1927, c. 94, s. 22.)

Editor's Note.—This section was taken from the law of Illinois, which was passed by the General Assembly on February 5, 1927. This section is specific in that it is limited to the final judgment or decree entered by the court, and cannot be taken from the arbitration directly. In other words it may be taken in accordance with sections 1-557 and 1-559. Notwithstanding that in many states an appeal can be had only in cases of fraud or some matter that goes to the very essence of the thing, this section gives the right of appeal in all cases. See "Handbook on the National Commission on Uniform State Laws" and the proceedings of the 35th annual meeting of 1925, pages 63, 701.

Presumption on Appeal.—Where parties to an action in ejectment consent to arbitration on questions of boundaries and an order is made accordingly under this and the following sections, but the record discloses no evidence upon which the arbitrators based their decision, the courts will assume that there was evidence to support their action. Bryson v. Higdon, 222 N. C. 17, 21 S. E. (2d) 836.

§ 1-566. Uniformity of interpretation.—Interpretation of article.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1927, c. 94, s. 23.)

§ 1-567. Citation of article.—This article may be cited as the uniform arbitration act. (1927, c. 94, s. 24.)

Art. 46. Examination of Parties.

§ 1-568. Action for discovery abolished.—No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in
the manner prescribed by this article. (Rev., s. 251; Code, s. 590; C. C. P., s. 592; C. S. 894.)

As to inspection of documents, see sec. 8-89; as to examining a witness, see sec. 1-570; as to reviewing a decision, see sec. 1-571; as to taking a deposition, see sec. 1-572; as to searching the files of the court, see sec. 1-573; as to practicing before the court, see sec. 1-574.

Editor's Note.—In 1851 Parliament passed what was known as Lord Denman's Act, which provided that in all actions or proceedings in any court of record, the court may examine, either at the trial or upon commission, any person in whose behalf any such suit or action or other proceeding may be brought or defended, shall, except as hereinafter provided, be entitled to compel the production of, to inspect and take copies of, the papers of an adversary party should be considered and examined, and to compel the examination of parties to the said suit, action or other proceeding.

At the time this Act was passed, the various courts of law and chancery were still maintained with the established procedure in each. When the courts of equity were abolished in 1875, Lord Chancellor Cottenham 

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Same—Appeal Does Not Lie from Order.—An appeal does not lie (being premature) from an order directing the examination of directors of a corporation under the provisions of this section in an action by a stockholder against the corporation, or from a refusal to discharge such order. Holt v. Southern Finishing, etc., Co., 116 N. C. 480, 21 S. E. 919.

Answers as Evidence—Where a defendant has been examined before the filing of the complaint in the action, but before trial in accordance with this section, his answers to the questions propounded on the examination are competent before a jury, see G. &c. Great Atlantic, etc., Tea Co., 204 N. C. 713, 169 S. E. 618.

Right to Cross-Examine Witnesses Is Available Only at Time of Examination.—Where the examination of witnesses prior to the commencement of the trial, as provided in the preceding sections and the testimony elicited from the witnesses read at the trial, the party against whom such evidence is introduced in the trial, has not been done, the de- cision of the lower court will not be disturbed. Chesson v. Union Guano Co., 180 N. C. 2319, 104 S. E. 653, cited and distinguished. Whitehurst v. Hin- ton, 200 N. C. 32, 33, 15 S. E. 1031; McGraw v. Southern Ry. Co., 209 N. C. 432, 184 S. E. 31.

§ 1-570. Before trial in his own county.—The examination, instead of being had at the trial, as provided in § 1-569, may be had at any time before the trial, at the option of the party claiming it, before a judge or commissioner duly appointed to take depositions, or clerk of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown the judge or court orders otherwise. (Rev., s. 866; Code, s. 581; 1893, c. 114; C. C. P., s. 334; 1899, c. 65, s. 1; C. S. 901.)

See section immediately preceding and annotations thereto.

Examination at Option of Party Claiming.—The examination is treated as a right to be exercised before trial at the option of the party claiming it. Vann v. Lawrence, 111 N. C. 33, 33, 15 S. E. 1031; McGraw v. Southern Ry. Co., 209 N. C. 432, 184 S. E. 31.

Examination May Be Necessary to Secure Order.—To obtain an order for the examination of the defendant to discover necessary information to file his complaint under this section, it is necessary for the plaintiff to show under oath that the information sought is not otherwise available to him, and its necessity in such detail as will enable the court to pass thereon, and when upon an appeal from the refusal of the court to grant such order, the examination of the lower court will not be disturbed. Chesson v. Washington County Bank, 190 N. C. 137, 129 S. E. 403.

The court is not bound to order an examination of a defendant for the purpose of procuring a complaint, unless it is made to appear under oath of the mover that such an order is necessary, that the evidence sought to be elicited is material, and that the application is made in good faith. Baskerville v. Baskerville, 151 N. C. 89, 62 S. E. 92.

Same—Appeal from Order.—An affidavit in support of a motion in the cause to allow the plaintiffs to examine the defendant adversely under the provisions of this section, showing that the defendant had assumed to manage the estate of a deceased person of whom the plaintiffs were the heirs at law under a paper purporting to be a will, but which had been subsequently declared invalid, and that this was the only available way in which certain information necessary in the action could be obtained, is sufficient to sustain the order of examination allowed by the court. Guder v. Robinson Bros. Contractors, 199 N. C. 251, 13 S. E. (2d) 414.

A party cannot appeal from an order to appear before the clerk to be examined under oath concerning the matters set out in the pleadings. Pender v. Mallett, 122 N. C. 165, 30 S. E. 92.

An appeal will not lie directly to the Supreme Court from an order of the superior court judge affirming the action of the judge in ordering the examination of the defendant to discover certain information, alleged to be not otherwise obtainable, and material to the filing of the complaint, when it does not appear that the defendant will be prejudiced or injured thereby. Monroe v. Holder, 192 N. C. 79, 188 S. E. 359.

Defendant Examined to Aid in Framing Complaint.—Under some circumstances the defendant may, be examined before the plead- ings are filed to procure information in framing the compl- int. Pender v. Mallett, 122 N. C. 57, 60, 31 S. E. 351.

The plaintiff in an action for injuries by alleged neglect of the physician in the course of his treatment of the plaintiff, examination of a defendant may be had at any time before the trial, if the examination of the defendant to aid him in filing his complaint, where he alleges that he knew the information sought is not otherwise accessible to the plaintiff, has the precise knowledge necessary for proper proceedings. Smith v. Wooding, 177 N. C. 546, 94 S. E. 404.

Upon application to examine a defendant outside the county, the clerk and approved by the judge of the superior court, to aid in preparing the complaint, such facts as will entitle the movant to the order must be made to appear by affidavit; but after filing a verified complaint out of court, which is not in the plaintifi has a right to the order for examination, and the leave of the court is unnecessary. Ward v. Martin, 172 N. C. 257, 95 S. E. 621.

Examinations Before Commissioner.—The parties may be examined before a commissioner appointed to take the examina- tion, but the commission must issue out of the court in which the cause is pending. Vyne v. Fogle Bros. Co., 176 N. C. 351, 152 S. E. 147.

Same—Before Clerk.—When a party elects to have the ex- amination before the clerk it would seem that the mode of conducting it must be such as respects the same as if had be- fore the judge. Harper v. Pinkston, 112 N. C. 293, 303, 17 S. E. 161.

Under this section the clerk is clothed with precisely the same authority as the judge. Bradley Fertilizer Co. v. Taylor, 112 N. C. 141, 147, 17 S. E. 69.

Same—Not Part of Pleadings.—The examination of the defendant filed in the record should not be taken as part of the pleadings. E. R. H. v. Watt, 176 N. C. 584, 197 S. E. 414.

The examination is not intended by the law to be a part of the pleading, but is in its very nature simply evidence which can be used by the plaintiff in support of his allegations and which may be rebutted by the defendant. Whit- aker v. Jenkins, 138 N. C. 476, 481, 51 S. E. 104.

Sufficiency of Petition for Examination.—A petition for the examination of a defendant is insufficient, in the form of an affidavit, and further fails to allege the facts upon which petitioner bases his allegation that the ex- amination of the respondent is necessary to enable it to pre- pare its defense, is insufficient to support an order for examination. Guder v. Robinson Bros. Contractors, 219 N. C. 251, 13 S. E. (2d) 414.

In order to justify the examination provided for in this section, the petition must state facts which will show the nature of the cause of action, and that the information sought is material and necessary and not other- wise accessible to the applicant. Further, it must be shown that the information sought is material and made in good faith. The court will not permit a party to spread a dragnet for an adversary to gain facts upon which to sue him, or to harass him un- der the guise of a fair examination. Washington v. Safe Bus. 219 N. C. 856, 858, 15 S. E. (2d) 372, and cases cited therein.

Sufficiency of Application.—An application for an order for the examination of an adverse party under this section must contain positive averments, and must not be argumentative, and mere statements that the examination is necessary and material is not sufficient. The application will not be ordered to proceed to an examination of an adverse party when the affidavit shows good faith, neces- sity, and materiality, and where it is alleged that the necessary information cannot be otherwise obtained. The adverse party because all other persons with such information are outside the jurisdiction, the applica- tion is sufficient, and an order based thereon will be upheld. B III v. Murchison National Bank, 196 N. C. 233, 145 S. E. 929.

Notice.—The provision, "unless for good cause shown, the judge or court orders otherwise," applies to the notice which can be given to make the pleadings in the five days prescribed. Vann v. Lawrence, 111 N. C. 33, 33, 15 S. E. 1031.

§ 1-571. Compelling party of adverse testimony for examination before trial.—The party to be examined, as provided in § 1-570, may be compelled to attend in the same manner as a witness who is to be examined conditionally, but he shall not be required to attend in any county other than that of his residence or where he may be served with a summons for his attendance. The examination shall be taken and filed by the judge, clerk or commissioner, as in case of witnesses examined conditionally, and may be read by either party on the trial. (Rev., ss. 866, 867; Code, ss. 581, 582; C. C. P., ss. 334, 335; 1899, c. 65, s. 2; C. S. 902.)

Either Party May Subject Other to Examination.—Either plaintiff or defendant may subject the adversary party or person adversely interested in the action to examination before the judge or clerk, or commissioner appointed by the court for the purpose of eliciting evidence in support of his contention in the controversy. Bradley Fertilizer Co. v. Taylor, 112 N. C. 141, 144, 17 S. E. 69.

Challenging a Witness Against Self-Crimination.—An order to examine a defendant will not be denied on the ground that the answers of the defendant will tend to incriminate him, in an action wherein the complaint has been filed alleging that the defendant committed the acts of which the defendant, while acting as his bookkeeper and accountant, the answers of the defendant not necessarily having to show a criminal intent, etc., and the time for his refusal to answer being within such time he were asked to give the examination. Ward v. Martin, 175 N. C. 287, 95 S. E. 621.

An order to examine the party to an action under this section may not be revoked on motion made on written notice upon a complaint, unless it is shown in the hearing that the answers elected will tend to incriminate him. Ward v. Martin, 175 N. C. 287, 95 S. E. 621.

County of Examination.—An examination of the defendant shall be made in the county in which he resided at the time of the action, if he resided in any county and has been issued and action commenced, and on motion before the clerk of the superior court of the same county or the judge presiding over that court, or holding the courts of the district; and a clerk of another county, where the action has been issued and action commenced, and on motion before the clerk of the superior court of the same county or the judge presiding over that court, or holding the courts of the district; and a clerk of another county, where the action is pending, is without jurisdiction over the proceeding, and his order made therein will be quashed. Vyne v. Pogue Bros. Co., 176 N. C. 355, 97 S. E. 147.

May Be Read by Either Party. — The examination of an adverse party, as this section provides, may be read by either party on the trial, and is, like a deposition, de bene esse, in that it becomes "the evidence of the law." Some speak, it is "caned evidence," kept in cold storage, for it cannot be altered. In both, the testimony is subject to all valid objections taken at the time, and there is stronger reason against the adoption of such a system, for while civil proceedings without any exception, that such testimony can be read "by either party at the trial," in the case of evidence de bene esse the deposition is taken in favor of the party who takes it, and de bene esse is evidence down to the present time, that a party has no right to impeach or disparage his own witness. Helms v. Green, 105 N. C. 251, 262, 11 S. E. 470; Coates v. Wilkes, 120 N. C. 528, 36 S. E. 621.

Same.—Appeal.—An appeal to the Supreme Court will directly lie from the refusal of the superior court judge to vacate an order of the clerk of that court to examine an adverse party, as this section provides, may be read by either party at the trial, in the case of evidence de bene esse the deposition is taken in favor of the party who takes it, and de bene esse is evidence down to the present time, that a party has no right to impeach or disparage his own witness. Helms v. Green, 105 N. C. 251, 262, 11 S. E. 470; Coates v. Wilkes, 120 N. C. 528, 36 S. E. 621.

May Rebut by Either Party. — The examination of an adverse party, as this section provides, may be read by either party on the trial, and is, like a deposition, de bene esse, in that it becomes "the evidence of the law." Some speak, it is "caned evidence," kept in cold storage, for it cannot be altered. In both, the testimony is subject to all valid objections taken at the time, and there is stronger reason against the adoption of such a system, for while civil proceedings without any exception, that such testimony can be read "by either party at the trial," in the case of evidence de bene esse the deposition is taken in favor of the party who takes it, and de bene esse is evidence down to the present time, that a party has no right to impeach or disparage his own witness. Helms v. Green, 105 N. C. 251, 262, 11 S. E. 470; Coates v. Wilkes, 120 N. C. 528, 36 S. E. 621.

May Rebut Deposition on Trial. — A plaintiff can rebut the defendant's deposition on trial by adverse testimony. Hargis v. Jocelyn, 103 N. C. 10, 13, 12 S. E. 1029.

May Contradict but Can Not Impeach. — A party who puts his adversary on the stand gives him an opportunity to testify on his own behalf on cross-examination, and waive his right of impeaching him by attacking his credibility, but retains the privilege of contradicting him by testimony of other witnesses inconsistent with his. Helms v. Green, 105 N. C. 251, 262, 11 S. E. 470; Coates v. Wilkes, 120 N. C. 528, 36 S. E. 621.


§ 1-574. Irresponsiveness of testimony may be met by party's own testimony.—A party examined by an adverse party, as provided in this article, may be examined in his own behalf, subject to the same rules of examination as other witnesses. But if he testifies to any new matter, not respons-
sive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto or to discharge himself when his answers would charge himself, the adverse party may offer himself and must be received as a witness in his own behalf in respect to the new matter, subject to the same rules of examination as other witnesses. (Rev., s. 870; Code, ss. 583, 585; C. C. P., ss. 538, 538; C. S. 905.)

§ 1-575. Real party in interest examined.—A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he was named as a party. (Rev., s. 871; Code, s. 586; C. C. P., s. 339; C. S. 906.)

As to examination of officers and agents of a corporation, see sec. 1-569.

The testimony sought must be that of a person immediately interested in the action. Strudwick v. Broadnax, 83 N. C. 401, 403.

§ 1-576. Examination of coplaintiff or codefendant.—A party may be examined on behalf of his coplaintiff or codefendant as to any matter in which he is not jointly interested or liable with such coplaintiff or codefendant, and as to which a separate and not joint verdict or judgment can be rendered. He may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken cannot be used in behalf of the party examined. When one of several plaintiffs or defendants who are jointly interested or liable in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself, and must be received, as a witness to the same cause of action or defense. (Rev., s. 872; Code, s. 587; C. C. P., s. 340; C. S. 907.)

As to production of writings, see sec. 8-89 et seq.

A party may be compelled to attend court, and be examined in behalf of a coplaintiff, or a codefendant, "as to any matter in which he is not jointly interested or liable with such coplaintiff or codefendant," etc.; and in such a case he is entitled to pay as a witness. Penny v. Brink, 73 N. C. 68.

Where one of defendants sued as joint tort-feasors alleged, among other defenses, that plaintiff's injuries resulted solely from the negligence of its codefendant, such codefendant is not entitled to an examination of respondent defendant, since, even though the defenses of defendants are antagonistic in regard to this defense, they are jointly interested in the defense of the action and a joint verdict and judgment against both is possible. Gudger v. Robinson Bros. Contractors, 219 N. C. 251, 13 S. E. (2d) 414.

Art. 47. Motions and Orders.

§ 1-577. Definition of order.—Every direction of a court or judge, made or entered in writing, and not included in a judgment, is an order. (Rev., s. 873; Code, s. 594; C. C. P., ss. 344, 345; C. S. 908.)

An appeal from an order continuing in force a former order made in the cause will be dismissed. Childs v. Martin, 68 N. C. 307.

§ 1-578. Motions; when and where made.—An application for an order is a motion. Motions may be made to a clerk of a superior court, or to a judge out of court, except for a new trial on the merits. Motions must be made within the district in which the action is triable. A motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, have preference over all other motions. (Rev., s. 874; Code, s. 594; C. C. P., ss. 344, 345; C. S. 909.)

Cross Reference.—As to motions in civil actions heard at law see art. 47, and §§ 7-77 to 7-81.

Editor's Note. — A motion in general relates to some incidental question collateral to the main object of the action. A motion is not a remedy in the sense of the Code, but is acting solely in a representative capacity for the original party. It is to furnish relief in the progress of the action or proceeding in which it is made, and generally relates to matters of procedure, although it may be used to secure the right in consequence of the determination of the principal remedy.

Form of Motion.—A motion must be in writing. Cotton Oil Co. v. Grimes, 183 N. C. 97, 112 S. E. 598.

On appeal to the Supreme Court a statement of record that the defendant filed a written motion to dismiss, negatives the exception that it was an oral motion, not in conformity with the requirements of the statute. Cotton Oil Co. v. Grimes, 183 N. C. 97, 112 S. E. 598.

While it is the better form for one making a written motion, as an attorney at law and in fact, to first state the names of those he represents and then that he is acting for them in the capacity of attorney, the error in stating that he appears as attorney at law and in fact for certain named parties, etc., is merely informal and harmless, and therefore could not be a demurrer to a demurrer, it clearly appearing that the attorney is not claiming any interest in the lands for himself, but is acting solely in a representative capacity for the persons named. Hartfield v. Bryan, 177 N. C. 166, 98 S. E. 139.

Where Motions Must Be Made. — Except by consent or in those cases specially permitted by statute the judge may make no orders in a cause outside of the county in which the action is pending. Parker v. Alexander, 115 N. C. 504, 16 S. E. 848; McNell v. Hodges, 99 N. C. 248, 6 S. E. 127; Bynum v. Powe, 97 N. C. 374, 2 S. E. 170; Gatewood v. Leak, 99 N. C. 367, 6 S. E. 779; Faison v. McIlwaine, 72 N. C. 312, 313.

An application is admissible as a mode of obtaining relief against an execution for irregularity the proper relief is, as formerly, by motion to set it aside. Foard v. Alexander, 64 N. C. 69.

A proceeding by a motion supported by affidavits after a notice to the opposite party, to have satisfaction of a judgment entered of record upon the ground that it has been paid since its rendition, is the appropriate remedy in such a case, but is neither a special proceeding nor a civil action, and only a question in a cause still pending. Foreman v. Bibb, 65 N. C. 128.

Power of Judge.—After leaving the bench for a term of the superior court to expire by limitation, the judge cannot hear motions or other matters outside of the courtroom except by consent, unless, they are such as are cognizable at chambers. May v. Insurance Co., 172 N. C. 795, 90 S. E. 899.

An order to stay proceedings, made without notice by a judge out of court for a longer time than twenty days, is irregular, and a demurrer to the complaint in the action in which such order was made may be made as a motion to vacate. Foard v. Alexander, 64 N. C. 69.

Same.—To Continue Motions, etc.—The judge below has no power to continue motions for judgments or to set aside verdicts under a written motion entered of record, without the consent of the parties litigant. Oak Hall Clothing Co. v. Bagley, 147 N. C. 37, 60 S. E. 648.

Such consent should certainly appear in a writing signed by all parties, or their counsel, in which the judge should recite the fact of consent in the order or judgment he directs to be entered of record—which is the better way; or such consent should appear by fair implication from the record. Godwin v. Morda, 107 N. C. 354, 355, 5 S. E. 791.


When Refused by Judge without Jurisdiction. — The refusal of a judge to grant a motion for want of jurisdiction is no bar to an entertainment of the motion by a judge.

Motions Which May Be Renewed. — Motions made in the progress of a cause to facilitate the trial, but which involve no substantial right, and the decision of which is not subject to an appeal to the Supreme Court, may be renewed as subsequent events require, and are not obstructed by the former action of the court. Sanderson v. Daily, 83 N. C. 66, 69; Henry v. Hildard, 120 N. C. 479, 487, 27 S. E. 130.

Res Adjudicata.—If a decision affects a substantial right, and may be reviewed and corrected on appeal, and the complaining party acquiesces, the doctrine of res adjudicata applies. Sanderson v. Daily, 83 N. C. 68, 69.

§ 1-579. Affidavit for or against, compelled.—When a party intends to make or oppose a motion in a court of record, and it is necessary for him to have the affidavit of any person who has refused to come into court, the court may, by order, appoint a referee to take the affidavit or deposition of such person. The person may be subpoenaed and compelled to attend and make an affidavit before such referee, as before a referee to whom an issue is referred for trial. (Rev., s. 875; Code, s. 594; C. C. P., ss. 344, 345; C. S. 910.)

The matter of reference, under the section, rests in the discretion of the court. In Re Brown, 168 N. C. 417, 424, 84 S. E. 690.

§ 1-580. Motions determined in ten days. — When a motion is made in a cause or proceeding in any of the courts to obtain an injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, or to vacate or modify the same, it is the duty of the judge before whom the motion is made to render his decision within ten days after the day on which the motion was submitted to him for decision. (Rev., s. 876; Code, s. 594; C. C. P., ss. 344, 345; C. S. 911.)

§ 1-581. Notice of motion. — When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time. (Rev., s. 877; Code, s. 595; C. C. P., ss. 346; C. S. 912.)

As to notice in supplemental proceedings, see sec. 1-352 and annotations thereto.

Editor's Note. — By section 346 of the Code, only eight days notice was required. However, this was changed by section 395 of the Code of 1893 to ten days, which was unchanged in the Rev. Code, section 877, and was brought forward in the form of this section. See Branch v. Walker, 92 N. C. 87, 89.

Compliance with Section Required.—Notice of a motion to set aside a judgment must ordinarily be given as required by this section, and the pleadings in an action to reform a deed of trust upon allegations of mutual mistake are insufficient as notice of a motion to set aside the decree for reform or settlement. But the pleadings in the suit for reformation containing no allegations of irregularities in the foreclosure or of surprise. Virginia-Carolina Joint Stock Bank v. Alexander, 201 N. C. 453, 3594; C. C. P. ss. 344, 345; C. S. 913.)

§ 1-582. Orders without notice, vacated. — An order made out of court, without notice to the adverse party, may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made. (Rev., s. 514; Code, s. 546; C. C. P., ss. 297; C. S. 913.)

§ 1-583. Orders without notice, vacated. — An order made out of court, without notice to the adverse party, may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made. (Rev., s. 514; Code, s. 546; C. C. P., ss. 346; C. S. 912.)

Music of Change of Venue before Clerk.—The power to entertain a demand of the defendant to remove an action to the proper venue, now conferred upon the clerk, subject to the right of appeal to the judge, when the motion shall be heard and passed on de novo. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

Where a defendant has made a motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is determined and passed upon. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

§ 1-584. Orders by clerk on motion to remove; right of appeal; notice. — All motions to remove as a matter of right shall be made before the clerk, who is authorized to make all necessary orders, and an appeal shall lie from such order upon such motion to the judge at chambers, or at the next term, who shall hear and pass upon such motion de novo. But no such motion shall be heard until ten days notice thereof shall have been given to the opposing party or his
§ 1-584. CH. 1. CIVIL PROCEDURE—INCIDENTAL

§ 1-585. Form and service.—All notices must be in writing, and notices and other papers may be served on the party or his attorney personally, where not otherwise provided in this chapter.

Art. 48. Notices.

§ 1-585. Form and service.—All notices must be in writing, and notices and other papers may be served on the party or his attorney personally, where not otherwise provided in this chapter.
Same.—Determined by clerk.—The fact that personal notice was given to the defendant is determined affirmatively by the clerk in making the order. Surratt v. Crawford, 87 N. C. 372, 375.

Service Must Be by Officer.—Service of all papers, except subpoenas, and in cases where service by publication is authorized, must be by an officer, or acceptance of service. Smith v. Smith, 119 N. C. 314, 315, 25 S. E. 878.

Same.—Case on Appeal.—A case on appeal, unless service is accepted, can be served only by an officer. Forte v. Boone, 114 N. C. 176, 177, 19 S. E. 632; State v. Johnson, 109 N. C. 853, 13 S. E. 843.

Same.—Appeal from Justice of the Peace.—The notice of appeal is a notice of the justice of the peace, when the notice is not given on the trial, must be served by an officer. Clark v. Manufacturing Co., 110 N. C. 111, 14 S. E. 518.

Qualifications of Officer Serving.—Service of notices must be made by an officer, authorized by law, and by virtue of his office to serve process of the court having jurisdiction of the action in which the notice is given. Cullen v. Absher, 119 N. C. 441, 26 S. E. 33.

Same.—Town Constable.—A town constable cannot serve a notice to take a deposition in an action pending in the superior court. Cullen v. Absher, 119 N. C. 441, 26 S. E. 33.

Same.—Chief of Police or Marshal.—A town charter provides for the appointment of a chief of police or marshal and declares that, in the execution of process, he shall have the same powers and authority as the sheriff, and constitutes the service by such officer of a summons directed to "the sheriff of W. county or town constable of W. town" is valid. Lowe v. Harris, 121 N. C. 287, 28 S. E. 535.


§ 1-586. Service upon attorney.—Notice upon an attorney may be served during his absence from his office, by leaving a copy of the paper with his clerk, or a person having charge of the office; or, when there is no person in the office, by leaving it, between the hours of six a. m. and nine p. m., in a conspicuous place in the office; or, if it is not open so as to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion. (Rev., s. 880; Code, s. 597; C. C. P., ss. 349, 353; C. S. 918.)

Notice to Attorney is Notice to Client.—In Ladd v. Tesague, 126 N. C. 544, 548, 38 S. E. 45, quoting from United States v. Teague, 106 U. S. 36, 27 L. Ed. 402, it was said:

"No attorney or solicitor can withdraw his name after he has once entered upon the record without the leave of the court. And while his name continues there, the adverse party has the right to treat him as the authorized attorney of the party on whose behalf he has acted, and the service of notice on him is as valid as if served on the party himself." See also Branch v. Walker, 92 N. C. 87; Walton v. Sugg, 61 N. C. 53.

Notice Left with Wife.—Notice may be duly served by leaving a copy thereof at the residence of the person sought to be served, with his wife, she being of suitable age and discretion. (Rev., s. 881; Code, s. 597; C. C. P., ss. 349, 353; C. S. 916.)

Notice Left with Wife.—Notice may be duly served by leaving a copy thereof at the residence of the person sought to be served, with his wife, she being of suitable age and discretion. (Rev., s. 881; Code, s. 597; C. C. P., ss. 349, 353; C. S. 916.)

Compliance with Section Sufficient.—Service made under the section is sufficient. Clark v. Manufacturing Co., 110 N. C. 111, 14 S. E. 518, and to the action, it is the duty of the party to make known to the officer at all times, until the service shall be completely ended. Turner v. Holdens, 109 N. C. 182, 183, 13 S. E. 731.

Compliance with Section Sufficient.—Service made under the section is sufficient. Clark v. Manufacturing Co., 110 N. C. 111, 14 S. E. 518, and to the action, it is the duty of the party to make known to the officer at all times, until the service shall be completely ended. Turner v. Holdens, 109 N. C. 182, 183, 13 S. E. 731.

§ 1-587. Service upon a party.—Notice upon a party may be served by leaving a copy of the paper at his residence, between the hours of six a. m. and nine p. m., with some person of suitable age and discretion. (Rev., s. 881; Code, s. 597; C. C. P., ss. 349, 353; C. S. 916.)

Notice Left with Wife.—Notice may be duly served by leaving a copy thereof at the residence of the person sought to be served, with his wife, she being of suitable age and discretion. (Rev., s. 881; Code, s. 597; C. C. P., ss. 349, 353; C. S. 916.)

As to issuance by the clerk, see sec. 8-59.

A subpoena may be served by any person not a party to the action, and proved by his oath. State v. Johnson, 109 N. C. 853, 13 S. E. 843; Smith v. Smith, 119 N. C. 314, 316, 25 S. E. 878.

§ 1-588. Service by publication.—Notice upon a person who cannot be found after due diligence, or who is not a resident of this state, may be served by its publication once for a week in four successive weeks in a newspaper published in the county from which the notice is issued; and if no newspaper is published therein, then in some newspaper published within the judicial district; and the proof of service is the same as is required by law in the case of service of summons by publication. (Rev., s. 882; Code, s. 597; C. C. P., ss. 349, 353; C. S. 917.)

Cross Reference.—As to service by publication generally, see secs. 1-98 to -99 and annotations thereto; as to when service by publication is complete, see sec. 1-100 and annotations thereto.

§ 1-589. Service by telephone or registered mail on witnesses and jurors.—Sheriffs, constables and other officers charged with service of such process may serve subpoenas for witnesses and summonses for jurors by telephone or by registered mail, and such service shall be valid and binding on the person served. When such process is served by telephone the return of the officer serving it shall state it is served by telephone. When served by registered mail, such process shall be mailed and a written receipt demanded and such receipt shall be filed with the return and be a necessary part thereof. (1915, c. 49; 1925, c. 98; C. S. 918.)

Editor's Note.—The last sentence of this section providing for service by registered mail is new with the Laws of 1925, c. 98. The words "or by registered mail," immediately following the word telephone, in the first sentence, are to new with the Act.

If served by registered mail a written receipt must be demanded and filed with the return, such receipt being a necessary part thereof. While the meaning of this provision is by no means clear, it would seem to refer to a written receipt given for the registered letter by the postmaster. This seems a more logical interpretation of the legislative meaning than to say that it refers to a written receipt signed by the addressee, showing that he had received the letter. See 3 C. N. Law Rev. 129.

§ 1-590. Subpoena, service and signature. — Service of a subpoena for witnesses may be made by a sheriff, coroner or constable, and proved by the return of such officer, or the service may be made by any person not a party to the action, and proved by his oath. A subpoena for witnesses need not be signed by the clerk of the court, and is sufficient if subscribed by the party or by his attorney. (Rev., s. 884; Code, s. 597; C. C. P., ss. 349, 353; C. S. 919.)

As to issuance by the clerk, see sec. 8-59.

A subpoena may be served by any person not a party to the action, and proved by his oath. State v. Johnson, 109 N. C. 853, 13 S. E. 843; Smith v. Smith, 119 N. C. 314, 316, 25 S. E. 878.

§ 1-591. Application of this article.—This article does not apply to the service of a summons, or other process (except summonses for jurors, as provided in § 1-589), or of any paper to bring a party into contempt. (Rev., s. 885; Code, s. 597; C. C. P., ss. 349, 353; C. S. 920.)

Article Applies Where Papers Not Excepted.—It seems clear that the article applies to all papers except those excepted by this section. State v. Price, 110 N. C. 599, 601, 13 S. E. 116.

The exceptions provided for in this section do not include the service of cases and counter-cases on appeal. State v. Price, 110 N. C. 599, 601, 13 S. E. 116.
§ 1-592. Officer's return evidence of service.—When a notice issues to the sheriff, his return thereon that the same has been executed is sufficient evidence of its service. (Rev., ss. 886, 1392; Code, ss. 940; R. C., c. 31, s. 123; 1700, c. 537; C. S. 921.)

§ 1-593. How computed.—The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Sunday or a legal holiday, it must be excluded. (Rev., s. 887; Code, s. 596; C. C. P., s. 348; C. S. 922.)

Uniform Rule.—The cases all go to establish one uniform rule, whether the question arises upon the practice of the courts, or the construction of a statute, and the rule is not to be departed from by courts of common computation. Cook v. Moore, 95 N. C. 1, 3; Burges v. Burgess, 117 N. C. 447, 23 S. E. 336; Walker v. Scott, 104 N. C. 481, 10 S. E. 322. Also, see Fitzpatrick v. Moore, 80 N. C. 749, 6 S. E. 20, in the latter part of the case, where the court says: "As to the 30th of August, the day before the fall of the last day is to be inserted in the time of the day, when the 30th day is the last day; and the 30th of August is the day before the 1st September; and the same is to be inserted in the time of the day, when the 30th day is the last day: and the 30th of August is the day before the 1st September.

Actions on Judgments.—Where a judgment was rendered on October 20, 1873, and an action was brought on the judgment on October 20, 1883, it was held that the statute barring actions on judgments in ten years was a defense. Cook v. Moore, 95 N. C. 1, cited in note in 49 L. R. A. 214.

Time for Filing Appeal.—In calculating the five days after the end of the term within which the case on appeal must be filed, the first day on which the court adjourned, is to be excluded. Turriente v. Richmond, etc., R. Co., 92 N. C. 642.

Petition for Rehearing.—Under the rule requiring petitions to rehear to be filed within twenty days after the commencement of the succeeding term, the first day of the period allowed to be reckoned from the 8th February, 1879, to 7th February, 1880, when the plaintiff in the case of Davis v. Atlantic, etc., R. Co., 145 N. C. 207, 59 S. E. 53, moved for rehearing, must be excluded from the count, and the last day is to be counted unless Sunday, and counted all other Sundays in the twenty days. Davis v. Atlantic etc., R. Co., 145 N. C. 120, 59 S. E. 53.

Same.—Transportation of Freight.—Though freight trains are prohibited from running on Sunday within certain hours, Sundays are not excluded from the reasonable time in which railroads are given to transport freight, except when Sunday is the last day in computing the time. Davis v. Atlantic, etc., R. Co., 145 N. C. 207, 59 S. E. 53.
include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication. (Rev. s. 888; Code, s. 602; C. C. P., s. 359; C. S. 923.)

Cross References.—As to manner of publication generally, see sec. 1-99; as to service and content of notice of attachment, see sec. 1-448; as to publication of warrant of attachment obtained from a justice of the peace, see sec. 1-452.

Art. 50. General Provisions as to Legal Advertising.

§ 1-595. Advertisement of public sales.—When a statute or written instrument stipulates that an advertisement of a sale shall be made for any certain number of weeks, a publication once a week for the number of weeks so indicated is a sufficient compliance with the requirement, unless contrary provision is expressly made by the terms of the instrument. (1909, cc. 794, 875; C. S. 924.)

Cross References.—As to manner of publication generally, see sec. 1-99; as to advertisement and newspaper publication, see sec. 1-325; as to advertisement of resale, see sec. 1-326; as to sale hours, see sec. 1-331; as to postponement, see sec. 1-334; as to personal property, notice and place of sale, see sec. 45-23.

Notice of Sale under Mortgage. — Powers of sale in a mortgage are contractual, and it is essential to the validity of a sale under a power to comply fully with the requirements of giving notice of the sale. Jenkins v. Griffin, 175 N. C. 184, 186, 95 S. E. 166.

Where a mortgage of lands provides that notice of the sale under the power thereof given in the conveyance shall be published in a newspaper, etc., “for a time not less than thirty days prior to the date of the sale,” by the agreement the advertisement should be inserted in the newspaper once a week for four consecutive weeks, and not consecutively for thirty days, and an allowance made in the superior court for an advertisement for thirty consecutive days, and an allowance made in the superior court for an advertisement for thirty consecutive days was erroneous. Saving Bank, etc., Co. v. Leach, 169 N. C. 706, 86 S. E. 701.

Burden of Proof. — However, “the presumption of law is in favor of the regularity in the execution of the power of sale; and if there was any failure to advertise properly, the burden was on defendant (here on plaintiffs) to show it.” Jenkins v. Griffin, 175 N. C. 184, 186, 95 S. E. 166.

§ 1-596. Charges for legal advertising. — The publication of all advertising required by law to be made in newspapers in this state shall be paid for at not to exceed the local commercial rate of the newspaper selected. Any public or municipal officer of board created by or existing under the laws of this state that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates. Nothing herein shall apply to contracts or agreements for legal advertising in this state existing at the time this section takes effect. This section shall not apply to any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a misdemeanor. (1919, c. 45, ss. 1, 2; C. S. 2588.)

§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.—Whenever a newspaper publishes any legal notice or advertisement of any kind or description shall be authorized or required by any of the laws of the state of North Carolina, hereafter or hereafter enacted, or by any order or judgment of any court of this state to be published or advertised in a newspaper, such publication, advertisement or notice shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers which newspaper at the time of such publication, advertisement or notice, shall have been admitted to the United States mails as second class matter in the county or political subdivision where such publication, advertisement or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least twenty-five of the twenty-six consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice; provided that in the event that a newspaper otherwise meeting the qualifications and having the characteristics prescribed by §§ 1-597 to 1-599, should fail for a period not exceeding four weeks in any calendar year to publish one or more of its issues such newspaper shall nevertheless be deemed to have complied with the requirements of regularity and continuity of publication prescribed herein. Provided further, that where any city or town is located in two or more adjoining counties, any newspaper published in such city or town shall, for the purposes of §§ 1-597 to 1-599, be deemed to be admitted to the mails, issued and published in all such counties in which such town or city of publication is located, and every publication, advertisement or notice required to be published in any such city or town or in any of the counties where such city or town is located shall be valid if published in a newspaper published, issued and admitted to the mails anywhere within any such city or town, regardless of whether the newspaper’s plant or the post office where the newspaper is admitted to the mails is in such county or not, if the newspaper otherwise meets the qualifications and requirements of §§ 1-597 to 1-599. This provision shall be retroactive to May first, one thousand nine hundred and forty, and all publications, advertisements and notices published in accordance with this provision since May first, one thousand nine hundred and forty, are hereby validated. (1939, c. 170, s. 1; 1941, c. 96.)

§ 1-598. Annual statements filed with clerk; violation a misdemeanor.—Every newspaper in this state which shall publish any such legal notice or other legal advertisement, as mentioned in § 1-597, shall, in each calendar year, file with the clerk of the superior court of the county in which it is published a sworn statement that such newspaper is a newspaper meeting the qualifications of §§ 1-597 to 1-599. This provision shall be retroactive to May first, one thousand nine hundred and forty, and all publications, advertisements and notices published in accordance with this provision since May first, one thousand nine hundred and forty, are hereby validated. (1939, c. 170, s. 1; 1941, c. 96.)
time of such statement, shall be guilty of a mis-
demeanor. (1939, c. 170, s. 1½.)

§ 1-599. Application of two preceding sections.
—The provisions of §§ 1-597 to 1-599 shall not
apply in counties wherein only one newspaper
is published, although it may not be a newspaper

Chapter 2. Clerk of Superior Court.

Art. 1. The Office.

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

performed by the clerks of the superior court as
clerks of said court. (Rev., s. 889; Code, s. 102;
C. S. 925.)

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

Editor’s Note.—The office of probate judge was created

[ 401 ]
covered the proof of wills, deeds, and official bonds; the ap-
judge were extensive and his jurisdiction embraced many
Although the office has now been abolished by the Consti-
guardians, executors, and administrators; he could bind
natics; the granting and revocation of letters testamentary
by the constitution of 1868. 'The powers of the probate
of the superior court or as and for the court, but as an in-
matters, to the clerk of the superior court.
Jurisdiction.—Under this section the duties of the pro-
ate judge devolve upon him. In addition to these, and
and the other matters that make up his jurisdiction, he

Cobby 95; Ne Ce 5:

The clerk acts not as the servant or ministerial officer
superior court for each county shall be elected by
superior court shall hold office for four years. (Rev.,

Although the clerks of the Superior Courts have no eq-

The clerk's bond embraces receiverships and incidental lia-

Liability on the Bond. — The stocky bond of a clerk of the

Cumulative Security. — The clerk's bonds are cumula-

Local Modification.—Camden, Hyde, Tyrrell: 1939, c 30;

Scope of Bond. — This section requires only one bond to be

Cumulative Security.—See also §153-4.

Appointee.—When there is a vacancy and the judge

Cross Reference.—See also §153-4.

Appointment.—When there is a vacancy and the judge

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by the constitution of 1868. The powers of the probate judge were extensive and his jurisdiction embraced many of the vital transactions of the business community. It covered the proof of wills, deeds, and official bonds; the appointment and revocation of guardians of infants and less than ten thousand dollars, and not more than fifty thousand dollars. (Rev., s. 295; Code, s. 72; C. C. P., s. 137; 1889, c. 7; 1891, c. 385; 1895, cc. 270, 271; 1899, c. 54, s. 52; 1901, c. 32; 1903, c. 747; 1931, c. 170; 1943, c. 713; C. S. 927.)

Local Modification.—Camden, Hyde, Tyrrell: 1939, c 30;

402
§ 2-4. Clerk’s bond; approval, acknowledgments and custody.—The approval of said bond by the board of commissioners, or a majority of them, shall be recorded by the clerk. The said bond shall be acknowledged by the parties there- to, or proved by a subscribing witness, before the clerk of said board of commissioners, or their pre- sidng officer, registered in the register’s office in a separate book to be kept by him for the registration of official bonds; and the original, with the approval thereof endorsed, deposited with the register for safe keeping. The like remedies shall be had upon said bond as are or may be given by law on official bonds. (Rev. s. 296; Code, s. 73; C. C. P., s. 138; C. S. 928.)


Proof—Evidence.—Such a bond may be proved, as at common law, without being subjected to the strict rules of evidence, and if there is a subscribing witness it may be proved by other witnesses, as if there was no subscribing witness. Battle v. Baird, 118 N. C. 854, 24 S. E. 668.


Same—Presumption.—The clerk of the superior court being required to give a bond for the discharge of the duties of his office, etc., it will be presumed, in the trial of an action on such bond, that he did so, and any such bond found in the keeping of the proper custodian will be presumed to have been properly given and accepted as such. Battle v. Baird, 118 N. C. 854, 24 S. E. 668.

§ 2-5. Oath of office.—The clerks of the superior court, before entering on the duties of their office, shall take and subscribe before some officer authorized by law to administer an oath, the oaths prescribed by law, and file such oaths with the register of deeds for the county. (Rev., 891; Code, s. 74; C. C. P., s. 130; C. S. 930.)

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

§ 2-6. Vacancy; judge of district fills.—1. Otherwise than by expiration. In case the office of clerk of a superior court for a county becomes vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of the superior court for the county shall appoint to fill the vacancy until an election can be regularly held.

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

3. Resignations. Any clerk of the superior court may resign his office to the judge of the superior court residing in the district in which is situated the county of which he is clerk, and said judge shall fill the vacancy. (Rev., ss. 892, 893, 895; Code, ss. 76, 78; C. C. P., s. 140; Const., Art. 4, s. 39; C. S. 931.)

Cross Reference.—As to failure to give satisfactory bond, see § 109-8. As to bond of successor, see § 109-9. As to willfully failing to discharge duties as ground for removal, see § 14-220.

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

Direct appointees.—If there are conflicting claim- ants for a vacant office a court must act upon the prima facie evidence of right and admit the one possessing it, leaving the other to pursue the proper legal remedy for the recovery of possession. Clark v. Carpenter, 81 N. C. 309.

§ 2-7. Removal for cause.—Upon the conviction of any clerk of the superior court of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he
shall be disqualified from holding or enjoying any office of honor, trust or profit under this state. (Rev., s. 894; Code, s. 123; 1868-9, c. 201, s. 33; C. S. 932.)

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

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

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

Editor's Note.—Prior to the amendment of 1935 the section required an inspection at every regular term and also provided the penalty in case the solicitor neglected or failed to perform his duty.

Art. 2. Assistant Clerks.

§ 2-10. Appointment; oath; powers and jurisdiction; responsibility of clerks.—Each clerk of the superior court, by and with the written consent and approval of the superior court judge resident in his district, may appoint an assistant clerk of the superior court, who before entering upon his duties shall take and subscribe the oath prescribed for clerks: Provided, that no more than one such assistant clerk shall hold office in any county at one time. Upon compliance with the provisions of this article such assistant clerk shall be as fully authorized and empowered to perform all the duties and functions of the office of clerk of the superior court as the clerk himself, and all the acts, orders, and judgments of such assistant clerk shall be entitled to the same faith and credit as those of such clerk. Such assistant clerks shall be subject in all respects to all laws which apply to the clerks. The several clerks of the superior court shall be held responsible for the acts of their assistant clerks, and the official bonds of such clerks as now provided by law shall be written to and shall cover the acts of their assistant clerks. (1921, c. 32, s. 1; C. S. 934(a).)

Local Modification.—Forsth: 1937, c. 331; Guilford: 1937, c. 331; 1941, c. 91; Hanover: 1943, c. 514.

Funds of minors paid into the hands of the assistant clerk of the superior court, appointed guardian, were not paid into court, and the surety on the guardianship bond may not successfully contend that the clerk's bond was liable therefor. State v. Royal Indemnity Co., 203 N. C. 420, 166 S. E. 2d. While the clerk of the superior court is a constitutional officer, the duties of clerks are prescribed by statute, and the legislature may prescribe that such duties may be performed by assistant clerks as in this and the following sections, and an attack upon the appointment of a guardian by an assistant clerk on the ground that the statute delegating the powers of clerks to assistant clerks is unconstitutional is untenable. In re Barker, 210 N. C. 417, 188 S. E. 305.

§ 2-11. Certificate of appointment; confirmation; revocation of appointment; compensation.—Any clerk of the superior court desiring to appoint such an assistant clerk shall present a formal written certificate of such appointment to the superior court judge resident in his district, and such judge, if he concurs in and approves such appointment, shall in writing enter his consent and approval upon such certificate and confirm such appointment. Said certificate of appointment, and approval of the judge, together with the oath subscribed by the appointee, shall thereupon be entered in full upon the minute docket of the court, and shall be recorded and cross-indexed in the office of the register of deeds for such county. The appointment of any such assistant clerk may be revoked at any time by the clerk who appointed him or by the superior court judge resident in the district, by the entry of the word "revoked" and the date thereof, with the signature of such clerk or judge, upon the margin of the records of such appointment in the offices of the clerk of the superior court and the register of deeds; and all such appointments shall expire by limitation when the clerk making same ceases to hold office. Nothing in this article shall increase the fees or compensation now allowed by law to clerks or deputy clerks of the superior court of the several counties of the state. (1921, c. 35, s. 2; C. S. 934(b).)

§ 2-12. Clerks not relieved from duties; deputies.—This article shall not in anywise excuse or relieve the clerk of the superior court from giving to the performance of his duties the same time, care, and attention as is now required of such clerks by law, nor shall it change or amend the present laws with reference to deputy clerks of the superior court: Provided, that one person may be appointed both as assistant clerk and as deputy. (1921, c. 32, s. 3; C. S. 934(c).)

Art. 3. Deputies.

§ 2-13. Appointment.—Clerks of the superior court may appoint deputies, who shall take and subscribe the oath prescribed for clerks. (Rev., s. 898; Code, s. 145; R. C., c. 19, s. 15; 1777, c. 115, s. 86; C. S. 935.)

Purpose.—In Miller v. Miller, 89 N. C. 402, 404, it was said: "The purpose of creating the office of 'deputy clerk' was to help the dispatch of public business, and to provide for the same time when the clerk might be necessarily absent from his office, or unable for any cause to give personal attention to his official duties."

Section Provides Only Method of Appointment.—Deputy clerks can be appointed only in the manner prescribed by this section. Sheid v. Lane, 113 N. C. 148. And are required to take the same oaths before entering upon their duties which are required of their principals. Jackson v. Buchanan, 89 N. C. 75, 76.

The certificate of probate of a deed by a deputy clerk, expressly authorized by statute to acknowledgment, etc., the deed having being duly registered, was prima facie evidence of his appointment and qualification. Piland v. Taylor, 113 N. C. 2, 18 S. E. 70.

Scope of Authority.—Deputy clerks may do all the acts which the clerk may do, except such as are judicial in their character, or such as a statute may require specially to be done by the clerk himself. Miller v. Miller, 89 N. C. 402, 404; Piland v. Taylor, 113 N. C. 3, 185 S. E. 70.

Deputies are expressly authorized to take acknowledgment and probate deeds, and exercising such functions a deputy acts by force of the statute alone, and not as the agent of or by a delegation of authority from the clerk. Franklin v. Taylor, 113 N. C. 2, 18 S. E. 70.

The probate of a deed of trust or mortgage by one acting as deputy clerk, but who had not been duly appointed, nor
Women as Deputies.—It would seem that women are not disqualified under the constitution nor any statute from holding the office of deputy clerk. See Bank v. Redwine, 171 N. C. 559, 572, 88 S. E. 878; Preston v. Roberts, 183 N. C. 62, 110 S. E. 586; State v. Bateman, 162 N. C. 588, 77 S. E. 768, referred to in Bank v. Redwine, Supra, 171 N. C. 569, 572, 88 S. E. 878.

§ 2-14. Record of appointment and discharge; copies.—Each clerk of a superior court shall make a record of the appointment of each deputy he may appoint, on the special proceedings docket of his court, giving the name of such appointee and the date of such appointment, and make a cross-index thereof on the general index in his office. When any such deputy clerk is removed from his office the clerk of the superior court by whom he was appointed shall write on the margin of the record of such appointment in his office, and on the margin of the record of such appointment in the office of the register of deeds, the word "Revoked" and the date of such revocation, and sign his name thereto. A duly certified copy of such appointment and of such revocation, under the hand and official seal of the register of deeds, shall be deemed prima facie evidence of the regularity of such appointment and revocation, and shall be admitted as evidence in all the courts. (Rev., s. 899; 1899, c. 235, s. 2; C. S. 936.)

§ 2-15. Responsibility of clerk for deputy's acts. —The several clerks of the superior court shall be held responsible for the acts of their deputies. Deputies shall be subject in all respects to all laws which apply to the clerks. (Rev., s. 900; 1899, c. 235, s. 2; C. S. 937.)

Liability for Acts.—Both deputy and clerk are liable for an unlawful act committed by the deputy under color of his office. Coltraine v. McCain, 14 N. C. 308. See also, Bank v. Redwine, 171 N. C. 559, 569, 88 S. E. 878.

Deputy's Bond.—This section does not require any bond of a deputy clerk; but, as the clerk is liable for the defaults and misfeasance of his deputies, common prudence dictates that he require bonds of them for his own protection. Such a bond, not being required by law, is not an official bond in the strict sense of that term. When given, however, it is valid as a common-law bond, the clerk individually, and not the public, being the obligee in interest thereunder. The fact that it runs in the name of the clerk as clerk is immaterial. Fidelity, etc., Co. v. Hoyle, 64 F. (2d) 413, 415.

Art. 4. Powers and Duties.

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

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

2. To administer oaths and take acknowledgments, whenever necessary, in the exercise of the powers and duties of his office.

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

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

5. To enforce all lawful orders and decrees, by execution or otherwise, against those who fail to comply therewith or to execute lawful process.

§ 2-16. Process may be issued by the clerk, to be executed in any county of the state, and to be returned before him.

6. To compel the return to his office by each justice of the peace, on the expiration of the term of office of such justice, or, if the justice be dead, by his personal representative, of all records, papers, dockets and books held by such justice by virtue or color of his office, and to deliver the same to the successor in office of such justice.

7. To take proof of wills and grant letters testamentary and of administration.

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

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

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

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

12. To compel the return to his office by each justice of the peace, on the expiration of the term of office of such justice, or, if the justice be dead, by his personal representative, of all records, papers, dockets and books held by such justice by virtue or color of his office, and to deliver the same to the successor in office of such justice.

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

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

15. To revoke letters testamentary and of administration.

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

17. To audit the accounts of executors, administrators, collectors, receivers, commissioners and guardians.

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

Cross References.—As to acknowledgments, see § 47-1. As to depositions, see §§ 8-71 to 8-84. As to process, see §§ 1-303, 1-305, 1-307, 1-313. As to use of copies of court papers in evidence, see § 8-34. As to probate, see §§ 28-1, 28-2, 47-4, 47-14, 47-37, 31-17. As to revocation of letters testamentary and of administration, see §§ 28-31, 28-32, 28-46. As to guardians, see §§ 33-1 to 33-62. As to accounts of executors, etc., see §§ 28-117, 28-121, 28-155, 28-155, 1-405, 33-41. As to reports to commissioner of revenue, see § 105-22. As to power of clerk to discharge insolvent debtors whose conviction in justice of peace court, see § 29-23. As to duty of clerk to name successor to trustee in a deed of assignment for benefit of creditors, see § 23-4. For section requiring the clerk to be present at the opening of lock boxes of decedents and prescribing a fee and mileage therefore, see § 105-24. For "color of his office" construed, see annotations to § 2-3. As to clerks acting as notaries, see § 10-3.

Legislature May Take Away or Modify Powers.—The powers and duties of clerks enumerated in this section are given and fixed by legislative enactment, and there is no constitutional barrier to the legislature's taking away, modifying them; or authorizing them to be exercised and performed by another. In re Barker, 210 N. C. 617, 619, 188 S. E. 235.

Jurisdiction—Limited.—The clerk is a court of very limited jurisdiction—having only such jurisdiction as is given by statute. It has no common law or equitable jurisdiction. McCauley v. McCauley, 125 N. C. 288, 292, 30 S. E. 344.
§ 2-17.

Disqualification to act.—No clerk can act as such in relation to any estate, proceeding or civil action—

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

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

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

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

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

Cross References.—As to clerk's disqualification to be ap- proved by the superior court, see § 46-31. As to probate when clerk is a party, see § 47-7. As to validity of orders of registration, see § 47-51.

Editor's Note.—As to the purpose of the 1915 amendment, see 111 N. C. 132, 134, 15 S. E. 1030.

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

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

Written Waiver.—The waiver must be in writing and made when the clerk isObjecting to such waiver in writing, the clerk shall act as in other cases. (Rev. s. 903; Code, s. 105; C. C. P., s. 420; C. S. 940.)

Probate a Nullity.—When the probate of a deed is a nullity because the clerk was disqualified to act, the defect is not cured by the approval of the final decree, under which it
§ 2-20. Disqualification unwaived; cause removed or judge acts.—When any of the disqualifications specified in this chapter exist, and there does not permit of waiver, any party in interest may apply to the judge of the district or to the judge holding the courts of such district for an order to remove the proceedings to the clerk of the superior court of an adjoining county in the same district; or may apply to the judge to make and render either in vacation or term time all necessary orders and judgments in any proceeding where the clerk is disqualified, and the judge in such cases is hereby authorized and empowered to make and render any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceeding. (Rev., s. 904; Code, s. 106; C. C. P., s. 421; 1913, c. 70, s. 1; C. S. 941.)

§ 2-21. Disqualification at time of election; judge acts.—In all cases where the clerk of the superior court is executor, administrator, collector or guardian of any estate at the time of his election to office, in order to enable him to settle such estate, the judge of the superior court mentioned in the preceding section is empowered to make such orders as may be necessary in the settlement of the estate; may audit the accounts of such executor or administrator, and make such orders as may be necessary in the premises. (Rev., s. 905; Code, s. 107; 1871-2, c. 197; C. S. 942.)

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

§ 2-22. Custody of records and property of office.—1. Receipt from Predecessor.—Immediately after he has given bond and qualified, the clerk shall receive from the late clerk of the superior court all the records, books, papers, moneys and property of his office, and give receipts for the same, and if any clerk refuses or fails within a reasonable time after demand to deliver such records, books, papers, moneys and property, he is liable on his official bond for the value thereof.

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

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

Order and Demand.—A person, duly elected clerk of the superior court, next to the person having the custody of such records, documents, papers, and money as aforesaid, or authority to demand from his predecessor the property of all kinds belonging to the office, nor is it necessary for a retiring superior court clerk to be ordered to pay over to his successor, whether elected or appointed, the funds, etc., of the officer. Peebles v. Boone, 116 N. C. 58, 21 S. E. 187.

But where the judge places some person temporarily in charge of the office until the regular appointment is made, it is then necessary for the new clerk to have an order from the judge, directing the person temporarily in charge, to deliver the possession of his office to such clerk. Peebles v. Boone, 116 N. C. 58, 60, 21 S. E. 187.

Right of Action.—The right of clerk of a superior court to bring an action against his predecessor on the latter's official bond for the recovery of the records, money, etc., of the officer. Peebles v. Boone, 116 N. C. 58, 62, 21 S. E. 187.

Remedy.—When an outgoing clerk fails to deliver the property of his office, as herein provided, the successor's remedy is by attachment and suit for the penalty. O'Leary v. Harrison, 51 N. C. 338, 341.

When Liability Ceases.—When a former clerk delivers to his successors all the proceeds, etc., of his office, his official duties, powers, and liabilities cease. Gregory v.Moisey, 79 N. C. 559, 562.

§ 2-23. Unperformed duties of outgoing clerk.

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

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

Proceeding Recorded.—Where an outgoing clerk has failed to record a proceeding, the court has the power, and it is its duty, on the application of an interested party, to have such proceeding recorded as of its proper date. Foster v. Woodfin, 65 N. C. 29, 30.

§ 2-24. Location of and attendance at office.—The clerk shall have an office in the courthouse or other place provided by the board of commissioners, in the county town of his county. He shall give due attendance, in person or by deputy, at his office daily, on each succeeding day till such matters are disposed of; and upon his failure to do so, unless caused by sickness or other urgent necessity or unless leave of absence is obtained by law, he shall forfeit an amount not exceeding two hundred dollars, said amount to be fixed and determined by the resident
§ 2-25. Obtaining leave of absence from office.

—Upon application of any clerk of the superior court to the judge of the superior court residing in the district in which the clerk resides, the judge of the superior court riding the district or judge of superior court riding in the county of said clerk, showing good and sufficient reason for the clerk to absent himself from his office, the judge may issue an order allowing him to absent himself from his office, the judge may deem proper. But he shall at all times leave a competent deputy in charge of his office during his absence. The order of the judge granting leave of absence shall be filed and recorded in the office of the clerk of the county in which the clerk resides. (Rev., s. 910; 1903, c. 467; 1935, c. 348; C. S. 946.)

Editor's Note.—The amendment of 1935 makes the section applicable when application is made by “the judge of the superior court riding the district or judge of superior court presiding in the county of said clerk.”

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

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

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

Appeal from justice of the peace, fifty cents.

Appeal from the clerk to the judge, fifty cents.

Appeal to the supreme court, including certificate and seal, two dollars.

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

Apprenticing infant, including indenture, one dollar.

Attachment, order in, fifty cents.

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

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

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

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

Bond or undertaking, including justification, sixty cents.

Canceling notice of lis pendens, twenty-five cents.

Capias, each defendant, one dollar.

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

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

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

Commission, issuing, seventy-five cents.

Continuance, thirty cents.

Docketing ex parte proceedings, fifty cents.

Docketing indictment, twenty-five cents.

Docketing liens, twenty-five cents.

Docketing judgment, twenty-five cents.

Docketing summons, twenty-five cents.

Execution and return thereon, including docketing, fifty cents; and certifying return to clerk of any county where judgment is docketed, twenty-five cents.

Filing all papers, ten cents for each case.

Guardian, appointment of, including taking bond and justification, one dollar.

Impeaching jury, ten cents.

Indexing judgment on cross-index book, ten cents for the judgment, regardless of number of parties.

Indexing liens on lien book, ten cents.

Indictment, each defendant in the bill, sixty cents.

Injunction, order for, including taking bond or undertaking and justification, one dollar.

Judgment, final, in term-time, civil action, one dollar.

Judgment, final, against each defendant, in criminal actions, one dollar.

Judgment, final, before the clerk, fifty cents.

Judgment by confession, without notice, all services, three dollars.
Judgment in favor of widow for year's support, fifty cents.

Judgment nisi, entering against a defaulting witness or juror, on bail bond or recognizance, twenty-five cents.

Juror ticket, including jurat, ten cents.

Justification of sureties on any bond or undertaking, except as otherwise provided, fifty cents.

Letters of administration, including bond and justication of sureties, one dollar.

Motions, entry and record of, twenty-five cents.

Notices, twenty-five cents, and for each name over one in same paper, ten cents additional.

Notifying solicitors of removal of guardian, one dollar.

Order enlarging time for pleading, and all interlocutory orders, in special proceedings and civil actions, twenty-five cents.

Order of arrest, one dollar.

Order for appearance of apprentice, on complaint of master, one dollar; for appearance of master on complaint of apprentice, one dollar.

Order for the registration of a deed or other writing, which has been proved or acknowledged in another county, or before a judge, justice, notary or other officer, except a chattel mortgage, twenty-five cents.

Postage, actual amount necessarily expended.

Presentment, each person presented, ten cents.

Probate of a deed or other writing, proved by a witness, including the certificate, twenty-five cents.

Probate of a deed or other writing, acknowledged by the signers or makers, including all except married women, who acknowledged at the same time, with the certificate thereof, twenty-five cents.

Probate of a deed, or other writing, executed by a married woman, for her acknowledgment and private examination, with the certificate thereof, twenty-five cents.

Probate of limited partnership, fifty cents.

Proof of will in common form and letters testamentary, one dollar.

Qualifying justice of the peace, to be paid by the justice, twenty-five cents.

Qualifying members of the board of commissioners, to be paid by the commissioners, twenty-five cents.

Recognizance, each party where no bond is taken, twenty-five cents.

Recording and copying papers, per copy-sheet, ten cents.

Recording appointment of process agent for nonresident, fifty cents.

Recording names, qualification, and expiration of term of office of justices of the peace, five cents for each name.

Registering trained nurses, including certificate of registration, fifty cents.

Recording certificates of incorporation of corporations, three dollars.

Recording names of jurors as required by law, five cents for each name.

Resignation of guardian, relinquishment of right to administer, or to qualify as executor, receiving, filing and noting same, twenty-five cents.

Seal of office, when necessary, twenty-five cents.

Subpena, each name, fifteen cents.

Summons, in civil actions or special proceedings, including all the names thereof, one dollar, and for every copy thereof, twenty-five cents.

Transcript of judgment, twenty-five cents.

Transcript of any matter of record or papers on file, per copy-sheet, ten cents.

Trial of any cause, or stating an account, as referee, pursuant to order of the judge, such allowance as the judge may make.

Witness ticket, including jurat, ten cents.

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

Provided that in such case as the clerk of the superior court is now or may hereafter be paid a salary in lieu of fees, that such clerk of superior court shall not charge and collect a fee for juror ticket, including jurat, or witness ticket, including jurat, as herein prescribed. (Rev., s. 2773; Code, ss. 229, 1789, 3109, 3739; 1885, c. 199; 1893, c. 55, s. 4; 1897, c. 68; 1899, c. 17, s. 2; 1899, c. 247, s. 3; 1899, cc. 578, 261; 1901, c. 121; 1901, c. 614, s. 3; 1903, c. 359, s. 6; 1905, c. 300, s. 3; 1917, c. 198, s. 6; 1919, c. 329; 1927, c. 247; 1939, cc. 45, 214; 1933, c. 91; C. S. 3903.)


Cross References.—As to compensation and liability of clerk in setting an estate, see § 2-171. As to fees of clerk for recording certificate of incorporation, see § 55-193. As to costs of appeal generally, see § 6-33 and annotations. As to costs of transcript on appeal taxel in supreme court, see § 6-34. As to costs of appeal from justices of the peace, see § 6-35. As to new provision relating to fees for docketing judgments and for auditing accounts, not applicable in certain counties, see §§ 2-32 to 2-35.

Editor's Note.—The 1927 amendment added the proviso to the section. That act provided that it should only apply to Chatham County; however, by Public Laws of 1929, c. 214, the 1927 act was amended to make it applicable to Chatham County. Public Laws 1931, c. 11; Wilson: 1915, c. 241.

Appeal from Judicatures of the Peace.—When a defendant is bound over to the superior court by a justice of the peace, the clerk of the superior court is not entitled to the fee of 50 cents allowed for appeal from justice of the peace. Guilford v. Commissioners, 120 N. C. 23, 27 S. E. 94.

The fee taxable for “appeal and docketing in Supreme Court” is two dollars only. State v. Simmons, 120 N. C. 19, 26 S. E. 649.

Appeal.—An appeal lies to this court from the erroneous taxation of items in the bill of costs in the superior court. State v. Simmons, 120 N. C. 19, 26 S. E. 649.

The fees for continuances of cases allowed to the clerk of the superior court must be for such continuances as may be ordered by the judge upon motion, and such as must be recorded in the minutes of the clerk, and not those affected by a crowded docket or the inability for that reason of reaching the cause for trial. Luther v. Southern R. Co., 154 N. C. 1069 S. E. 752.

Motion for Judgment.—The fee of twenty-five cents for motion for judgment can only be taxed when the motion is an appeal in the cause, in writing, and required to be recorded. State v. Simmons, 120 N. C. 19, 26 S. E. 649.

Filing Papers.—The fee of 10 cents allowed the clerk of the superior court for “filing papers,” is for filing all papers in an action after final judgment, and not for filing each paper in a case. Guilford v. Commissioners, 120 N. C. 23, 27 S. E. 94.

Transcript on Appeal When Fees Unpaid.—The clerk of...
the court below is entitled to receive his fees before being required to send up a transcript on appeal, and therefore a writ of certiorari will be refused where it appears from the affidavit of the clerk that the transcript was not sent up by the court below, after repeated demands, at full cost, for stating an account, one-half to be paid by the plaintiffs and the other half by the defendants it was held that the court and transcribing the minutes, to be paid out of the general county fund. (Rev., s. 2773; C. S. 3904.)

From and after February 27, 1923, it shall be unlawful for the clerks of the superior courts of Vance, Warren, Northampton, Wayne and Bertie counties to charge fees for witness and juror tickets issued by them. (1929, c. 28; C. S. 3904.)

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

Local Modification.—Harnett: 1931, c. 75; Johnston: 1943, c. 653.

Editor's Note.—Public Laws 1933, c. 84, amended by Public Laws 1939, c. 300, s. 2, inserted Scotland in the list of counties appearing in the first paragraph.

§ 2-28. Fees for probating and recording federal crop liens and chattel mortgages.—The fee to be charged by the clerk of the superior court for the probate of a federal crop lien or a federal chattel mortgage given to secure a seed and fertilizer loan from the United States government, or crop production loans, live stock loans, and/or other loans made by the regional agriculture credit corporation of Raleigh, North Carolina for production credit associations in North Carolina and/or production credit associations in North Carolina as provided for by the Farm Credit Act of Congress of one thousand nine hundred and thirty-three, or the North Carolina Rural Rehabilitation Corporation or other relief organizations by relief clients, shall be limited to twenty-five cents for each probate; and the fee of the register of deeds for registering said instrument shall be limited to fifty cents for each lien or chattel mortgage: Provided that this section shall not apply to Brunswick, Caswell, Harnett, Haywood, Hertford, Macon, Moore, Person, Polk, Richmond, Stokes, Surry and Wilson counties. (1933, cc. 160, 176, 266, 281, 326, 393, 429, 479, 514; 1935, cc. 120, 280, 369; 1939, c. 211.)

Local Modification.—Gates, Jones, Moore, Perquimans, Richmond, Rowan, Wilson: 1935, c. 120, s. 2; Stanly: 1935, c. 120, s. 2; Wilson: 1935, c. 120, s. 2.

Editor's Note.—This section was originally enacted by Public Laws 1933, c. 160. Public Laws 1933, c. 176 struck Caswell from the list of counties exempted from the operation of this act. Public Laws 1933, c. 226 added the material beginning with "or crop" in line six, and ending with "Raleigh, North Carolina" in line eight. Public Laws 1933, c. 261 inserted the counties of Haywood, Jackson, and Macon in the list of counties exempted from the operation of this act. Public Laws 1933, c. 336 inserted Brunswick in the list of counties exempted from the operation of this section. Public Laws 1933, c. 390 added the counties of Harnett, Johnston, Polk, Moore, and Wilson to the list of counties exempted from the operation of this section. Public Laws 1933, c. 429 added Stokes to the list of counties exempted from the operation of this section. Public Laws 1933, c. 479 added Caswell, Hertford, and Person counties

[410]
§ 2-29. Advance court costs.—The clerk of the superior court is hereby authorized to collect as advance court cost on all suits started in any court the sum of seven dollars and fifty cents ($7.50) for one defendant, and one dollar and a half for each additional defendant, which fees shall include any process tax or tax on suits and sheriff fees. (1935, c. 379, s. 2.)

Local Modification.—Catawba: 1939, c. 62.

§ 2-30. Advance costs on appeal from justice of the peace.—The clerk of the superior court is authorized to collect from the appellant in all cases in appeals from justices of the peace court to the superior court four dollars as advance cost to be applied on the court cost including the process tax. (1935, c. 379, s. 1.)

§ 2-31. Fee for cross-indexing names of parties.—The fee for cross-indexing the name of each party to any action or proceeding required to be cross-indexed by law shall be ten cents for each name entered upon the cross-index records. (1935, c. 379, s. 3.)

§ 2-32. Fee for docketing judgment.—The fee for docketing any judgment shall be ten cents per copy sheet, minimum charge twenty-five cents. (1935, c. 379, s. 4.)

§ 2-33. Fee for auditing annual accounts of receivers, executors, etc.—For auditing annual accounts of receivers, executors, guardians, administrators, administrators with will annexed, trustees for incompetents, trustees under wills, surviving partner, where the total receipts and disbursements do not exceed one thousand dollars, the fee shall be twenty-five cents for each one hundred dollars on receipts and disbursements or a fraction thereof through one thousand dollars. If the receipts and disbursements exceed one thousand dollars, the fee shall be for the receipts and disbursements above one thousand dollars five cents on each one hundred dollars or a fraction thereof through one thousand dollars. When the receipts and disbursements exceed one thousand dollars, the fee for the amount of same above eleven thousand dollars shall be one-tenth of one per cent on the amount of receipts and disbursements in excess of eleven thousand dollars, but in no event shall the fee be less than one dollar nor more than twenty-five dollars. (1935, c. 379, s. 5.)

§ 2-34. Fee for auditing final accounts of receivers, executors, etc.—For auditing final accounts of receivers, executors, administrators, administrators with will annexed, collectors, trustees for incompetents, trustees under wills, guardians or surviving partner, the fee shall be fifty cents for each one hundred dollars or a fraction thereof of the total receipts and disbursements through one thousand dollars, and ten cents per each one hundred dollars or a fraction thereof on everything above one thousand dollars, but in no event shall the fee be less than two dollars: Provided, that when stocks, bonds or any other personal property is delivered to any heir or distributee without converting the same into cash, these fees shall be computed and charged on the same just as though they had been converted into cash; the value of said stocks, bonds, etc., to be fixed as of the date of death, or qualification of the fiduciary. (1935, c. 379, s. 6.)

Local Modification.—Beaufort: 1939, c. 103.

§ 2-35. Fee for auditing final accounts of trustees, etc., selling real estate under foreclosure proceedings.—For auditing final accounts of trustees, mortgagees, commissioners, or other persons, firms, or corporations selling real estate under foreclosure proceeding required to render such final report, the fee shall be twenty-five cents on each one hundred dollars of receipts and disbursements through one thousand dollars and ten cents on each one hundred dollars for everything above one thousand dollars, provided that the minimum fee shall be one dollar and fifty cents and the maximum fee shall not exceed twenty-five dollars. (1935, c. 379, s. 7.)

§ 2-36. Certain counties not subject to sections 2-29—2-35.—Sections 2-29—2-35 shall not apply to the counties of: Cabarrus, Chowan, Cleveland, Columbus, Franklin, Iredell, Lincoln, Martin, Mecklenburg, Montgomery, Moore, New Hanover, Pitt, Richmond, Robeson, Rockingham, Surry, Union, Jackson, Swain, Buncombe, Rowan, Orange, Avery, Wayne, Nash, Wilson, Bladen, Cumberland, Ashe, Edgecombe, Tyrrell, Person, Duplin, Vance, Davie, Guilford, Onslow, Washington, Alleghany, Haywood, Davidson, Burke, Stokes, Franklin, Catawba, Lenoir, Jones, Pamlico, Caldwell, Caswell. Provided, that section 2-29 shall apply to Iredell county. (1935, c. 379, s. 8; 1935, c. 494; 1937, cc. 148, 149, 290.)

Editor's Note.—The 1937 amendments struck out Bertie and Yancey from the list of counties in this section, and added the proviso as to Iredell county.

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

§ 2-38. To furnish blank process, bonds and undertakings.—Clerks of courts shall furnish to parties printed copies of the formal parts of all process required to be issued by them, with convenient blank spaces for the insertion of written matter; and also the blank forms of such bonds and undertakings as are required to be taken by them. (Rev., s. 911; Code, s. 3761; C. C. P., s. 559; 1868-9, c. 279, s. 588; C. S. 948.)

§ 2-39. To file papers in proceedings.—The clerk must file and preserve all papers in proceedings before him, or belonging to the court; and shall keep the papers in each action in a separate roll or bundle, and at its termination attach them together, properly labeled, and file them in the order of the date of the final judgment. All

[411]
such papers and the books kept by him belong to, and appertain to, his office, and must be delivered to his successor. (Rev. s. 913; Code, ss. 86, 111; C. C. P., ss. 146, 426; C. S. 949.)

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

Filing Papers.—The fee allowed the clerk for “filing papers,” is allowed for the single act of filing all the papers when the case is closed, as herein provided. Guilford v. Commissioners, 120 N. C. 23, 27 S. E. 94.

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

Clerk's Record.—Clerks are required to keep a record, in which shall be recorded all orders and decrees passed in their office, which they are required to make in writing. Gulley v. Macy, 81 N. C. 356, 359.

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

Cross Reference.—As to who may sue for and recover penalties, see § 1-38.

Action in Name of State.—An action brought against a sheriff, for the penalty herein provided for neglecting to note upon process the day on which it was received, should be in the name of the state as plaintiff. Duncan v. Philpot, 64 N. C. 473, 480.

Final Process.—This section has no reference to the final process. Wyche v. Newsom, 87 N. C. 144, 145. See also, Person v. Newsom, 87 N. C. 142.

§ 2-42. To keep books; enumeration.—Each clerk shall keep the following books, which shall be open to the inspection of the public during regular office hours:

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

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

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

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

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

6. Record of lis pendens, which shall contain the names of the parties to the action, place where such notice, whether formal or in the pleadings, is filed, the object of the action, the date of indexing, and a sufficient description of the land to be affected, and which shall be cross-indexed.

7. Criminal docket, which shall contain a note of every proceeding in each criminal action.

8. Minute docket of superior court, which shall contain a record of all proceedings had in the court during term, in the order in which they occur, and such other entries as the judge may direct to be made therein.

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

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

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

12. Record of appointments, which shall contain a record of appointments of executors, administrators, guardians, and collectors, with rev-
ocations of all such appointments; and on which shall be noted all subsequent proceedings relating thereto.

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

14. Record of accounts, which shall contain a record of accounts, in which must be recorded inventories and annual accounts of executors, administrators, collectors, trustees under assignments for creditors, and guardians, as audited by him from time to time.

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

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

17. Record of justices of the peace, which shall contain a complete list of the justices of the peace of the county, by townships, giving the date of election or appointment, qualification, and expiration of term of office of each; and whenever a vacancy occurs it shall be noted therein. These books shall at all times show a complete list of the justices of the peace of the county and who was the predecessor of each justice and the succession in office.

18. Record of books, which shall contain the date of delivery to each justice of the peace of any dockets, records, and books; and the date of the receipt by him to any justice of the peace, or to the personal representative of a deceased justice of the peace, for any dockets, records, and books returned to him.

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

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

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

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

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

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

25. Record of corporations, which shall contain a record of the certificate of incorporation of all corporations charted under general law, with principal office or place of business in his county.

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

27. Register of physicians and surgeons, which shall contain a list of the names and places of residence, with date of registration, of all persons registered by him as physicians and surgeons.

28. Register of dentists, which shall contain a registration of certificates of all persons entitled to practice dentistry in his county.

29. Register of chiropodists, which shall contain a list of the names and places of residence, with date of certificate, of all persons registered by him as chiropodists.

30. Register of trained nurses, which shall contain the name, residence and date of registration of all trained nurses duly licensed in his county.

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

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

33. Record of county treasurer's report, which shall contain an itemized statement of all fines and penalties paid to the county treasurer; which said itemized statement of fines and penalties received by the county treasurer shall be by him reported to the clerk on the first day of January, April, July and October, respectively, of each and every year.

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

35. Record of permits to purchase weapons, which shall contain the name, date, place of residence, age, former place of residence, etc., of each person, firm or corporation to whom or which a permit is issued to purchase deadly weapons. (Rev., s. 915; Code, ss. 83, 96, 97, 112, 1789; 1887, c. 178, s. 2; 1889, c. 181, s. 4; 1893, c. 52; 1899, c. 1, s. 17; 1899, c. 82, 110; 1901, c. 2, s. 9; 1901, c. 89, s. 13; 1901, c. 550, s. 3; 1903, c. 51; 1903, c. 350, s. 6; 1905, c. 360, s. 2; 1919, c. 78, s. 7; 1919, c. 132, 314; 1919, c. 197, s. 4; 1937, c. 93; C. S. 953.)

Local Modification.—Caldwell: Pub. Loc. 1927, c. 43; Durham: 1929, c. 88.

Cross Reference.—For provisions similar to paragraph 35, see § 14-605.

Editor's Note.—The 1937 amendment added the second sentence of subsection 4.
ascertain in advance whether or not judgments have been rendered which, when docketed will affect the title to the property in which their clients are interested. The new law will thus tend to facilitate real estate loans and transfers. (Rev., 1943, c. 523; Wayne: 1939, c. 92.)

§ 2-43. To notify commissioners of insolvency of surety company in which county officer bonded.—Every clerk of the superior court shall furnish to the board of county commissioners copies of all fiats made by them. Perry v. Bragg, 111 N. C. 159, 164, 16 S. E. 10. Evidence of Appointment.—The record of appointments is admissible as evidence to show a guardian's appointment. Young v. Preble, 120 N. C. 23, 28, 27 S. E. 94. Sufficient Notice of Lien.—A notice of a lien filed on the civil issue docket should not be disregarded, yet where there is a conflict between the two, nothing else appearing, those on the former must prevail. Walton v. McKesson, 101 N. C. 428, 7 S. E. 566. Record of Fiats.—Clerks are required to record in general order books copies of all fiats made by them. Perry v. Bragg, 111 N. C. 159, 164, 16 S. E. 10.

§ 2-44. List of justices to secretary of state.—The clerk of the superior court of each county in which justices of the peace are not elected by the qualified voters thereof on the first Monday in January preceding each regular session of the general assembly shall certify to the secretary of state a correct list of all justices of the peace in his county, the township in which each resides, the term of office of each, time of election or appointment, and when the respective terms of office of each expire. He shall also report the names of all justices elected or appointed just before the commencement of the regular session of the general assembly. (Rev., 1941, c. 316; Forsyth: 1941, c. 109; Greene: 1943, c. 378; Union: 1941, c. 316; Wake: 1943, c. 523; Wayne: 1939, c. 92.)

Editor's Note.—The Act of 1931 inserted the words: “upon ten days' written notice” in the first sentence of this section. For construction of “color of his office,” see § 2-4 and annotations.

Method of Procedure.—Where a clerk has admitted money to his hands in the manner prescribed by this section, he can only be proceeded against on motion, for a summary judgment for money that has remained in his hands for three years. Summey v. Johnston, 60 N. C. 98.

Purpose.—The clerk's proceedings are summary in their nature, and should always be put in such shape as to present all that he does in the course of a proceeding, including his official bond, his interlocutory order, and such documents that may be distinctly seen and understood. To this end, he is required to keep certain permanent records of proceedings before him. Edwards v. Cobb, 95 N. C. 4, 8.

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

§ 2-45. List of attorneys-at-law to commissioner of revenue.—It shall be the duty of the Clerk of the Superior Court in each county of the State on or before the first day of May each year to certify to the Commissioner of Revenue of the State of North Carolina the names and addresses of all Attorneys-at-Law located within the county and engaged in the practice of law. (1931, c. 299.)

Art. 6. Money in Hand; Investments.

§ 2-46. Public funds to be reported to county commissioners.—On the first Monday in December of each and every year, or oftener, if required by order of the board of commissioners or any other lawful authority, the clerk of the superior court shall make an annual report of all public funds which may be in their hands. The report shall be made to the board of county commissioners and addressed to the chairman thereof. It shall give an itemized statement of said funds so held, the date and source from which they were received, the person to whom due, how invested and where, in whose name deposited, the date of any certificate of deposit, the rate of interest the same is drawing, and other evidence of investment of said fund; and it shall include a statement of all funds in their hands by virtue or color of their office, and which may belong to persons or corporations. The report shall be subscribed and verified by the oath of the party making it before any person allowed to administer oaths. (Rev., 1918, 1891, c. 580; 1931, c. 156; C. S. 956.)

Local Modification.—Bertie: Pub. Lec. 1941, c. 39; Carteret: 1941, c. 316; Forsyth: 1941, c. 109; Greene: 1943, c. 145; Rockingham: 1943, c. 378; Union: 1941, c. 316; Wake: 1943, c. 523; Wayne: 1939, c. 92.

Cross Reference.—See also, § 109-18.
§ 2-48. Report compelled by commissioners.—If any clerk fails to report, or if after a report has been made the board of county commissioners have reason to believe that any report is incorrect, the board shall take legal steps to compel a proper report to be made by suit on the bond of such clerk, or by reporting the fact to the solicitor of the district to which the county of said board is registered, sign the same and file it in his office. The register shall also cause a copy of the report to be published one time in some newspaper of general circulation published in the county of the register and also posted at the courthouse door within twenty days after filing the reports; and if no newspaper is published in the county the posting of the report at the courthouse door shall be a sufficient publication. The cost of publishing the report shall be paid by the county. (Rev., s. 919; Code, s. 90; 1891, c. 580, s. 3; 1893, c. 14, s. 3; 1874-5, c. 151; 1876-7, c. 276; C. S. 957.)


§ 2-49. Payment to persons entitled.—The said clerks shall, on or before the first day of January in every year after the statements required in the foregoing sections are made, account with and pay to the persons entitled to receive the same all such balances reported as aforesaid to be in their hands. (Rev., s. 921; Code, s. 1865; R. C., c. 73, s. 2; 1825, c. 1186, s. 2; 1831, c. 3, ss. 1, 3; 1893, c. 14, s. 13; C. S. 959.)

Account.—"Account" means a statement in writing of debts and credits, or of receipts and payments, and when payments or settlement is intended, additional words are used. State v. Dunn, 134 N. C. 663, 668, 46 S. E. 949.

§ 2-50. Unclaimed fees of jurors and witnesses paid to school fund.—All moneys due jurors and witnesses which remain in the hands of any clerk of the superior court on the first day of January after the publication of a third annual report of the said clerk showing the same shall be turned over to the county treasurer for the use of the school fund of the county, and it is the duty of said clerk to indicate in his report any moneys so held by him for the period embracing the two annual reports. (Rev., s. 922; 1891, c. 580, s. 4; 1885, c. 14, s. 3; C. S. 960.)

Local Modification.—Wayne: 1941, c. 70. Cross Reference.—See also, § 115-183.

§ 2-51. Use by public until claimed.—The money aforesaid, while held by the clerks, shall be paid, on application, to the person entitled thereto; and after it ceases to be so held, it may be used as other revenue, subject, however, to the claim of the rightful owner. (Rev., s. 923; Code, s. 1869; R. C., c. 73, s. 6; 1828, c. 41, s. 1; C. S. 961.)

Cross Reference.—See also, § 115-184.

§ 2-52. Payment of sum due minor insurance beneficiary.—Where a minor is named as beneficiary in a policy or policies of insurance issued in a sum not exceeding five hundred ($500.00) dollars, and the insured dies prior to the majority of such beneficiary, any sums due on such policy may be paid to the public guardian or clerk of the superior court of the county wherein such beneficiary resides, to be administered by such clerk or public guardian for the benefit of said minor, and the receipt of the clerk or public guardian in such cases shall be a full and complete discharge of the company or association for any sums due under such policy or policies. (1937, c. 201.)

§ 2-53. Payment of money for indigent children and persons non compos mentis.—When any moneys in the amount of three hundred dollars or less are paid into court for any minor, indigent or needy child or children for whom no one will become guardian, upon satisfactory proof of the necessities of such minor, child or children, the clerk may upon his own motion or order pay out the same in such sum or sums at such time or times as in his judgment is for the best interest of said child or children, or to some discreet and solvent neighbor of said minor, to be used and faithfully applied for the sole benefit and maintenance of such minor indigent and needy child or children. The clerk shall take a receipt from the person to whom any such sum is paid and shall require such person to render an account of the expenditure of the sum and sums so paid, and shall record the receipt and the accounts, if any are rendered by order of the clerk, in a book entitled, Record of Amounts Paid for Indigent Children, and such receipt shall be a valid acquittance for the clerk. In all cases where a minor child is now or may hereafter be the beneficiary of any policy of life insurance and the sum due to said minor child by virtue of any such policy does not exceed three hundred dollars, the insurance company which issued said policy may pay the sum due thereunder to the clerk of the superior court of the county where said minor child resides whose duty it shall be to receive it, and said clerk shall issue and deliver to such insurance company his receipt for the sum so paid, which shall be a complete release and discharge of said company from any and all liability to said minor child under and by virtue of any such policy of insurance. Moneys so paid to said clerk shall be held and disbursed by him in the manner and subject to the limitations provided by this section. This section shall also apply to incompetent or insane persons, and it shall be the duty of any person or corporation having in its possession $300.00 or less for any minor child or indigent child, or incompetent or insane person to pay same in the office of the clerk of the superior court, and the clerk of the superior court is
hereby authorized and empowered to disburse the sum thus paid into his office, upon his own motion or order, without the appointment of a guardian. (Rev., c. 924; 1899, c. 82; 1911, c. 29, s. 1; 1919, c. 91; Ex. Sess. 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15; 1933, c. 363; C. S. 962.)

Editor's Note.—This section was amended by the Laws 1924, c. 1 to apply to all funds contemplated by it, which amended language is inserted into the hands of the clerk of the superior court, when the amount thereof does not exceed one hundred dollars ($100) for each child who may be entitled to share therein. The Act of 1927 added a proviso relating to deposits from compo mentis which was struck out by the Act of 1929. The latter Act changed the word “one” formerly appearing in line two to “three.” See note under sec. 2-54.

The last sentence of the section, relating to payment of $300 or less held for a “minor child or indigent child, or incompetent or insane person,” was added by Public Laws 1933, c. 363.

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

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

Editor's Note.—The act from which this and the six following sections are codified, was apparently intended to supply the need indicated in William v. Hooks, 199 N. C. 497, S. E. 529, wherein the court held that “there is no mandatory requirement of law imposing upon the clerk of the Superior Court the express duty of investing funds in his hands belonging to minors.” The act is broader than that, however, and applies to all funds held by the clerk as such or as receiver or trustee for any infant or non compos mentis which should be read in connection with §§ 2-46, 28-166 and 65-10. See 9 N. C. L. Rev. 399, 400.

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

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

(b) United States Government bonds.

(c) United States Government Postal Savings Certificates.

(d) North Carolina State bonds.

(e) North Carolina county or municipal bonds which are approved by the Local Government Commission.

(f) Certificates of deposit for time deposit or savings accounts with any bank or trust company where such protection is furnished as required in § 2-56.

(g) When the clerk of the superior court as receiver or trustee for any infant or non compos mentis shall come into the possession of any lands for the use of such person and it shall be necessary to make investments of the funds of such person to manage or cultivate said lands, the clerk may make such investments as are necessary for said purposes: Provided, the same is approved by the resident judge of the superior court or the judge holding the court of the district. (1931, c. 281, s. 2; 1937, c. 188; 1939, c. 110.)

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

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

Editor's Note.—This section was amended in the 1939 amendment inserted the words “for savings accounts” in subsection (f).

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

Editor's Note.—The 1939 amendment added the proviso to this section.

The 1943 amendment struck out the words “Sinking Fund Commission” in the twelfth line and inserted in lieu thereof the words “Local Government Commission.”

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

§ 2-58. Inspection and audit by county auditors or accountants; reports of audits.—It shall be the duty of the County Auditor or County Accountant of any county to inspect and audit the records and accounts of the Clerk of the Superior Court of the county for the purpose of ascertaining that such clerk is complying with the requirements of §§ 2-54 to 2-60 and that such clerk is properly safeguarding and accounting for all funds of every nature and character which have come into his hands by virtue of his office; such audits to be made and a report thereof made by the County Auditor or County Accountant to the board of county commissioners of the county and to the Local Government Commission or such other governmental agency as shall succeed to the rights and duties of the Local Government Commission. (1931, c. 281, ss. 6, 60.)
§ 3-1. Appointment by governor; term; oath. — The governor is authorized to appoint and commission one or more commissioners in any foreign country, state or republic, and in such of the states of the United States, or in the District of Columbia, or any of the territories, colonies or dependencies as he may deem expedient, who shall continue in office for two years from the date of their appointment, unless sooner removed by the governor. Before such commissioner proceeds to perform any duty by virtue of this chapter, he shall take and subscribe an oath before a justice of the peace in the city or county in which he resides well and faithfully to execute and perform all the duties of such commissioner, according to the laws of North Carolina; which oath shall be filed in the office of the secretary of state. (Rev., ss. 926, 927; Code, ss. 632, 633; C. S. 963.)

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

§ 3-2. Record of appointments; certified copies evidence. — It is the duty of the governor to cause to be recorded by the secretary of state the names of the persons who are appointed and qualified as commissioners, and for what state, territory, county, city, or town; and the secretary of state, when the oath of the commissioner is filed in his office, shall forthwith certify the appointment to the several clerks of the superior courts of the state, who shall record the certificate of the secretary at length. All removals of commissioners by the governor, and of all whose commissions have expired, or whose commissions have been renewed, revoked, or have resigned, removed or died since the date of the list previously published, as far as the same may be known to him, with the dates of such revocation, resignation, removal or death. (Rev., s. 929; Code, ss. 635, 636, 637, 639; C. S. 965.)

§ 3-3. List of appointments prepared and published by secretary of state. — The secretary of state shall prepare and cause to be printed in each volume of the public laws a list of all persons who since the preceding publication in the public laws have been appointed commissioners of affidavits and to take the probate of deeds in any foreign country and in the several states and territories of the United States and in the District of Columbia, under this chapter, setting forth the state, territory or district or foreign country for which such persons were appointed and the dates of their respective appointments and term of office; and he shall add to each of said lists a list of all those persons whose appointments have been renewed, revoked, or have resigned, removed or died since the date of the list previously published, as far as the same may be known to him, with the dates of such revocation, resignation, removal or death. (Rev., s. 930; Code, ss. 635, 636, 637, 639; C. S. 966.)

§ 3-4. Published list conclusive. — The list of commissioners so published in any volume of the public laws shall be conclusive evidence in all courts of the appointments therein stated, and of the dates thereof. (Rev., s. 930; Code, ss. 635, 636, 637, 639; C. S. 966.)

§ 3-5. Powers of such commissioners. — The commissioners have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this state, and to take the private examination of married women, parties thereto, or any other writings to be used in this state. Such acknowledgment or proof, taken or made in the manner directed by the laws of this state, and certified by the commissioner, shall have the same force and effect for all purposes as if made or taken before any competent authority in this state. The commissioners also

It is the duty of the Secretary of State forthwith upon the appointment of such commissioners, to certify the same to the several clerks of the superior courts of the State, and, in like manner, to certify to the said clerks all removals of commissioners, and of all whose commissions have expired. Evans v. Etheridge, 99 N. C. 43, 5 S. E. 386, 388.

§ 3-6. Fees of commissioners of affidavits. — The powers of the clerks of courts in other states. (Rev., ss. 926, 927; Code, ss. 632, 633; C. S. 963.)

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

§ 3-7. Powers of clerks of courts in other states. — The fees of commissioners of affidavits.

§ 3-8. Clerks and notaries to take affidavits. — The published list conclusive.

§ 3-9. Published list conclusive. — The list of commissioners so published in any volume of the public laws shall be conclusive evidence in all courts of the appointments therein stated, and of the dates thereof. (Rev., s. 930; Code, s. 635, 636, 637, 639; C. S. 966.)

§ 3-10. Powers of such commissioners. — The commissioners have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this state, and to take the private examination of married women, parties thereto, or any other writings to be used in this state. Such acknowledgment or proof, taken or made in the manner directed by the laws of this state, and certified by the commissioner, shall have the same force and effect for all purposes as if made or taken before any competent authority in this state. The commissioners also

It is the duty of the Secretary of State forthwith upon the
have full power and authority to administer an oath or affirmation to any person willing or desirous to make it before him, to take depositions, and to examine the witnesses under any commission emanating from the courts of this state, relating to any cause depending or to be brought in said courts. Every deposition, affidavit, or affirmation made before him is as valid as if taken before any proper officer in this state. (Rev., ss. 926, 927; Code, ss. 632, 633; C. S. 967.)

Editor's Note.—In the case of De Courcy, etc., Co. v. Barr, 45 N. C. 151, the court, construed section 2, chapter 21, of the Revised Statutes, as empowering commissioners of affidavits to take the acknowledgments of nonresidents only, upon the ground that the section declared that the acknowledgment should have “the same power and effect,” etc., as if the same had been made “before some of the judges of supreme jurisdiction in any other state.” Section 5, chapter 37, of the Revised Statutes, authorizes judges of etc., as if the same had been made “before some of the judges of supreme jurisdiction in any other state.” The Revised Code was enacted at the next session of the General Assembly held after that decision was rendered, and the law (as embodied in section 2, chapter 21, Rev. Code) seems to have been drawn with the purpose of enlarging the powers of commissioners of affidavits, and enabling them to take and certify acknowledgments of grantors of deeds, whether they were nonresidents, or residents of this state temporarily absent from the state. The section last mentioned has been in force since its enactment by the Legislature of 1854-55, being almost the same as section 533 of the Code. The latter gives to acknowledgments, taken before commissioners of affidavits, “the same force and effect, for all purposes, as if the same had been made or taken before any competent authority in this state.” It does not seem that any serious doubt has been entertained as to the true meaning of the law now in force since the case of Simmons v. Gholson, 59 N. C. 401, was decided. It has been considered as conferring upon a commissioner of affidavits the same authority to take the proof of executions or the acknowledgment of grantors, who may be in the state for which they were appointed (whether there temporarily or as residents), as to the execution of deeds conveying land or other property located in this state that are required or allowed by law to be registered—that is, given by law to the clerk of the superior court of the county in which the land lies but the clerk has power to adjudge that the execution has been properly proven and order the registration, while the commissioner is functus officio, as to any given deed, when he has attached to it his certificate as to proof or acknowledgment of its execution. Evans v. Etheridge, 99 N. C. 43, 5 S. E. 386; James, etc., Co. v. Pegram, 102 N. C. 540, 543, 9 S. E. 412.

Scope of Commissioner’s Authority.—Under the section commissioners of affidavits have full authority to take the acknowledgment, within the states for which they are appointed, of the grantors to any deed or conveyance of lands in this state, and to take the private examination of females covert. James, etc., Co. v. Pegram, 102 N. C. 540, 9 S. E. 412; Maphis v. Pegram, 107 N. C. 505, 12 S. E. 215.

Commissioners of affidavits are empowered by the provision to take acknowledgments of deeds in other states, by residents of both this state and that for which such commissioners are appointed. Barcello v. Happgood, 118 N. C. 712, 727, 24 S. E. 124; Hinton v. Life Ins. Co., 116 N. C. 22, 21 S. E. 201.

Acknowledgments of Residents Visiting in Another State.—Where a man and his wife, being residents of this state, duly acknowledged a deed before a commissioner in Virginia, where they had gone on a visit merely, and the certificate of the commissioner, being in due form, was approved by the clerk of the superior court of the county in which the land was situated, and the deed duly recorded, the registration was valid. James, etc., Co. v. Pegram, 102 N. C. 540, 9 S. E. 412; Maphis v. Pegram, 107 N. C. 505, 12 S. E. 215.

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

Acknowledgment a Judicial Act.—In this state it is settled law that an acknowledgment of a deed by the husband and privy examination of the wife taken before a commissioner is a judicial, or at least a quasi judicial, act. This was laid down by Pearson, J., in Decourcy, etc., Co. v. Barr, 45 N. C. 181; Long v. Crews, 113 N. C. 256, 257, 18 S. E. 499.

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

§ 3-6. Fees of commissioners of affidavits.—Commissioners of affidavits, and those who are authorized by law to act as such, shall receive the following fees, and no other, namely: for an affidavit taken and certified, forty cents; affixing his official seal, twenty-five cents. (Rev., s. 2795; Code, s. 3741; C. S. 3924.) Cross Reference.—As to fees of notaries, see § 10-8.

§ 3-7. Powers of clerks of courts in other states.—Every clerk of a court of record in any other state has full power as a commissioner of affidavits and deeds as is vested in regularly appointed commissioners of affidavits and deeds for this state. (Rev., s. 931; Code, s. 640; C. S. 968.) Cross Reference.—As to probate and registration by officials of the United States, foreign countries, and sister states, see §§ 47-2, 47-3, 47-44, 47-47.

Authority of Clerks to Act.—The section confers upon clerks of courts of record in other states the powers both of commissioners of affidavits and of deeds and of commissioners regularly appointed by the courts, and the courts will take judicial notice of their seals. Barcello v. Happgood, 118 N. C. 712, 727, 24 S. E. 124; Hinton v. Life Ins. Co., 116 N. C. 22, 21 S. E. 201.

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

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

Verification of Pleadings Before Clerk.—A verification of a pleading made before the clerk of the Hustings Court of Richmond, Virginia, and authenticated by his seal, is valid. Hinton v. Life Ins. Co., 116 N. C. 22, 21 S. E. 201.
§ 4-1. Common law declared to be in force.

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

General Considerations.—The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. Kent, Vol. 1, p. 471; Kansas v. Colorado, 206 U. S. 46, 96, 27 S. Ct. 65, 51 L. Ed. 296.

As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs, immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs. Black's Law Dict., p. 232; Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 102, 21 S. Ct. 561, 45 L. Ed. 765.


So much of the common law as is in force by virtue of this section may be modified or repealed, but those parts of the common law which are imbedded in the Constitution are not subject to control. State v. Mitchell, 202 N. C. 439, 195 S. E. 394.

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


Reference to Debts Due to State Abrogated.—The English common law which gave a debt due to the sovereign a preference over the debts due to others, is abrogated by this section, and is not in force as applied to a debt due to this state. This on the principle that the rule as it existed at common law is antagonistic to the spirit of our governmental institutions. Corp. Com. v. Trust Co., 193 N. C. 513, 17 S. E. 357.

Right of Bail in Capital Cases.—At common law bail might be granted in capital cases only by a high judicial officer upon thorough scrutiny of the facts and great caution. This right though once modified by the old constitution against its existence in capital offenses where the proof was evident and the presumption was great, now prevails in this state as it existed at common law, since that Constitution is superseded by the present Constitution which contains no provisions which qualify the right. In England the power to bail was exercised by the King's superior courts of justice; and in this state the power is conferred upon the justices of the Supreme Court, judges of the inferior and circuit courts. State v. Herndon, 107 N. C. 934, 941, 12 S. E. 268.

Exemption of Attorneys from Arrest.—The common law exemption of an attorney from arrest in a civil action, should, under our institutions and because of absoluteness by nonusage, not prevail. The privilege in attendance upon court in the due course of their employment as attorneys. Greenleaf v. Bank, 133 N. C. 292, 296, 45 S. E. 638.


Percolating Waters.—The owner of lands is only entitled to the reasonable use of percolating waters collected in subterranean channels on his own lands; and the English common law doctrine to the contrary is inapplicable under this section. Rouse v. Kimston, 188 N. C. 1, 125 S. E. 483.

Habeas Corpus.—If the common law doctrine that every court of record in this state as it existed at common law, since that Constitution is superseded by the present Constitution which contains no provisions which qualify the right, in effect and by statutory implication. Speight v. Speight, 208 N. C. 352, 179 S. E. 461.

Champerthy is an offense at common law, and prevails in this state, being retained under this section. Remmicks v. Stuart, 220 N. C. 350, 17 S. E. (2d) 458.

Barraty.—The common-law offense of barraty obtains in this state, as it has never been the subject of legislation in North Carolina and is not repugnant nor inconsistent with our form of government. State v. Batson, 220 N. C. 411, 17 S. E. (2d) 451, 139 A. L. R. 514.

Forfeiture for felony, which was the established rule at common law, has had no force in this state since 1778. Wills v. Bank, 110 N. C. 251, 264.

Exemption from Civil Process.—The common law privilege of the exemption of nonresidents from service of civil process while attending upon litigation in the courts of this state, as suitors or witnesses, was not repealed by implication by sections 8-64, 9-18. Cooper v. Wyman, 122 N. C. 784, 29 S. E. 942.

Survivorship; Husband and Wife Tenants by Entitlements. —The common law doctrine of survivorship between husband and wife as tenants by entitlent has not been changed by statute and is in force in this state. Dorsey v. Kirkland, Eng. 150, 99 S. E. 470.

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

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

Limitation Over in Personal Property.—The common-law rule that there can be no limitation over in personal property after reservation of a life estate therein is in force in this state, under this section, and has been recognized by judicial decision and by statutory implication. Speight v. Speight, 208 N. C. 132, 179 S. E. 461.

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


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

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

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

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

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

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

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

7. The publication of grossly inaccurate reports of the proceedings in any court, about any trial, or other matter pending before said court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

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

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

I. General Consideration.
II. Subdivision I.
III. Subdivision II.
IV. Subdivision IV.
V. Subdivision V.
VI. Subdivision VI.
VII. Subdivision VII.
VIII. Subdivision VIII.

I. GENERAL CONSIDERATION.

Editor's Note.—It is essential for an effective administration of justice in an orderly and efficient way that the court possess certain powers to enforce its mandate. A legislative interference to the extent of depriving the courts of these powers is tantamount to depriving the judicial department of the means of self-preservation and cannot be constitutionally justified. See Snow v. Hawkes, 183 N. C. 360, 111 S. E. 621; Ex parte McCown, 139 N. C. 25, 107, 51 S. E. 957.

These powers, however, as they existed at common law, while they may not be abrogated, may be reasonably regulated by legislation. See In re Robinson, 117 N. C. 553, 23 S. E. 453. Thus, this and the following sections are regulatory legislation upon the subject, and being in accord with modern doctrine, cannot be assailed on the ground of unconstitutional enactments. See In re Brown, 168 N. C. 417, 44 S. E. 690; In re Oldham, 89 N. C. 23, 56.

The enumeration of the acts punishable for contempt under this section is exhaustive; hence no other act than those specifically designated may be the subject matter of contempt proceedings. See In re Odum, 133 N. C. 230, 252, 45 S. E. 569.

It is a thoroughly seminal opinion on the history, nature, and extent of the power of courts to punish for contempt, see In re Brown, 168 N. C. 417, 44 S. E. 690, and Ex parte McCown, 139 N. C. 95, 51 S. E. 957.

Construed Strictly.—This section should be strictly construed as a criminal statute. West v. West, 199 N. C. 12, 13, 133 S. E. 600. See also In re Hege, 205 N. C. 625, 113 S. E. 135.

Definition.—Contempt is a willful disregard of the authority of a court of justice, or a legislative body or disobedience to its lawful orders. Black Law Dictionary of 1898.

Nature and Purpose of Proceedings.—The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded. In The Matter of Lewis, 202 U. S. 614, 26 S. Ct. 767, 50 L. Ed. 982.

Punishments for contempt of court have two aspects, namely: 1. To vindicate the dignity of the court from disrespect shown to it or its orders. 2. To compel the performance of some order or decree of the court which the will of the power of the party to perform and which he refuses to obey. See In re Chiles, 22 Wall. 157, 22 L. Ed. 819; Besse v. Conkey, Co., 194 U. S. 324, 327, 24 S. Ct. 665, 48 L. Ed. 977.

Nature of Offense.—A contempt proceeding is sui generis. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action. In The Matter of Lewis, 202 U. S. 614, 26 S. Ct. 767, 50 L. Ed. 982.

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

Facts Must Be Found andFiled.—In contempt proceedings the facts upon which the contempt is based must be found and filed, especially the facts concerning the purpose and object of the contemnor, and the judgment must be founded on those findings. In re Odum, 133 N. C. 250, 252, 45 S. E. 569.

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

The power to punish for contempt is inherent in all courts. Ex parte Terry, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 465.
Must Be in Presence of the Court.—A willful disobedience of the process or order of the superior court must consist of obstruction of a public road is not a contempt committed within the immediate presence or view of the court. In re Parker, 177 N. C. 469, 93 S. E. 342. But see cases cited in this section.

Nature of the Acts Punishable for Contempt.—Acts which are punishable under this section include all cases of disorderly conduct, breaches of the peace, noise and other disturbances of the court proceedings, and any act which may be designed and reasonably calculated to interrupt the proceedings of the court then engaged in the administration of justice and the dispatch of the business of the court.

Protection Extended to Officers of Court, Witnesses, etc.—It is an act of contempt to interfere with the functioning of the business of the court but such an act need not be such as to prevent the witness from testifying. In re Fontaine v. Southern Underwriters, 83 N. C. 133.

Appeal.—Actions of judge in respect to contempts committed in the presence of the court are not appealable except for gross abuse of discretion. See Vaughan v. Vaughan, 213 N. C. 189, 195 S. E. 351.

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

III. SUBDIVISION II.

Punishment by Court Making the Reference.—When, in the course of supplementary proceedings before a referee, a contempt is committed by refusing to answer the questions, the court may make the reference for contempt. LaFontaine v. Southern Underwriters, 83 N. C. 133.

IV. SUBDIVISION IV.

Cross References.—As to contempt in failure of personal representative to file account, see § 28-118. As to failure to obey judgment, see § 1-304. As to failure to obey a court order in summary contempt proceedings, see §§ 1-358. As to acts punished as for contempt, see §§ 5-8, 5-9.

Willful and Unlawful Distinguished.—"The word 'willful,' when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law." "The term 'unlawfully' implies that an act is done, or not done as the law allows, or requires; while the term 'willfully' implies that the act is done, or not done as the law directs, and is done with the will, or without the deliberation, of the party doing such act."

In re Hege, 205 N. C. 635, 630, 172 S. E. 345, citing West v. West, 199 N. C. 12, 153 S. E. 600.

Refusal to Deliver Note.—In Thompson v. Onley, 96 N. C. 99, 11 E. S. 623, it was held that a refusal to obey an order requiring the surrender of a note, whether amounting to contempt or not, warranted a commitment as a means of enforcing a compliance.

Discovery of Disrespectful Intent.—The willful disobedience of a restraining order by the party on whom it had been served, and who was aware of its meaning and import, is in itself an act of contempt under this section, from which the party is hence prevented from furnishing the respectful intent. In re Parker, 177 N. C. 463, 99 S. E. 342.

Possibility of Comply with the Order or Process.—Where the necessary process or order is due to circumstances which make it impossible for the contemnor to obey such an order or process, he may not be punished for contempt. Thus, where the clerk issued a process to the witness to produce a certain will which was in the custody of some other clerk, it was held the order to adjudge the respondent guilty of contempt was reversible on appeal. In re Scarborough Will, 139 N. C. 452, 51 S. E. 931.

But where the impossibility of performing the order is due to the arrest for contempt the defendant will not be excused. Shooting Club v. Thomas, 120 N. C. 334, 26 S. E. 1007. The excuse is sufficient where the defendant has been arrested for a violation of a state statute, as for example, 66 N. C. 1; Boyett v. Vaughan, 89 N. C. 27; Smith v. Smith, 92 N. C. 304.

Where the husband, in proceedings against him for contempt for disobeying an order of the superior court for the support of his child, shows by the uncontradicted testimony of himself and witness that he had no property nor income except what he could earn, and that he was unable to obtain employment by the evidence fails to show that the disobedience was willful, and he may not be adjudged in contempt of court. In re Kauffman, 199 N. C. 12, 153 S. E. 601.

Failure to Pay Alimony, etc.—Upon the hearing of an order to show cause why defendant should not be attached for contempt for failure to pay alimony and counsel fees, it was held the prior judgment, defendant pleaded his inability to pay. The court found defendant had earned $140.00 since the original order, and adjudged defendant to be in contempt and the judgment for contempt was not appealed and fails to show the length of time during which defendant earned the sum stated, and fails to find any facts upon the defendant's plea of disavowal, the record and findings do not sufficient to support a conviction of "willful disobedience" of a court order. Berry v. Berry, 215 N. C. 391, 1, S. E. (2d) 871.

The mere fact that defendant, ordered to pay a certain sum monthly to his wife, the necessary subsistence of his wife and child, has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is willful. Smithwick v. Smithwick, 218 N. C. 505, 11 S. E. (2d) 455.

Order Void Ab Initio.—Where an order is void ab initio, one may not be held for contempt for disobeying such order, and the order for commitment and the judgment for contempt was not appealed and fails to show the fact that the disobedience was willful, the order not being one "lawfully issued" as provided by this section. In re Longley 205 N. C. 488, 171 S. E. 788.

Nature of the Acts Issued or Made No House.—The failure to obey the order of the court placing property in possession of a receiver is, under this clause, a direct contempt, even though the contractor acted under an advice of counsel. Such advice is no protection to the intentional violation of the order. Delozier v. Bird, 123 N. C. 689, 694, 31 S. E. 834. In such a case the counsel himself may be subjected to contempt proceedings. (G. This fact, however, does not prevent the imposition of the punishment.) Weston v. Roper Lumber Co., 158 N. C. 270, 73 S. E. 799. See Green v. Griffin, 95 N. C. 50.

Disobeying Order of Clerk. — Where, in supplementary proceedings, the defendant has falsely disobeyed an order of the clerk of the superior court having jurisdiction, in disposing of his property, he is guilty of contempt of court under the provisions of this section. Bank v. Chamberle, 113 N. C. 124 S. E. 274.

Must Be Able to Obev. —The defendant must have been able to obey the order, and in spite of his ability must have disobeyed it. Inability to obey is a good excuse—for example money payment, of money. Kane v. Haywood, 66 N. C. 273; Boyett v. Vaughan, 89 N. C. 27; Smith v. Smith, 92 N. C. 394.

Other Actions Held to Constitute Contempt.—Disobeying an injunction is a sufficient reason to hold a person guilty of contempt.


V. SUBDIVISION V.

Willfully Preventing Receiver from Taking Possession.—A judgment debtor, fixed with knowledge as a party upon whom notice was served, is guilty of contempt in willfully preventing the receiver from taking possession of
§ 5-2. Appeal from judgment of guilt.—Any person adjudged guilty of contempt under the preceding section has the right to appeal to the supreme court in the same manner as is provided for appeals in criminal actions, except for the contempt described and defined in subsections one, two, three, and six. Nor shall the right of appeal lie under subsections four and five if such contempt is committed in the presence of the court. (Rev., s. 940; Code, s. 649; C. S. 980.)

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

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

Imprisonment for 60 days and a fine of $2000 were held illegal under this section. In re Patterson, 59 N. C. 407, 6 S. E. 643. See also In re Walker, 82 N. C. 95.

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

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

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

Imprisonment until the order is complied with is valid. Cromartie v. Commissioners, 85 N. C. 211; Thompson v. Commissioners, 96 N. C. 120; Wood v. Commissioners, 61 N. C. 538; Delozier v. Bird, 123 N. C. 689, 694, 31 S. E. 834.

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

Punishment by Working on Road.—A person sentenced to jail as for contempt of court can not be worked on the roads. State v. Moore, 146 N. C. 633, 61 S. E. 463.

Punishment Immaterial.—The punishment in contempt cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage, which impedes the business of the court. State v. Young, 98 N. C. 225, 3 S. E. 515.

No Defense to Criminal Prosecution.—The fact that a person has been punished for contempt of court, is no defense to a crime. In re Hayes, 200 N. C. 133, 134, 156 S. E. 791.

§ 5-5. Summary punishment for direct contempt.—Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every
§ 5-6. Courts and officers empowered to punish. — Every justice of the peace, referee, commissioner, clerk of the superior court, inferior court, criminal court, or judge of the superior court, or justice of the supreme court, or board of commissioners of each county, or the utilities commission, has power to punish for contempt while sitting for the trial of causes or engaged in official duties. (Rev., s. 942; Code, ss. 651, 652, 1933, c. 134, s. 8; 1941, c. 97; C. S. 983.)

Authority of Mayor to Punish. — The authority given under this section to a justice of the peace to punish for contempt is extended to mayors by sections 160-13, 160-14. State v. Aiken, 113 N. C. 61, 18 S. E. 690; In re Deaton, 105 N. C. 59, 61 S. E. 244.

Referee. — Acts constituting contempt committed before a referee in supplementary proceedings are to be punished by the court making the reference. LaFontaine v. Southern Underwriters, 83 N. C. 52, 61 S. E. 244.

Authority of Commissioner Not Exclusive. — The power of a commissioner, appointed by the court, to commit for contempt while sitting for the trial of causes or engaged in official duties. (Rev., s. 942; Code, ss. 651, 652; C. S. 983.)

Authority of Mayor to Punish. — The authority given under this section to a justice of the peace to punish for contempt is extended to mayors by sections 160-13, 160-14. State v. Aiken, 113 N. C. 61, 18 S. E. 690; In re Deaton, 105 N. C. 59, 61 S. E. 244.

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

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

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

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

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

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

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

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

Cross References. — As to punishment for using profanity within hearing of justice of peace, see § 7-128. As to punishment of witness refusing to testify in action against a railroad before a justice of peace, see § 7-146.

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

For a discussion of this section and its relation to the preceding sections, see Cromartie v. Commissioners, 87 N. C. 411.

Applicable to Civil Actions. — The provisions of this section, except subsections 4, 5, and 6, apply only to civil actions. In re Deaton, 105 N. C. 59, 64, 11 S. E. 244.

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

Persuading Witness. — Where a defendant in a criminal action tried to persuade the state's witness to leave the state and then try to persuade the state's witness to return to the state to continue in the civil remedy or protect the rights of any party to an action. (Rev., s. 944; Code, ss. 654, 656; C. S. 985.)
Suggesting to Witness Not to Attend.—Suggesting to a material witness not to attend court, etc., with apparent intent to prevent the attendance of the witness, is under this clause an unlawful interference with the process and proceedings of the court. State v. Moore, 146 N. C. 653, 61 S. E. 463.

Juror Improperly Influenced.—Under subdivision 5 a juror may be punished as for contempt for allowing himself to be improperly influenced. In re Gorham, 129 N. C. 141, 17 S. E. 69.


§ 5-9. Trial of proceedings in contempt.—Proceedings as for contempt shall be prosecuted and carried on as provided in provisional remedies. In all proceedings for contempt and in proceedings as for contempt, the judge or other judicial officer who issues the rule or notice to the respondent may make the same returnable before some other judge or judicial officer. When the personal conduct of the judge or other judicial officer or his fitness to hold his judicial position is involved, it is his duty to make the rule or notice returnable before some other judge or officer. Nothing herein contained shall apply to any act or conduct committed in the presence of the court and tending to hinder or delay the due administration of the law, nor to proceedings for the disobedience of a judicial order rendered in any pending action. (Rev., s. 945; Code, s. 655; 1915, c. 4; C. S. 986.)

Chapter 6. Costs.

Art. 1. Generally.

Sec.
6-1. Items allowed as costs.
6-2. Summary judgment for official fees.
6-3. Sureties on prosecution bonds liable for costs.
6-4. Execution for unpaid fees; itemized bill of costs to be annexed.
6-5. Jurors' tax fees.
6-6. In criminal cases, not demandable in advance.
6-7. Clerk to state in detail in entry of judgment.
6-8. Clerk to itemize bills of criminal costs; approval of solicitor.
6-9. Justice required to itemize costs.
6-10. Justice of the peace refusing to furnish bill of costs.
6-11. Bills of costs open to the public.
6-12. Clerks to tax solicitors' fees; paid to school fund.

Art. 2. When State Liable for Costs.

6-13. Civil actions by the state; joinder of private party.
6-14. Civil action by and against state officers.
6-15. Actions by state for private persons, etc.
6-16. Costs of county in certain bribery prosecutions to be a charge against state.
6-17. Costs of state on appeals to federal courts.

Art. 3. Civil Actions and Proceedings.

6-18. When costs allowed as of course to plaintiff.
6-19. When costs allowed as of course to defendant.
6-20. Costs allowed or not, in discretion of court.
6-21. Costs allowed either party or apportioned in discretion of court.
6-22. Petitioner to pay costs in certain cases.
6-23. Defendant unreasonably defending after notice of no personal claim to pay costs.
6-24. Suits in forma pauperis; no costs unless recovery.
6-25. Party seeking recovery on usurious contracts; no costs.
6-27. Fees and disbursements in supplemental proceedings.
6-29. Costs of reassessment of homestead.

Sec.
6-30. Costs against infant plaintiff; guardian responsible.
6-31. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.
6-32. Costs against assignee after action brought.

Art. 4. Costs on Appeal.

6-33. Costs on appeal generally.
6-34. Costs of transcript on appeal taxed in supreme court.
6-35. Costs on appeal from justices of the peace.

Art. 5. Liability of Counties in Criminal Actions.

6-36. County to pay costs in certain cases; if approved, audited and adjudged.
6-37. Local modification as to counties paying costs.
6-38. Liability of county when defendant acquitted in supreme court.
6-39. County where offense committed liable for costs.
6-40. Liability of counties, where trial removed from one county to another.
6-41. Statement of costs against county to be filed with commissioners.
6-42. Expenses in conveying prisoner to another county; provision for payment.
6-43. Cost of investigating lynchings.
6-44. Costs due credited on taxes due by payee.


6-45. Costs against defendant convicted, confessing, or submitting.
6-46. Defendant imprisoned not discharged until costs paid.
6-47. Judgment confessed; bond given to secure fine and costs.
6-48. Arrest for nonpayment of fine and costs.

Art. 7. Liability of Prosecutor for Costs.

6-49. Prosecutor liable for costs in certain cases; court determines prosecutor.
6-50. Imprisonment of prosecutor for nonpayment of costs, if prosecution frivolous.

Art. 8. Fees of Witnesses.

6-51. Not entitled to fees in advance.
6-52. Fees and mileage of witnesses.
§ 6-1. CHG,
§ 6-54. Witness tickets to be filed; only two wit-
Sec.
nesses for single fact.
§ 6-55. Fees of witnesses before jury of view, com-
missioner, etc.
§ 6-56. Fees of witnesses before grand jury.
§ 6-57. Pay of state's witnesses.
§ 6-58. County to pay defendant's witnesses in cer-
tain cases.
§ 6-59. County to pay defendant's witness for certain
§ 6-60. Fees of state witnesses; two only in misde-
meanors; one fee for day's attendance.

Art. 1. Generally.

§ 6-1. Items allowed as costs.—To either party for
motion judgment is given there shall be al-
lowed as costs his actual disbursements for fees
for the officers, witnesses, and other persons en-
titled to receive the same. (Rev. s. 1249; Code, s.
528; C. S. 1225.)

Cross Reference.—As to prosecution bonds for fees, see
§ 1-109 et seq.

Editor's Note.—In general this section states the rule
that costs follow the judgment, a rule which is founded on pol-
icy and natural justice, designed to prevent the unsuc-
cessful litigant from escaping the consequence ensuing from
the unfavorable term—inaction of a suit, and which, to
a great extent, acts as deterrent to the prosecution or ap-
peal of promiscuous and frivolous litigation. Criminal ac-
tions and civil suits alike are controlled by the principle:
In State v. Horne, 119 N. C. 833, 26 S. E. 36, Clark, J., says:
"There is no exception to the rule prevailing
in civil cases that the costs follow the result of the final
judgment." The true and only test of liability for
costs depends upon the nature of the final judgment, and
"There is no exception in State cases to the rule prevail-
ing in civil cases that the costs follow the result of the final
judgment." The true and only test of liability for
costs is found in the books has the losing party recovered his costs
or any part of them.

In General.—For a discussion of costs generally, see State
v. Massie, 167 N. C. 877, 10 S. E. 698.

Partial Recovery.—See § 6-18 and annotations thereto.

Costs of Witnesses.—See sections 6-51 et seq., and the
notes thereto.

Dependent upon Statutes.—At common law neither party
to a civil action could recover costs. Chadwick v. Life
Ins. Co., 158 N. C. 380, 74 S. E. 115; Costin v. Baxter, 29
N. C. 111; State v. Massey, 104 N. C. 877, 10 S. E. 698.

Wills, 177 N. C. 461, 100 S. E. 182. And it has been
frequently held that costs are entirely creatures of legisla-
tion, without which they do not exist. Clerk's Office v.
Commissioner, 121 N. C. 29, 30, 27 S. E. 1003. See also Lowe
v. Kaneast, 173 U. S. 81, 33 L. Ed. 693.

The whole matter of costs, including the party to or
against whom they may be given, the items or sums to be
allowed, etc., is always been within the regulation
and control of the legislature. See Gulf, etc, R. Co.

Jurisdiction Essential. — Where a court has no jurisdic-
tion of a case, it cannot award costs, or order execution
for issue to them. See Mansfield, etc., R. Co. v. Swan,
111 U. S. 379, 4 S. Ct. 516, 28 L. Ed. 823. And where a contract sounding in damages is one at
law, and the costs are taxable under this section, are
not in the discretion of the court as an equity proceeding
controlled by section 6-20. Cotton Mills v. Knitting Co,
104 N. C. 89, 10, 18 S. E. 428.

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

Sec.

6-61. On appeal from justice only two witnesses
bound over.

6-62. Solicitor to announce discharge of state's
witnesses.

6-63. Witnesses not paid without certificate;
Court's discretion.

Art. 9. Criminal Costs before Justices, Mayors,
County or Recorders' Courts.

6-64. Liability for criminal costs before justice,
mayor, county or recorder's court.

6-65. Imprisonment of defendant for nonpayment
of fine and costs.

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

Advance Fees for Docketing Transcript. — This section
impliesly authorizes the clerk of the Supreme Court to re-
sume the transcript when the prescribed fee is
not paid in advance. Section 128-2 specifically authorizes
the refusal. Dunn v. Clerk's Office, 176 N. C. 50, 96 S. E.

When Cause Is Still Pending.—This section is not applica-
ble to the right to docket payments of services ren-
dered in a cause which is still pending in the courts upon
exceptions to his report. Farmers Bank v. Merchants &
Farmers Bank, 204 N. C. 378, 168 S. E. 221.

Time of Motion to Re-tax.—This section permits a motion
to re-tax costs to be made in favor of any officer within
one year after termination of the action. In re Smith,
105 N. C. 167, 10 S. E. 962.

Judgment Becomes a Lien. — A judgment under this sec-
tion becomes a lien on the lands of the defendants. Shep-

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

§ 6-3. Sureties on prosecution bonds liable for
costs.—When an action is brought in any court
in which security is given for the prosecution
thereof, or when any action is brought up to a
Court by an appeal or otherwise, in which
security for the prosecution of the suit has been
given, and judgment is rendered against the plain-
tiff for the costs of the defendant, the appellate
court shall also give judgment against the surety
for said costs, and execution may issue jointly
to the defendant and his surety. (Rev. s. 1851;
Code, s. 543; R. C. c. 14; W. R. Co. v. Cox,
R. S., c. 31, s. 133; 1891, c. 48; 1911, c. 189, s. 1; C. S. 1227.)

Cross Reference.—As to use of mortgages in lieu of se-
curity for costs, see § 199-25. As to appeal bonds, see
§ 1-297.

Applies to Judgment for Defendant.—The section is so
broadly worded as to apply to all causes where the costs are
adjudged for the defendant against the plaintiff, and not
simply to those where the plaintiff appeals. Kenney v.
Seaboard Air Line Railway Co., 166 N. C. 566, 569, 82 S. E. 849.

**Appeals in Supreme Court.**—This section cannot be restricted in its application to appeals from the court of a justice of the peace, for the first sentence of the section would not apply to such a court, as no prosecution bond for costs is given in such a court, or in the Supreme Court if an action is brought here against the state, or perhaps in some other cases not cognizable by a justice of the peace. Kenney v. Seaboard Air Line Railway Co., 166 N. C. 566, 571, 82 S. E. 849.

The words of this section "security for the prosecution of action," undeniably mean the prosecution bond, and, under the order allowing the motion to re-tax, Smith v. Arthur etc., Co., 116 N. C. 872, 874, 21 S. E. 696.

Increasing Penalty of Bond.—Where the defendant has been successful on his appeal to the Supreme Court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. Kenney v. Seaboard Air Line Railway Co., 166 N. C. 566, 571, 82 S. E. 849.

**Partial New Trial.**—This section does not apply where the defendant does not gain an entire reversal in the Supreme Court; where a partial new trial only is awarded the costs are in the discretion of the Supreme Court as provided in section 6-33. Sheehy v. Casualty Company, 142 N. C. 376, 55 S. E. 296.

**Application.**—Where an action is brought to recover fees of an officer, and in the same action judgment is asked against the sureties on a bond given in a quo warranto proceeding, the superior court has jurisdiction and judgment may be rendered against the sureties. McCali v. Zane, 106 N. C. 902, 60 S. E. 903.

**Appeal.**—Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to re-tax. Smith v. Arthur etc., Co., 116 N. C. 872, 874, 21 S. E. 696.

§ 6-4. Execution for unpaid fees; itemized bill of costs to be annexed. — The clerks of the supreme, superior and criminal courts, where suits are determined and the fees are not paid by the party from whom they are due, shall be authorized to instruct the sheriff of any county in the state, who shall levy them as in other cases; and to the said execution shall be annexed a bill of costs, written in words so as plainly to show each item of costs and on what account it is taxed; and all executions for costs, issuing without such a bill annexed, shall be deemed irregular, and may be set aside as to the costs, at the return term, at the instance of him against whom it is issued. (Rev., s. 1253; Code, s. 3702; R. C., c. 102, s. 24; C. S. 1228.)

Every execution presupposes a judgment of some sort, and the right given by this section to issue the one implies the existence of the other. Sheppard v. Bland, 87 N. C. 163, 107.

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

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

**Cross References.**—Cross references to fees of jurors, see § 9-5. As to unclaimed fees of jurors, see § 2-50.

Not a "Tax" within Meaning of Constitution.—The tax prescribed by Rev. Code, ch. 28, sec. 4, (similar to this Act of 1858-59) was not a tax within the meaning of the Revenue Act of 1838-59, which repealed all taxes not therein imposed; nor was it a tax within the meaning of the Constitution, Art. V, sec. 3, which requires taxes to be equal and uniform. Such a tax was not in violation of the Constitution, Art. I, sec. 35. State v. Nutt, 79 N. C. 263.

Failure to List Taxes.—The plea of guilty to an indictment for failure to list taxes as required by the Revenue Act of 1862 is not a violation of the constitution and meaning of this section requiring in criminal cases a tax of $4 against the "party convicted or adjudged to pay the cost," and applies whether the jury has been impaneled or not; and the tax of $5 in the civil actions should be imposed as a part of the costs, when the jury has been impaneled. This but evidences the legislative intent to draw this distinction between criminal and civil actions, the reason therefor, though apparent, is immaterial in construing the meaning of the statute. State v. Smith, 184 N. C. 728, 114 S. E. 625.

§ 6-6. In criminal cases, not demandable in advance.—In all cases of criminal complaints before justices of the supreme court, judges of the superior court, and other magistrates having jurisdiction of such complaints, the officers entitled by law to receive fees for issuing or executing process are not entitled to demand them in advance. Such officers shall indorse the amounts of their respective fees on every process issued or executed by them, and return the same to the court to which it is returnable. (Rev., s. 1354; Code, s. 1173; 1868-9, c. 176, subch. 3, s. 40; C. S. 1236.)

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

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

**In General.**—In Young v. Connelly, 112 N. C. 646, 650, 17 S. E. 404, the court in deciding the action states the following: "So it seems in this view of the testimony that it was the duty of the clerk to have filled the blanks and docketed the judgment. The referee's fee was a part of those costs. It was necessary for the clerk to tax the costs and insert the amount in the entry of judgment in addition to the sum adjudged by his honor."

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

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

§ 6-9. Justice required to itemize costs.—In all...
trials before justices of the peace any party, plaintiff or defendant, may demand of the justice trials before justices of the peace any party, plaintiff or defendant, may demand of the justice before whom the trial is held an itemized statement of the costs of the action. Up-on such demand it shall be the duty of the justice to furnish the statement demanded. No person shall be compelled to pay any cost in any trial before a justice of the peace until an itemized statement of the costs has been made out and given to the party charged. It shall be the duty of the justice to insert in the entry of the judgment in every criminal action tried or otherwise disposed of by him a detailed statement of the different items of cost, and to whom due. (Rev., ss. 1257, 2789; Code, s. 734; 1887, c. 297; C. S. 1233.)

Cross Reference.—As to fees and costs in appeal from justices of the peace, see § 7-381.

§ 6-10. Justice of the peace refusing to furnish bill of costs.—If any justice of the peace before whom any trial is held shall refuse to furnish an itemized bill of costs, when demanded by the plaintiff or defendant, he shall be guilty of a misdemeanor, and upon conviction shall be punished at the discretion of the court. (Rev., s. 3588; Code, s. 734; 1887, c. 297; C. S. 1234.)

§ 6-11. Bills of costs open to the public.—Every bill of costs shall at all times be open to the inspection of any person interested therein. (Rev., s. 1258; Code, s. 735; 1887-4, c. 116; C. S. 1235.)

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

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

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

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

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

(e) For all other offenses, eight dollars.

No larger fee than ten dollars shall be taxed for the solicitor in an indictment against the justices of the peace of any county, as justices, when there are more than three justices who are found guilty. The solicitors of the several judicial districts and criminal courts shall prosecute all penalties and forfeited recognizances entered in their courts respectively, and a sum to be fixed by the court, not to exceed ten per centum of the amount collected upon such penalty or forfeited recognizance, shall be taxed in such prosecutions.

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

Cross References.—As to salary of solicitors in lieu of fees, see §§ 7-44, 7-45. As to solicitors fees where the bill of indictment contains more than one count, see § 15-152.

Art. 2. When State Liable for Costs.

§ 6-13. Civil actions by the state; joinder of private party.—In all civil actions prosecuted in the name of the state, by an officer duly authorized for that purpose, the state shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the state as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the state till after execution is issued therefor against such private party and returned unsatisfied. (Rev., s. 1259; Code, s. 536; C. S. 1236.)

Constitutionality.—In Blount v. Simmons, 119 N. C. 50, 25 S. E. 789, it is said: "We find nothing in the Constitution depriving the Legislature of power to enact, Code, secs. 5, 56, (the direction) and we do not think it would impair the sovereign character of the state to meet its just liabilities, whether in the form of costs or otherwise." Dependent upon statute. — At common law, the king neither paid nor received costs, as the former was his prerogative and the latter was beneath his dignity, and the general statutes giving costs did not include the sovereign. The same principle has been applied in this country and in this state, so that the state is only liable in the event of express statutory provisions, which are now quite general in the different states. Blount v. Simmons, 120 N. C. 19, 40, 26 S. E. 649.

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

States Recover Costs.—In an action in the United States Supreme Court between states, the successful state may ask for costs or not as it sees fit. Missouri v. Illinois, 202 U. S. 596, 26 S. Ct. 713, 50 L. Ed. 1660.

Application to Legislature for Payment.—In an article, entitled Jurisdiction of The North Carolina Supreme Court, 5 N. C. Law Rev. 1, 9, the following appears: "Costs of action as a claim. While the State may be sued only in the Supreme Court, it may sue in any court having jurisdiction over the cause of action, and the cost of such litigation may be taxed against the state as in case of private litigants. Such costs, however, do not constitute a claim against the State as contemplated in the jurisdiction of the Supreme Court, but are only incident to the right to sue. The court in which the action is brought adjudicates the costs, and the parties interested should apply to the Legis-
I. In General.

II. Actions for Recovery of Real Property, etc.

III. Recovery of Personalty.

IV. When Justice Has No Jurisdiction.

V. No More Recovery of Costs than Damages.

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

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

3. In actions of which a court of justice of the peace has no jurisdiction, unless otherwise provided by law.

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

5. When several actions are brought on one bond, recognizance, promissory note, bill of exchange, or instrument in writing, or in any other case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions were within the state and not secreted at the commencement of the previous action or actions.

(R. v. Boyd, 104 N. C. 422, 10 S. E. 490; Yates v. Yates, 170 N. C. 531, 87 S. E. 317. All these sections are, however, subject to the exception as to when costs are allowed against the plaintiff by reason of the fact that he virtually disclaimed any right or title. Patterson v. Ramsey, 136 N. C. 561, 564, 48 S. E. 811.)

Where the action is pursued by any of the officers of the state, or the auditor, who shall thereupon issue a warrant for the amount thereof as taxed. (Rev., s. 1260; code, s. 3373; 1874-5, c. 154; C. S. 1237.)

Where the proceedings for disbarment of an attorney have not been sustained the costs are taxable against the State under the provisions of this section, and an order erroneously taxing them against the county in which the matter was tried will be vacated. Committee on Grievances of Bar Assn. v. Strickland, 201 N. C. 619, 161 S. E. 75.

§ 6-12. Costs of state on appeals to federal courts. —In all cases, whether civil or criminal, to which the State of North Carolina is a party, and the state is adjudged to have come in question at the trial, for the same cause of action against several persons, no costs other than disbursements shall be allowed to the plaintiff in favor of the plaintiff in case of only partial recovery. The language of the statute as to them is comprehensive and without exceptive provision. In Wooten v. Wooten, 76 N. C. 150, it was held that no part of the costs in such actions can be taxed against the party recovering.

In order to determine who should bear such costs, the general result must be considered and inquiry made as to who has, in the view of the law, succeeded in the action. Patterson v. Ramsey, 136 N. C. 561, 564, 48 S. E. 811.

Partial Recovery. —There is no provision that limits the allowance of costs in favor of the plaintiff in case of only partial recovery. The language of the statute as to them is comprehensive and without exceptive provision. In Wooten v. Wooten, 76 N. C. 150, it was held that no part of the costs in such actions can be taxed against the party recovering.

§ 6-16. Costs of state in certain bribery prosecutions to be a charge against state. —The expenses incurred by any county in investigating and prosecuting any charge of bribery or attempt to bribe any state officer or member of the general assembly within said county, and of receiving bribes by any state officer or member of the general assembly in said county, shall be a charge against the state, and the properly attested claim of the county commissioners shall be paid by the treasurer of the state. (Rev., s. 1261; code, s. 557; C. S. 1238.)

§ 6-17. Costs of state on appeals to federal courts. —In all cases, whether civil or criminal, to which the State of North Carolina is a party, and from which are carried from the courts of this state, or the United States, and the state is adjudged to have come in question at the trial, for the same cause of action against several persons, no costs other than disbursements shall be allowed to the plaintiff in favor of the plaintiff in case of only partial recovery. The language of the statute as to them is comprehensive and without exceptive provision. In Wooten v. Wooten, 76 N. C. 150, it was held that no part of the costs in such actions can be taxed against the party recovering.

Where the action is pursued by any of the officers of the state, or the auditor, who shall thereupon issue a warrant for the amount thereof as taxed. (Rev., s. 1260; code, s. 3373; 1874-5, c. 154; C. S. 1237.)
II. ACTIONS FOR RECOVERY OF REAL PROPERTY, ETC.

Common Law Rule.—This subdivision of the section in they shows that the plaintiff, who has made or caused to be made the improvements, may recover costs as of course, upon recovery, in an action involving title to real estate. And $6-21, providing apportionment of costs in a special proceeding for the division or sale of realty or personalty are related sections, pertaining to the recovery, which is set out under the preceding analysis line. It is held that where the plaintiff is adjudged entitled to one tract or is one of several tracts for which the action is brought, then the plaintiff to recover costs, although he has allowed the plaintiff to recover against the defendant. See also Staley v. Staley, 174 N. C. 640, 94 S. E. 497.

Where the plaintiff has been required to introduce evidence of his title to the whole of the locus in quo, and then the defendant consents that the court charge the jury to the remaining land, the costs of the action are properly awarded against the defendant. See also Staley v. Staley, 174 N. C. 264, 93 S. E. 491. In an action of trespass to real property, where the plaintiff's title and the defendant's title are distinct, and the plaintiff establishes title to the defendant's property, he is entitled to recover costs. Phillips v. Little, 147 N. C. 282, 28 S. E. 812. This is not the case where some of the defendant's recovery is general, in which case, of course, they recover costs. Phillips v. Little, 147 N. C. 282, 28 S. E. 812.

Persons Severally Sued.—In the case of several persons, severally bound, and severally sued, until one has actually made satisfaction and one concedes, costs may be allowed in all suits, only one satisfaction can be recovered. See Larin v. Morris, 2 Dall. 115, 1 L. Ed. 312.

Boundary Dispute.—Where, in an action in ejectment and for damages for wrongs done by defendant, defendant files answer denying plaintiffs' title to the land in dispute, and verdict is rendered in favor of plaintiffs, costs are recoverable. In an action in the defendant upon a prior legal title, and costs are recoverable. In an action in ejectment, where the defendant's title, disputed by the plaintiff, is good in law, the issue as to the plaintiff's title will arise, and the findings of the defendant's title, disputed by the plaintiff, is good and that the defendant has sustained greater damages than his adversary, upon both necessarily, perhaps on either, will entitle the defendant to costs. Moore v. Angel, 116 N. C. 843, 846, 21 S. E. 699.

Liability of Intervener.—Where the defendant intervenes in an action to recover real property and files a joint answer with his co-defendant, and makes a joint defense, the defendant is not bound by the adverse findings of the section. Having joined in the controversy, and made common cause in the defense, interveners must abide the result. Spruill v. Arrington, 195 N. C. 190, in E. 445. Where a party is entitled to a verdict in his favor upon an issue of fraud, the question of taxing the costs does not depend upon the finding of the jury in the plaintiff's favor upon determinative issues, but in the defendant's favor upon issues which are not determinative. See also Willis v. Coleburn, 116 N. C. 670, 80 S. E. 596.

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

III. RECOVERY OF PERSONALTY.

Partial Recovery.—There is no exception to the partial recovery rule (see ante, this note, I. "In General") when the action is for the recovery of personalty, and when the plaintiff establishes title to property which has already been adjudged to be the property of the plaintiff. If some exception is made, that as a matter of law, the plaintiff establishes title to property, and must be construed in part materia. Bailey v. Hayman, 222 N. C. 58, 22 S. E. (2d) 6.

Partial Recovery.—Applying the general rule as to partial recovery, which is that the plaintiff is entitled to costs as of course, upon recovery, in an action involving title to real estate, and $6-21, providing apportionment of costs in a special proceeding for the division or sale of realty or personalty are related sections, pertaining to the recovery, which is set out under the preceding analysis line. It is held that where the plaintiff is adjudged entitled to a part of the land sued for, whether such land is a portion of one tract or is one of several tracts for which the action is brought, then the plaintiff to recover costs, although he has allowed the plaintiff to recover against the defendant. See also Staley v. Staley, 174 N. C. 640, 94 S. E. 497.

Where the plaintiff has been required to introduce evidence of his title to the whole of the locus in quo, and then the defendant consents that the court charge the jury to the remaining land, the costs of the action are properly awarded against the defendant. See also Staley v. Staley, 174 N. C. 264, 93 S. E. 491. In an action of trespass to real property, where the plaintiff's title and the defendant's title are distinct, and the plaintiff establishes title to the defendant's property, he is entitled to recover costs. Phillips v. Little, 147 N. C. 282, 28 S. E. 812. This is not the case where some of the defendant's recovery is general, in which case, of course, they recover costs. Phillips v. Little, 147 N. C. 282, 28 S. E. 812.

As an example of the application of this rule to claims for personal property, it has been held that the plaintiff on being adjudged entitled to only a portion of a crop in a suit for claim and delivery was entitled to costs. Field v. Wheeler, 120 N. C. 264, 26 S. E. 812. This rule is forcibly illustrated by the case of Moore v. Angel, 116 N. C. 843, 21 S. E. 699, where, in an action in ejectment and for damages on his counterclaim than was allowed the plaintiff, in order to escape the payment of costs. Swain v. Clemons, 175 N. C. 240, 95 S. E. 491.

This section the plaintiff in an action to recover both real and personal property is entitled to recover costs, although he has allowed the plaintiff to recover against the defendant. See also Staley v. Staley, 174 N. C. 640, 94 S. E. 497.

Persons Severally Sued.—In the case of several persons, severally bound, and severally sued, until one has actually made satisfaction and one concedes, costs may be allowed in all suits, only one satisfaction can be recovered. See Larin v. Morris, 2 Dall. 115, 1 L. Ed. 312.

Partial Recovery.—Under this section the plaintiff in an action to recover both real and personal property is entitled to recover costs, although he has allowed the plaintiff to recover against the defendant. See also Staley v. Staley, 174 N. C. 640, 94 S. E. 497.

Equitable Defense.—One who successfully maintains an equitable defense against the recovery of land on the bare trust for him, and judgment is rendered that the defendant's title, disputed by the plaintiff, is good in law, the issue as to the plaintiff's title will arise, and the findings of the defendant's title, disputed by the plaintiff, is good and that the defendant has sustained greater damages than his adversary, upon both necessarily, perhaps on either, will entitle the defendant to costs. Moore v. Angel, 116 N. C. 843, 846, 21 S. E. 699.

Liability of Intervener.—Where the defendant intervenes in an action to recover real property and files a joint answer with his co-defendant, and makes a joint defense, the defendant is not bound by the adverse findings of the section. Having joined in the controversy, and made common cause in the defense, interveners must abide the result. Spruill v. Arrington, 195 N. C. 190, in E. 445. Where a party is entitled to a verdict in his favor upon an issue of fraud, the question of taxing the costs does not depend upon the finding of the jury in the plaintiff's favor upon determinative issues, but in the defendant's favor upon issues which are not determinative. See also Willis v. Coleburn, 116 N. C. 670, 80 S. E. 596.

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

IV. WHEN JUSTICE HAS NO JURISDICTION.

Construed with Sections 6-19 and 6-20.—The meaning of this subdivision of the section when considered in connection with section 6-20, is not clear, nor has it ever been fully and satisfactorily interpreted. The discretion of the court it has been held to be the correct construction of these sections that, in actions which under the old system were peculiarly cognizable in courts of equity and unless coming in the class of actions specified in sections 6-18 and 6-19, in which the plaintiff and defendant who succeed in the controversies were to recover costs as of course, that the costs could not be allowed the defendant, and the discretion of the court under provisions of section 6-20.


Application.—A justice has no cognizance of an action brought for the purpose of subjecting land to the payment of money, for damages, and the substantial object was to litigate the right of the parties as to the taking of the land, and the costs are recoverable. In an action of claim and delivery, judgment in an action of claim and delivery, the justice has no cognizance of the suit, and carries all costs under this section. Rawlings v. Neal, 126 N. C. 271, 35 S. E. 597.

Right to Possession Determined.—Where the controversy is made to depend upon the right of the mechanic to repossess an automobile that he has repaired, in order that he may enforce his lien thereon, and the jury has found in the plaintiff's favor upon determinative issues, but in the defendant's favor upon issues which are not determinative, the justice has no cognizance of the suit, and the costs are recoverable. Maxton Auto Co. v. Rudd, 176 N. C. 497, 97 S. E. 477.

V. NO MORE RECOVERY OF COSTS THAN DAMAGES.

In a civil action, if the provocation is great, the jury will usually seek to return costs less than a full amount. If the amount is less than fifty dollars the plaintiff, under the power vested in the court for the purposes of this section, may recover from the defendant, if the court is satisfied that there is an issue of slander, that the damages are more than fifty dollars, and that the defendant is liable for the costs. Van Dyke v. Ins. Co., 174 N. C. 78, 93 S. E. 444.

[429]
188 N. C. 551, 125 S. E. 178. And again when one dollar damages were sustained by the erection of a mill. See Bridgers v. Purcell, 23 N. C. 232. The former rule as to slander is stated in Coates v. Stephenson, 52 N. C. 12, where it is held that, as a breach of a covenant, costs under section 78, could not be taxed against the defendant.

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

Applied, as to action of slander, in Wooten v. Montgomery, 205 N. C. 295, 142 S. E. 772.

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

Editor's Note.—As this section provides that costs shall be allowed to the defendant in the actions mentioned in the preceding section, unless the plaintiff is entitled to recover, the cases construing the constructions of the preceding section determining when the plaintiff is entitled to recover, are necessarily constructions of this section. Reference should be made to said cases in the present section.

Applications.—Where the plaintiff fails in an action upon a covenant, the defendant recovers costs under this section, Britton v. Ruffin, 123 N. C. 67, 71, 31 S. E. 271.

Costs were properly awarded to the grantees in a deed in an unsuccessful action to set aside such deed, Brisco & Co v. Norris, 112 N. C. 671, 16 S. E. 850. Cited in Gold v. Kiker, 218 N. C. 204, 10 S. E. (2d) 659.

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

Editor's Note.—This section as it appeared in the Code of 1913 contained a substantial repetition of the provision now appearing in section 6-23 (c. c., as to costs on appeal). The cases pertaining to this subject will be found in the notes to section 6-23.

The purpose of this provision is to give the court authority to allow costs, as the justice of the case may require. Gulley v. Macy, 89 N. C. 343; Parton v. Boyd, 104 N. C. 422, 423, 10 S. E. 490.

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

Exercise of Discretion Presumed.—Nothing to the contrary appearing, it will be taken that the court gave judgment in the exercise of its discretion as provided in this section. Gulley v. Macy, 89 N. C. 343; Wooten v. Walters, 110 N. C. 739, 740, 81 S. E. 714, 715.

Discretion Not Reviewable.—The provisions of this section the taxing of the costs is placed in the discretion of the trial judge, which discretion is not reviewable. Klutts v. Allison, 214 N. C. 379, 384, 199 S. E. 395.

Conveyances of Real Estate.—When the conveyance was a bad conveyance in the subject of costs, Little v. Lockman, 50 N. C. 433, 434, and the allowance rested with the court. Hooper v. Davis, 166 N. C. 236, 81 S. E. 1063; Worthy v. Brower, 93 N. C. 492. And even since the abolition of the courts of equity in this State, it is held that where the case partakes of an equitable nature, the question of costs is in the court's discretion. For example in Hare v. Hare, 183 N. C. 419, 111 S. E. 630.

When the court is not called upon to tax costs, as in an execution, neither party was permitted to recover costs from the other, the question was of an equitable nature, and the taxing of costs was, under this section, in the sound discretion of the court. But a consolidated action, tried before the referee, in which judgments are rendered, is not an equitable proceeding, in which costs may be allowed or not, in the discretion of the court under this section. Highland Cotton Mills v. Ragan Knitting Co., 194 N. C. 80, 90, 138 S. E. 428.

New Trial.—See section 6-33 and notes thereto.

Qualified by Section 28-115.—This provision is subject to the qualification provided in section 28-115, relative to costs against a representative. Whitaker v. Whitaker, 138 N. C. 205, 50 S. E. 610.

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

Specific Performance.—Where the purpose of an action was simply to compel the specific performance of an executory contract, and to adjust certain rights involved in an account of moneys collected and certain indebtedness incident to that contract, it was clearly within this section. Parton v. Boyd, 104 N. C. 422, 423, 10 S. E. 490.

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

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

1. Application for year's support, for widow or children.
2. Caveats to wills.
3. Habeas corpus; and the court shall direct what officer shall tax the costs thereof.
4. In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by the wife, either by the husband or by her from her separate estate, as may be just.
5. Application for the establishment, alteration or discontinuance of a public road, cartway or ferry. The board of county commissioners may order the costs incurred before them paid in their discretion.
6. The compensation of referees and commissioners to take depositions.
7. All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the chapter entitled Partition.
8. In all proceedings under the chapter entitled Drainage, except as therein otherwise provided.
9. In proceedings for reallocation of homestead for increase in value, as provided in the chapter, Civil Procedure.

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow. (Rev., s. 1265; Code, s. 1266; Code, s. 277; Rev.; s. 1266; Code, s. 277; C. S. 1266.)

Local Modification.—Nash: 1939, c. 46; 1941, c. 18.

Editor's Note.—The 1937 amendment added the paragraph at the end of this section and provided that it should not apply to pending causes.

For article generally on the subject of the effect of the amendment and the history of attorneys' fees as costs in this State, see 15 N. C. L. Rev. 333.

Caveats to Wills.—It is within the discretionary power of a court, under this section, before which an issue of deviseavit vel non is tried, to direct the payment of the costs out of the estate. Mayo v. Jones, 78 N. C. 468. See in re
§ 6-23. Defendant unreasonably defending after notice of no personal claim to pay costs.—In case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant, for the purpose of obtaining such sum as he may recover from him, a statement of the nature of the claim and the amount standing against him, and such defendant shall either pay the same to the plaintiff or tend to sue as a pauper to recover the same, and in such proceedings the plaintiff shall recover costs, except in case of recovery in forma pauperis; and no officer shall require of him any fee, and he shall be entitled to recover costs of his witnesses.

§ 6-24. Suits in forma pauperis; no costs unless recovery.—When any person sues as a pauper, no officer shall require of him any fee, and he shall recover no costs, except in case of recovery by him. (Rev., s. 1276; Code, s. 212; 1895, c. 149; 1868-89, c. 46, s. 3; C. S. 1894.)

Cross Reference.—As to when suits in forma pauperis may be permitted, see § 1-101.

Leave to Sue.—The leave to sue as a pauper does not extend in civil actions beyond the trial in the Superior Court. (Rev., s. 2436; Code, s. 243; 1879-80, c. 243.)

Costs of Witnesses.—One suing in forma pauperis is not entitled to recover costs of his witnesses. (Rev., s. 2436; Code, s. 243; 1879-80, c. 243.)

The Act of 1868-69, ch. 54, s. 3, amending the section, ameliorates the rigors of the pre-existing law in regard to witnesses, who are not compelled to attend for more than an hour, and braces the costs of witnesses. Compensation to witnesses is part of the cost of an action, as much so as any other statutory charges in and about the same. Hall v. Younts, 121 N. C. 316; Bailey v. Surles, 86 N. C. 90; Draper v. Buxton, 90 N. C. 127, 10 S. E. 1054.

Cross Reference.—As to when suits in forma pauperis may be permitted, see § 1-101.

§ 6-26. Party seeking recovery on usurious contracts; no costs.—No costs shall be recovered by any party, whether plaintiff or defendant, who may endeavor to recover upon any usurious contract. (Rev., s. 1271; 1895, c. 69; C. S. 1894.)

Cross Reference.—As to usury generally, see §§ 24-1, 24-2.
§ 6-26. Costs in special proceedings.—The costs in special proceedings shall be as allowed in civil actions, unless otherwise specially provided. (Rev., s. 1272; Code, s. 541; C. S. 1249.)

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

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

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

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

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

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


§ 6-29. Costs of reassessment of homestead.—If the superior court at term shall confirm the appraisal or assessment, or shall increase the exemption allowed the debtor or claimant, the levy shall stand only upon the excess remaining, and the creditor shall pay the costs of the proceeding in court. If the amount allowed the debtor or claimant is reduced, the costs of the proceeding in court shall be paid by the debtor or claimant, and the levy shall cover the excess then remaining. (Rev., s. 1275; Code, s. 551; C. S. 1252.)

Cross Reference.—As to reassessment of homestead, see § 1-381. As to costs in reallotment of homestead for increase in value, see § 6-21, subsec. 9.


§ 6-30. Costs against infant plaintiff; guardian responsible.—When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor. (Rev., s. 1276; Code, s. 539; C. S. 1255.)

§ 6-31. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.—In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense. And when any claim against a deceased person is referred, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law. (Rev., s. 1277; Code, s. 535; C. S. 1254.)

Cross Reference.—As to personal liability of personal representative for denial of claim, see § 28-133. As to when costs against representative are allowed, see § 28-115. As to the availability of guardians for costs for defaults, see § 33-90. As to reference of disputed claim generally, see §§ 28-111, 28-112.

When Fiduciary Personally Liable.—By virtue of this section costs should be taxed against the estate in the hands of a trustee, and not against him personally, except when the court adjudges that the trustee has been guilty of mismanagement, or bad faith, in such action or defense. Smith v. King, 113 N. C. 205, 59 S. E. 630. See section 28-115 and the notes thereto.

Includes Next Friend.—While "next friends" may not be embraced in the strict letter of this section, they come within its purview. Smith v. Simpson, 121 N. C. 105, 13 S. E. 113. And it is error to tax "next friends" who are not parties without a finding of mismanagement or bad faith. Hockaday v. Lawrence, 156 N. C. 319, 322, 72 S. E. 387.

Allowance to Trustee.—A trustee, as against those for whose benefit the trust is created, will be allowed to apply so much of the funds to the payment of costs and expenses, including counsel fees, as may be necessary to protect it, but he will not be allowed such disbursements one who establishes an adverse title to the property. Chemical Company v. Johnson, 101 N. C. 223, 7 S. E. 770, 775.

Cited in In re Hargrove, 200 N. C. 307, 173 S. E. 577.

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

Absolute Assignments.—Cases have been decided in which it is held that the assignments contemplated by this section are only such as are absolute, and that such an assignment is intended to be a collateral security only for a continuing obligation or claim are not within the purview of this act. Thus, it has been held that an assignee could not be subjected to the payment of the costs incurred when the transfer was, as a collateral security, of a right to damages for an assault on the person of the assignor then in process of enforcement. Wolfe v. Holcomb, 31 N. Y. 125—of judgments. Peck v. Yorks, 75 N. Y. 487—a demand under the mechanics' lien law; In the matter of the lien of R. H. Dowling, 52 N. Y. 658. Davis v. Higgins, 92 N. C. 203.

Art. 4. Costs on Appeal.

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

In General.—The first part of this section manifestly refers not only to a reversal of the judgment below, but to a judgment in favor of the appellant on the merits and not merely to an order for a new trial. Elliott v. Kelly, 4 E. D. Smith 121, 21 N. C. 276, 42 S. E. 926. Consequently new trial is granted where the judgment below is reversed, not only to a reversal of the judgment below, but to a new trial, unless in exceptional cases and for special reasons, since the court is in no laches, as is shown by its having obtained the judgment below. This is also the practice, as new trials on this ground are outside of the regular course and are only granted, in discretion, when justice requires a departure from the usual procedure. By analogy, where asked for on the ground of newly discovered evidence, the statute expressly forbids it to be granted except upon payment of the costs of the term. Haynes v. Ross, 121 N. C. 498, 500, 28 S. E. 144; Ladd v. Ladd, 121 N. C. 118, 28 S. E. 890.

When both parties are entitled to a new trial, each will pay his own costs in the Supreme Court. Ladd v. Ladd, 121 N. C. 128, 28 S. E. 890.

The taxing of the costs on appeal, by partial new trial being granted, is in the discretion of the court. Satterwith v. Goodyear, 137 N. C. 302, 49 S. E. 255.

Appeal from the superior court. On an appeal from the court of a justice of the peace to the superior court, the trial in the superior court is de novo, and its costs in both courts are required, by this section and section 1-284, to be taxed against the successful party, or, as in this case, upon a judgment in the plaintiff's favor for the difference between the amount of her demand over that allowed upon her cross-decree, if judgment be given of answer. Ritchie v. Ritchie, 192 N. C. 518, 135 S. E. 458.

When the subject-matter of the action is destroyed before the appeal is heard, the judgment below is presumed to have accrued against the appellee. Taylor v. Vann, 127 N. C. 241, 37 S. E. 363.

Reversal Necessary to Tax Appellee.—Unless the court below reverses the judgment below, it cannot adjudge any part of the costs against the appellee. Commissioners v. Gill, 126 N. C. 85, 87, 55 S. E. 238.

Partial Affirmance and Partial Reversal.—Where the judgment of the lower court is partly affirmed and partly reversed, in the exercise of the discretion permitted by this section, the costs in the Supreme Court may be divided so that each party pays his own costs. Lowman v. Lake, 121 N. C. 267, 25 S. E. 41; Hawkins v. Cedar Works, 122 N. C. 87, 30 S. E. 13.

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

In McLean v. Breece, 111 N. C. 390, 393, 18 S. E. 694, where the judgment was modified in the Supreme Court, the costs were taxed against the appellee. And where the plaintiffs recovered a partial judgment on their demand, by establishing a mechanic's lien, they were entitled to an appeal. See N. C. v. See Hoggard v. Lumber Co., 170 N. C. 529, 37 S. E. 337.

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

Modification by Superior Court.—The superior court is without power to modify former orders of the supreme court. App. p. 14. Under the order appealed from, he may be taxed with the costs of the appeal, though the case be remanded. Harrington v. Rawls, 136 N. C. 65, 48 S. E. 571.


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

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

§ 6-35. Costs on appeal from justices of the peace.—1. After an appeal from the judgment of a justice of the peace is filed with a clerk of a superior court, the costs in all subsequent stages shall be as herein provided for actions originally brought to the superior court.

2. If, on appeal from a justice of the peace, judgment is entered for the plaintiff, and he shall not recover on his appeal a greater sum than was recovered before the justice, besides interest accrued since the rendition of the judgment, he shall not recover the costs of the appeal, but shall be liable at the discretion of the court to pay the same. (Rev., ss. 1281, 1282; Code, ss. 542, 566; R. C., c. 31, s. 106; 1794, c. 414, s. 17; C. S. 1258.)

Cross References.—As to advance costs on appeal, see § 2-30. See also, § 1-269.


Art. 5. Liability of Counties in Criminal Actions.

§ 6-36. County to pay costs in certain cases; if approved, audited and adjudged.—If there is no prosecutor in a criminal action, and the defendant is acquitted, or convicted and unable to pay the costs, or a nolle prosequi is entered, or judgment is reversed on appeal, or the defendant is liable at the discretion of the court to pay the costs, the clerk, sheriffs, constables, justices and witnesses one-half their lawful fees; except in capital cases and in prosecutions for forgery, perjury, or conspiracy, when they shall receive full fees. No county shall pay any such costs unless the same are approved, audited and adjudged against the county as provided in this chapter. (Rev., s. 1283; Code, ss. 733, 739; R. C., c. 28, s. 8; R. S., c. 28, s. 12; 1874-5, c. 247; C. S. 1259.)


Construed with Local Law.—Where a prosecutor in a local law permits the costs of a municipal court to be recovered from a county upon conviction of a criminal offense in certain instances, the provision will be construed in pari materia with this section, and the intent and meaning of the local law will be to permit a recovery of one-half the costs only. City v. Guilford County, 191 N. C. 594, 132 S. E. 528.

Cross Prosesqui Entered.—Where a nolle prosequi is en-
In New Hanover County, in a criminal action, if there is no prosecutor, and the defendant is convicted and serves out his sentence on the public roads of the county, the county shall pay one-half fees as provided in the first sentence of this section. (Rev., s. 1285; 1889, c. 354; C. S. 1262.)

§ 6-38. Liability of county when defendant acquitted in supreme court.—If, on appeal to the supreme court in criminal actions, the defendant is successful, the county from which the appeal was taken shall pay one-half the costs of the appeal and shall also pay all such sums as have been properly expended by the defendant for the transcript of the record and printing done under the rules of the court. (Rev., s. 1284; C. S. 1261.)

§ 6-39. County where offense committed liable for costs.—In all cases where the county is liable to pay costs, that county wherein the offense is alleged to have been committed shall be adjudged to pay them. (Rev., s. 1285; 1889, c. 354; C. S. 1262.)

§ 6-40. Liability of counties, where trial removed from one county to another.—The costs taxed in any case removed from another county for trial shall include the fees and expenses allowed for summoning the special venire, if one is ordered in the case, and the per diem and mileage of jurors who are impaneled to try the case, together with all other costs and expenses of the trial of the case, the amount of which, if not provided for by law, to be fixed by the presiding judge, so as to fully relieve the county in which the trial is had of all costs and expenses thereof. All fines, forfeitures, penalties and amercements imposed or levied in the case shall belong to the county from which the case was removed and be paid to the treasurer of said county. When a prisoner is sent from one county to another to be held for trial, or for any other cause or purpose, the county from which he is sent shall pay his prison expenses, unless the same is collected from him, on or before the first Monday in each month, and upon a failure to do so, it shall be the duty of the county to which he is sent to pay the same to the sheriff or jailer entitled to receive it at the same rate and under the same regulations as its own prison expenses are paid; and the county liable shall repay the same within thirty days after demand, and upon failing to do so the county to which the money is due shall be entitled to recover in the superior court, or, if the amount be within its jurisdiction, the court of justice of the peace of its own county, the amount due, with ten per cent additional, together with eight per cent interest on the sum due; and said courts of said county shall have full jurisdiction.
§ 6-41. Statement of costs against county to be filed with commissioners.—In all criminal actions where the county is liable in whole or in part for costs, it is the duty of the clerks of the courts to make out a statement of such costs from the record or docket, within thirty days after the hearing, trial, determination, or other disposition thereof, and file the same with the board of commissioners of the county. (Rev., s. 1286; Code, s. 736; 1873-4, c. 116, s. 3; C. S. 1264.)

Cross Reference.—As to requirement that prisoner pay charges and fees, see § 153-181.

§ 6-42. Expenses in conveying prisoner to another county; provision for payment. — When a sheriff or other officer arrests a person under a capias or other legal process, which requires him to deliver the prisoner, and such demand be not complied with within ten days, the sheriff or jailer shall at once return such prisoner to the county from which such prisoner was sent, and deliver him to the sheriff or jailer thereof. (Rev., s. 1288; 1889, c. 354; 1901, c. 718; C. S. 1263.)

Cross Reference.—As to requirement that prisoner pay charges and fees, see § 153-181.

§ 6-43. Expenses in conveying prisoner to another county; provision for payment. — When a sheriff or other officer arrests a person under a capias or other legal process, which requires him to have the person arrested before a court or judge of another county, and such sheriff or other officer is obliged to incur expense in the safe delivery of such person by reason of his failing to give bond for his appearance, or if the sheriff or other officer of the county to which the prisoner is to be carried incurs any expense in going for and conveying said prisoner to his county, then in either case the sheriff or other officer shall file with the court or judge issuing the capias or other legal process and with the register of deeds an itemized and sworn account of such expenses, which shall be presented by the register to the board of commissioners at their next regular meeting, to be audited by them. Such sworn statement shall be received by the said board as prima facie correct. Upon such auditing the board of commissioners shall cause to be issued to such sheriff or other officer an order on the county treasurer for the amount so allowed shall be taxed in the costs to the use of the county. (Rev., s. 1287; 1885, c. 262; 1901, c. 64; C. S. 1263.)

§ 6-44. Costs due credited on taxes due by payee.—Whenever a bill of costs in a criminal action is presented to any board of county commissioners in any county of the state for payment, as provided in this chapter and article, and the said bill is ordered to be paid by the said county commissioners, it shall be the duty of the clerk of said board, before issuing any orders for payment of the sum set out in said bill, to ascertain whether any person to whom any amount is due on said bill of costs, is indebted to the county for taxes, and if said person to whom said order is payable is so indebted, the order shall state in its face, "Payable only on taxes due . . . County," and upon presentation of such order to the sheriff or tax collector, said sheriff or tax collector shall give said taxpayer credit for the sum designated in said order, and the said sheriff or tax collector shall be entitled to receive credit for said sum so paid in his settlement for taxes.

It shall be unlawful for any board of county commissioners to pay to any person who is indebted to the county for taxes any money payable out of the revenues of the county on account of costs in a criminal case, which is payable by the county, except as provided in paragraph one above. (1933, c. 245.)

Local Modification.—Alamance: 1935, c. 319, ss. 1, 2; Craven: 1933, c. 426; Granville: 1933, c. 426; Wilson: 1933, c. 501.


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

Editor's Note.—This section is cited in 5 N. C. Law Rev. 359, in a note on "Interest in Cost."

In General.—The right of the officers to recover costs in the name of the state is a mere incidental one arising out of the conviction under the provisions of this section, and the judgment for them vests the claim in the officers to whom they are due. State v. Crook, 115 N. C. 760, 765, 20 S. E. 513. The legal effect of a conviction and judgment is to fix the costs in the case in those entitled to receive them. The judgment, though nominally in the name of the state, is, in effect, in favor of those performing services in the case for which the fees are given as a compensation. State v. Mooney, 74 N. C. 98, 99.

The "costs of prosecution" are those incurred in the conduct of the prosecution, and do not include the costs incurred by the defendant in resisting the prosecution. State v. Wallin, 89 N. C. 575.

Where a defendant is taxed with the costs of prosecution, a witness, though summoned by the defendant and examined in his defence, has no right to have his ticket for attendance allowed in the bill of costs. It is a personal debt of the defendant, to vest the right to the costs in those entitled to receive them. State v. Crook, 115 N. C. 760, 20 S. E. 513.

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

Cross References.—As to imprisonment for costs, see § 43.
§ 6-47. Judgment confessed; bond given to secure fine and costs.—In cases where a court, mayor, or a justice of the peace permits a defendant convicted of any criminal offense to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid. (Rev., s. 1293; Code, s. 749; 1885, c. 304; 1879, c. 264; C. S. 1290.)

Cross Reference.—As to bonds generally, see § 151-177.

Art. 7. Liability of Prosecutor for Costs.

§ 6-49. Prosecutor liable for costs in certain cases; court determines prosecutor.—In all criminal actions, if the defendant is acquitted, nolle prosequi entered, judgment against him arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees of all witnesses summoned for the accused, whom the judge, court or justice of the peace before whom the trial took place shall certify to have been proper for the defense, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the judge, court or justice is of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. And every judge, court or justice is hereby fully authorized to determine who the prosecutor is at any stage of a criminal proceeding, whether before or after the bill of indictment has been found, or the defendant acquitted: Provided, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record. (Rev., s. 1295; Code, s. 737; 1889, c. 34; R. C., c. 35, s. 37; 1799, c. 4, s. 19; 1800, c. 558; 1868-9, c. 277; 1874-5, c. 151; 1879, c. 49; C. S. 1271.)

Cross Reference.—See also, §§ 6-50, 6-64 and 6-52.

General Consideration.—This section was intended to enlarge the power of the courts over the question of costs in criminal actions. State v. Norwood, 84 N. C. 794. Its enactment was within the power of the Legislature. State v. Cannady, 77 N. C. 505; 76 N. C. 597; 73 N. C. 453.

§ 6-48. Arrest for nonpayment of fine and costs.—In default of payment of such fine and costs, it is the duty of the court at any subsequent term thereof, on motion of the solicitor of the state, to order a capias to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law; and a justice of the peace or mayor may at any subsequent time arrest the defendant and hold him for the fine and costs until discharged according to law. (Rev., s. 1294; Code, s. 750; 1885, c. 364; 1879, c. 264; C. S. 1270.)

Cited in State v. Smith, 196 N. C. 438, 146 S. E. 73.

Marking Prosecutor. — Under the Code of 1854 it was held that the person to be taxed must be marked on the bill as prosecutor (see State v. Lupton, 63 N. C. 483; State v. Darr, 63 N. C. 516) and that the court had no right to order him to be marked as such without his consent. See State v. Crossen, 81 N. C. 579, 382. But note the language of the section as it now reads, viz., “whether marked on the bill or warrant or not.”

Notice. — It is necessary for the trial court, in order to adjudge the costs of a criminal action “was not required for public interest,” that there was a finding that it “was not required by the public interest.” State v. Smith, 195 N. C. 323, 141 S. E. 1049. The object of notice is only to give the party a day in court, and it matters not how he gets the notice, if he appears and defends under the bill as prosecutor. The court should find the facts, and where it is an application for the discharge of the defendant’s counsel or by the court of its own motion. State v. Hughes, 83 N. C. 665; State v. Hamilton, 106 N. C. 660, 10 S. E. 854. The court should find the facts, and where it is an application for the discharge of the defendant’s counsel or by the court of its own motion. State v. Roberts, 83 N. C. 662, 10 S. E. 900, and State v. Owens, 87 N. C. 565; State v. Jones, 117 N. C. 676, 11 S. E. 247.

A notice to mark one as prosecutor under this section need not be writing. Where it was announced in open court, upon the calling and continuance of a state case, that a motion would be made at the next term to mark a.
witness as prosecutor (all the witnesses being present), and
on the argument of the case before the court, it was announced that all
the witnesses were present, it was held to be sufficient evidence
that such notice was given, and warranted the court in
ordering the witness to be marked as prosecutor. State v.
Norwood, 84 N. C. 794.

Insolvent Prosecutor—County Liable. — When a judge
below orders an insolvent prosecutor to pay costs, and he
fails or is unable to pay the county in which the
insolvent became insolvent to pay the same. Pegram
v. Commissioners, 75 N. C. 120.

Conclusiveness of Finding. — A judgment that a prose-
cution is frivolous and not required by the public interest,
and that the prosecutor pay the costs, is conclusive and not
The finding by the judge below that a criminal prosecu-
tion is frivolous or malicious, and the judgment that the prosecutor pay costs, or in de-
fault thereof be imprisoned. State v. Vance, 109 N. C. 789,
14 S. E. 110.

But where the trial judge has dismissed a criminal action as being frivolous and malicious, and taxed the prosecu-
tors with costs, and it appears from his findings of record
that he has done so without any proper consideration of
their affidavits in support of their position, and relevant to
the issue, so as to deprive them of the benefits of the due
process of law, his order will set aside on appeal, leaving
the matter open for proper adjudication. State v. Col-
lins, 169 N. C. 323, 84 S. E. 1049.

In this latter case it is said: "In the disposition made of
this appeal we do not intend to impair or qualify our former
decisions on the subject, notably State v. Hamilton, 106 N. C.
660, 661, 10 S. E. 854, and State v. Roberts, 106 N. C. 662,
10 S. E. 900, to the effect that, on a hearing of this charac-
ter, the findings of fact by the trial judge are conclusive.
In the disposition of the case under review, we think
there must necessarily be some tribunal having the power to deter-
mine the ultimate facts on which the rights of the parties
depend, and we think the cases which refer this power to
the trial judge, while present and have opportunity to per-
sonal evidence, and note the circumstances and attend-
ance conditions, are grounded in good reason; but, on the facts
as they appear from his honor's findings, and we think it
not improper to say that he has spread them on the record
with commendable candor, we do of opinion that these men,
as heretofore stated, have had no proper hearing,
within the meaning of the constitutional provision, and
that the judgment against them must be set aside." 7

State v. Darr, 63 N. C. 516.

§ 6-50. Imprisonment of prosecutor for non-
payment of costs, if prosecution frivolous.—
Every such prosecutor may be adjudged not only
for the nonpayment thereof, when the judge,
court, or justice of the peace from whom the
case was tried shall adjudge that the prosecution
was frivolous or malicious. (Rev., s. 1297; Code,
s. 738; R. C., c. 33, s. 37; 1800, c. 533; 1878, c. 49;
1881, c. 176; C. S. 1278.)

Constitutionality. — This section is held constitutional.
State v. Cannady, 78 N. C. 599; State v. Hamilton, 106 N.
C. 660, 661, 10 S. E. 854.
Costs of prosecution against a prosecutor (upon acquit-
tal of the accused or nolle prosequi entered), or against
the accused upon a verdict of guilty, or a fine imposed, does
not constitute a debt within the meaning of Article one,
section sixteen, of the Constitution, and hence the defendant
may be imprisoned for nonpayment of the same. 8

This case under section 6-45, State v. Wallin, 89 N. C.
578.
Where Bill Ignored. — No power is conferred by this
section to tax a prosecutor with costs when the bill is ig-
nored. State v. Howard, 89 N. C. 581; State v. Cockerham,

Art. 8. Fees of Witnesses.

§ 6-51. Not entitled to fees in advance. — Wit-
enesses are not entitled to receive their fees in ad-
advance; but no witness in a civil action or special
proceeding, unless summoned on behalf of the
state or a municipal corporation, shall be comp-
elled to attend more than one day, if the party
by or for whom he was summoned shall, after
one day's attendance, on request and presenta-
tion of a certificate, fail or refuse to pay what
then may be due for traveling to the place of ex-
amination and for the number of days of attend-
ance. (Rev., s. 1298; Code, s. 1368; 1869-9, c. 279,
1891, c. 147; 1905, cc. 279, 522; P. L. 1911, c. 402;
§ 6-53. **Witness to prove attendance; action for fees.**—Every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure to file the certificate and cause it to be entered of record, the witness may not require the same to be taxed against the adverse party, at whose instance such witness was summoned (witnesses for the state and municipal corporations excepted), to pay the same to the sheriff of the county from which the witness was summoned, or to the county treasurers, or to any other person or persons appointed by the legislative body of the county.
"sworn and examined or tendered" i.e., witnesses subpoenaed by the successful party cannot be taxed against the losing party unless sworn and examined, that their materiality may be shown. Otherwise, a successful party may oppress the losing party by subpoenaing witnesses and having their attendance taxed, while examining only the few necessary to gain the action. Merely swearing the witnesses would be no assurance of this materiality. They must be examined and tendered to the opposite party to be examined as the witnesses of the party summoning such witnesses, and under the rules of cross-examination to the certaining of the materiality of the party's adversary's witnesses. Sitton v. Lumber Company, 135 N. C. 540, 541, 47 S. E. 699.

Effect of Nonsuit.—The costs of the defendant's witnesses who are present when the case is brought for trial, but are not sworn, because the plaintiff takes a nonsuit, are properly taxed against the latter. Henderson v. Williams, 120 N. C. 339, 27 S. E. 30, citing Lottis v. Raxter, 66 N. C. 340, cited in Sitton v. Lumber Company, 135 N. C. 540, 541, 47 S. E. 699.


Witnesses Summoned by Both Parties.—If a witness summoned by each party to a suit is entitled to compensation from each. Peace v. Person, 5 N. C. 188.

§ 6-54. Witness tickets to be filed; only two witnesses for single fact.—At the court where the cause is finally determined the party recovering judgment shall file in the clerk's office the witness tickets; the amount thereof shall be taxed in the bill of costs, to be levied and recovered for the benefit of said party. The party cast shall not be obliged to pay for more than two witnesses to prove a single fact. (Rev. s. 1300; Code, s. 1370; R. C., c. 31, s. 74; 1783, c. 189, s. 3; 1796, c. 458, s. 2; C. S. 1275.)

Local Modification.—Anson, Buncombe, Columbus, Forsyth, Gaston, Richmond, Robeson, Rutherford, Surry: C. S. 1276.

Editor's Note.—"Service as a witness," as stated by Justice Clark, (then Chief Justice) in State v. Wheeler, 141 N. C. 773, 777, 53 S. E. 358, "is the exaction of a public duty, like service upon a jury, grand jury, coroner's inquest, special venire, military service, and the like, which men are required to render either wholly without compensation or (usually) with inadequate pay, as the sovereign may require. Originally none of these received any pay whatever; even as late as 1844 N. C. 877, 878, 10 S. E. 698, the duration of military service only having a time limit. And to this day witnesses, above two to each material fact, receive no pay." See also annotations under § 6-53.

Where the issue submitted is a complex one, involving the investigation of a multiplicity of single facts material to be ascertained, to establish each such fact two witnesses are allowable under this section. Ex parte Beckwith, 124 N. C. 311, 32 S. E. 393.

Four Witnesses Summoned—Two Called by Each Party.—Where there was only one issue in the case, and plaintiff summoned four witnesses, but called only two of them, and the defendant summoned the witness who did not attend, the defendant was not liable for the costs of the two witnesses summoned by the party who did not attend, as the court could not say that they had not been summoned to contradict testimony expected from the defendant's witness. Hayle v. Cowan, 2 N. C. 21.

Against Parties Summoning Witnesses.—While not more than two witnesses summoned by the successful party to prove a single fact, can be taxed against the losing party under this section, this does not abridge the right of all the witnesses to recover compensation against the party summoning them. State v. Mays, 59 N. C. 377, 381, 10 S. E. 698.

This section does not apply to expert witnesses, the court being allowed under § 6-59 to tax privilege, discretion, and the like, upon the party in whose behalf the service was rendered for same. Connor v. Hayworth, 206 N. C. 721, 724, 175 S. E. 140.


§ 6-55. Fees of witnesses before jury of view, commissioner, etc.—Witnesses summoned to appear at any survey, or before any jury of view, or before any commissioner, arbitrator, referee, or other person authorized to require their attendance, shall be entitled to the same fees as for similar attendance at the court of the county, and may prove, by their own oath, their attendance, mileage, and ferriage before such person, who is hereby authorized to administer the oath; and when they shall attend on any commission issuing from without the state, they may recover the fees for attendance against the party summoning them, or his agent or attorney directing them to be summoned; and when they shall attend under a commission or authority from any court in this state, the fees for attendance shall be proved as aforesaid, and be certified to the proper court and taxed among the costs of the cause, as if the witness had attended the court; but nevertheless, such fees may be immediately recovered against the party summoning. (Rev. s. 1301; Code, s. 1355; R. C., c. 31, s. 67; 1805, c. 685; 1848, c. 66; 1850, c. 188, s. 3; C. S. 1277.)

§ 6-56. Fees of witnesses before grand jury.—No witness shall receive pay for attendance in a criminal case before a grand jury, unless such witness has been summoned by direction in writing of the chairman of the grand jury, or of the solicitor prosecuting, addressed to the clerk of the court, commanding him to summon such witness, stating the name of the parties against whom his testimony may be needed, or unless he has been bound or recognized by some justice of the peace to appear before the grand jury. (Rev. s. 1302; Code, s. 743; 1879, c. 264; C. S. 1278.)

Local Modification.—Martin, Moore, Wayne: C. S. 1279.

Cross Reference.—As to witnesses before grand jury, see §§ 15-130, 15-139.

Permission to Summon.—Grand juries have no right to summon witnesses to appear before them except by the permission of their foreman or the solicitor as prescribed by this section. State v. Wilcox, 104 N. C. 847, 10 S. E. 45.

Endorsement of Names.—Witnesses are entitled to compensation where a bill is prepared and sent to the grand jury with the names of those summoned endorsed as sworn and sent. Lewis v. Board of Commissioners, 74 N. C. 194.

§ 6-57. Pay of state's witnesses.—All witnesses summoned or recognized in behalf of the state shall be allowed the same pay for their daily attendance, ferriage and mileage as is allowed to witnesses attending in civil suits; and such fees for attendance shall be paid by the defendant only upon conviction, confession or submission; and if the defendant is acquitted on any charge of an inferior nature, or a nolle prosequi be entered thereto, the court shall order the prosecution to pay the cost, if such prosecution appears to have been frivolous or malicious; but if the court is of opinion that such prosecution was neither frivolous nor malicious, and a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, nevertheless, order the prosecution to pay the attendance of such unnecessary witnesses, if it appear that they were summoned at his special request. (Rev. s. 1306; Code, s. 1294; R. C., c. 35, s. 37; 1800, c. 558, s. 1; 1879, c. 49; 1879, c. 92, s. 3; 1851, c. 176; C. S. 1280.)

An appeal lies from the judgment of a justice of the peace in a criminal action taxing the prosecutor with cost. State
§ 6-58. County to pay state's witnesses in certain cases.—Witnesses summoned or recognized on behalf of the state to attend on any criminal prosecution in the superior or criminal courts where the defendant is insolvent, or by law is not bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in any case where witnesses were not summoned or recognized to attend any such court to give evidence on behalf of the state, and the defendant is discharged, and in cases where the defendant breaks jail and is not afterwards retaken, the court shall order the witnesses to be paid. (Rev., s. 1289; Code, s. 740; R. C., c. 28, s. 9; 1804, c. 665; 1819, c. 1008; 1824, c. 1223; C. S. 1281.)

Local Modification.—Durham, Wilkes: C. S. 1282; Wake: C. S. 1283; 1929, c. 102; 1931, c. 201.

Editor's Note.—See annotations under § 6-36. For history of this pay to state's witnesses, see State v. Massey, 104 N. C. 877, 10 S. E. 608.

Service out of State.—The service of a subpoena on a witness beyond the borders of the state in a criminal action in which he is to be tried, if the trial is not commenced within a reasonable time, and if the adverse party fail to give such notice as may be required by law, shall be deemed sufficient service for the purposes of this section, and the court may, for good cause shown, order the state to pay such witness the fees provided by law.

§ 6-59. County to pay defendant's witnesses in certain cases.—When the defendant is acquitted, a nolle prosequi entered, or judgment against him arrested, and it is made to appear to the court, by certificate of counsel or otherwise, that said defendant had witnesses, duly subpoenaed, bound or recognized, in attendance, and that they were necessary for his defense, it is the duty of the court, unless the prosecutor is adjudged to pay the costs, to make and file an order in the cause directing that said witnesses be paid by the county in such manner and to such extent as is necessary and proper.

Cross Reference.—See also §§ 6-36 and 6-64.

In General.—This section shows the legislative intent to restrict payment by the county of the defendant's witnesses to the cases specified, and their number and amount of compensation. State v. Massey, 104 N. C. 877, 880, 10 S. E. 608.

In this case the court below held that there is no statute authorizing the court to tax defendant's witnesses against the county when the "bill is quashed." If this is a casus omissus the remedy can only be found in a legislative enactment. It would seem, however, intentional for the Legislature, in the case of such cases in which the defendant was not present, that the court shall have discretion as to the form of the certificate. It also requires that the discharge shall be in open court. The requirement as to entry on the minutes is new.
of them, shall receive no pay, or only a portion of the compensation authorized by law. The court, at any time within one year after judgment, may order that any witness may be paid who for any good reason satisfactory to the court failed to have his fees included in the original bill of costs. (Rev., s. 1306; Code, ss. 733, 748; 1879, c. 264; 1881, c. 318; C. S. 1287.)

The discretion conferred upon the court, in this section, in respect to regulating, or refusing to allow any compensation to the witnesses therein named, is not reviewable. State v. Massey, 104 N. C. 877, 10 S. E. 608.

It is within the discretion of the trial Court (under § 733 of the Code of 1883) to refuse to make an order for the payment by the county of the fees of witnesses for a defendant acquitted of a criminal charge, where no prosecutor is marked, and the exercise of such discretion is not reviewable. State v. Ray, 122 N. C. 1095, 29 S. E. 946.

Appeal.—In an appeal from defendant's motion to retax the costs in a criminal action it should appear on the record that the provisions of this and § 6-60 were complied with and when it does not so appear the case will be remanded. State v. Kirby, 201 N. C. 789, 161 S. E. 483.

Art. 9. Criminal Costs before Justices, Mayors, County or Recorders' Courts.

§ 6-64. Liability for criminal costs before justice, mayor, county or recorder's court.—The party convicted in a criminal action or proceeding, within the jurisdiction of a justice of the peace, before any justice, mayor, county or recorder's court, shall always be adjudged to pay the costs, and if the party charged be acquitted, the complainant shall be adjudged to pay the costs, and may be imprisoned for the nonpayment thereof, if the justice, mayor, county or recorder's court shall adjudge that the prosecution was frivolous or malicious. But in no action or proceeding in which a justice of the peace has final jurisdiction, commenced or tried in a court of a justice of the peace, mayor, county or recorder's court shall the county be liable to pay any costs: any defendants or prosecuting witness shall have the right of appeal to the superior court. (Rev., 1307; Code, s. 895; 1868-9, c. 178; 1879, c. 92, s. 3; 1881, c. 176; 1931, c. 252; C. S. 1288.)

Local Modification.—Jackson: 1933, c. 225; Martin: 1935, c. 20; Swain: 1935, c. 84.

Cross References.—As to liability of prosecutor for costs, see § 6-49. As to liability of county for costs, see § 6-36. As to appeals, see §§ 15-177, 15-180.

Editor's Notes.—The Act of 1931 repealed the former section and enacted this section in lieu thereof. The former section applied only to proceedings before a justice. For general discussion of costs in criminal actions before a justice of the peace, see Merrimon v. Henderson County Com'rs, 106 N. C. 369, 11 S. E. 267; State v. Carlton, 110 N. C. 956, 12 S. E. 44.

Where the justice of the peace has testified on the trial to recover damages for a false arrest that he considered the criminal action "frivolous and malicious," and had taxed the defendant (prosecutor) with cost, the erroneous admission of this evidence is cured by the defendant's admission that he had paid the cost thus taxed him. Harris v. Singley, 193 N. C. 583, 137 S. E. 724.

Taxation of Prosecutor in Justices Court.—See annotations under § 6-49.

Cited in 5 N. C. Law Rev. 359, in a note on "Interest in Costs."
CHAPTER 7. COURTS

Art. 6. Salaries of Supreme Court Employees.
Sec.
7-36. Governor and council to fix certain salaries.
7-37. Limit of salary; certificate and payment.
7-38. Proceedings and reports.
7-39. Employment of additional assistants; compensation.

SUBCHAPTER II. SUPERIOR COURTS.

Art. 7. Organization.
7-40. Number of judges and solicitors.
7-41. Election and term of office of judges.
7-42. Salaries of superior court judges.
7-43. Election and term of office of solicitors.
7-44. Solicitors; general compensation.
7-45. Appropriation for expenses of solicitor.
7-46. Residence and rotation of judges.
7-47. Oath of office.
7-48. Vacancies filled.
7-49. When judge may discharge solicitor.
7-50. Emergency judges; duties; compensation.
7-51. Salaries of resigned or retired justices of supreme court and judges of superior courts.
7-52. Jurisdiction and powers of emergency judges.
7-53. Orders returnable to another judge; notice.
7-54. Governor to make appointment of four special judges.
7-55. Time for appointment.
7-56. Further appointments.
7-57. Extent of authority.
7-58. Jurisdiction as of regular judges.
7-59. Salary, expenses; terms; practice of law.
7-60. Powers after commission expires.
7-61. Effect on sections 7-50 and 7-51.
7-62. Disposition of motions where judge disqualified.

Art. 8. Jurisdiction.
7-63. Original jurisdiction.
7-64. Concurrent jurisdiction.
7-65. Jurisdiction in vacation or at term.
7-66. Appellate jurisdiction.
7-67. Transfer of cases pending in abolished inferior court.

Art. 9. Judicial and Solicitorial Districts and Terms of Court.
7-68. Number of districts.
7-69. Eastern and western judicial divisions.
7-70. Terms of court.
7-71. Governor to assign judges to hold terms of court when regular judges are not available.
7-71.1. Governor authorized to cancel terms of court; judges available for assignment elsewhere.
7-71.2. Cancellation not to affect subsequent terms.
7-72. Civil cases at criminal terms.
7-73. No criminal business at civil terms.
7-74. Rotation of judges.
7-75. Exchange of courts.
7-76. Court adjourned by sheriff when judge not present.

Art. 10. Special Terms of Court.
7-77. Governor may designate judge.
7-78. Governor may order special terms.

Sec.
7-79. Compensation of judge.
7-80. Notice of special terms.
7-81. Certificate of attendance.
7-82. Grand juries at special terms.
7-83. Jurisdiction.
7-84. Attendance and process at special terms.
7-85. Subpoenas returnable.

Art. 11. Special Regulations.
7-86. Reading the minutes.
7-87. Officer attending juries sworn.
7-88. Quakers may wear hats in court.
7-89. Court reporters.
7-90. Official court reporter for second judicial district.
7-91. Official court reporter for fifth judicial district.
7-92. Official court reporter for sixth judicial district.

SUBCHAPTER III. COMMISSION FOR IMPROVEMENT OF LAWS.

7-93. Commission established.
7-94. Members of commission.
7-95. Terms of office.
7-96. Chairman and executive secretary.
7-97. Vacancy appointments.
7-98. Meetings of commission.
7-100. Compensation.

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

Art. 13. In Counties with a City of at Least Twenty-Five Thousand Inhabitants.
7-101. Established by county or city or both.
7-102. Vote on establishment of court; any other city in county with required population may have such court.
7-103. Jurisdiction.
7-104. Election of judge and term of office; vacancy appointments; judge to select clerk; Juvenile Court officers may be declared officers of new Court.
7-105. Co-operation of all peace officers.
7-106. Procedure, practice and punishments.
7-107. Right of appeal to Superior Court; trial de novo.
7-108. Offenses before Court to be petty misdemeanors; demand for jury trial; appearance bonds.
7-109. Pending cases in Juvenile Court transferred to new Court.
7-110. Cases transferred from Superior Court.
7-111. Discontinuance of Court.

SUBCHAPTER V. JUSTICES OF THE PEACE.

7-112. Constitution, article seven, abrogated; exceptions.
7-113. Election and number of justices.
7-114. Oath of office; vacancies filled.
7-115. Governor may appoint justices.
7-116. Forfeiture of office.
CHAPTER 7. COURTS

Sec. 7-117. Resignation.
7-118. Removal and disqualification for crime.
7-119. Justice may hold other office.
7-120. Validation of official acts of certain justices of the peace.

Art. 15. Jurisdiction.
7-121. Jurisdiction in actions on contract.
7-122. Jurisdiction in actions not on contract.
7-123. Action dismissed for want of jurisdiction; remitter.
7-124. Title to real estate in controversy as a defense.
7-125. Title to real estate in controversy, action dismissed.
7-126. Another action in Superior Court.
7-127. Justice may act anywhere in county.
7-128. Punishment for contempt in certain cases.
7-129. Jurisdiction in criminal actions.

Art. 16. Dockets.
7-130. Justice shall keep docket.
7-131. Entries to be made.
7-132. Dockets filed with clerk.
7-133. Dockets, papers, and books delivered to successor.

Art. 17. Fees.
7-134. Fees of justices of the peace.

7-135. Action begun by summons.
7-136. Issuance and contents of summons.
7-137. Service and return of summons.
7-138. Process issued to another county.
7-139. Civil process in inferior courts.
7-140. Endorsement of process to another county.
7-141. Certificate of clerk on process for another county.
7-142. Judgment against defendant in another county.
7-143. Service on foreign corporation.
7-144. Attendance of witnesses.
7-145. Subpoena issued to another county.
7-146. Subpoena duces tecum in case against railroad.

Art. 19. Pleading and Practice.
7-147. Removal of case.
7-148. Removal in case of death or incapacity.
7-149. Rules of practice.

7-150. Parties entitled to a jury trial.
7-151. Jury trial waived.
7-152. Number constituting the jury.
7-153. Jury list furnished.
7-154. Names kept in jury box.
7-155. Fees deposited for jury trial.
7-156. Jury drawn and trial postponed.
7-157. Summoning the jury.
7-158. Selection of jury.
7-159. Challenges.
7-160. Names returned to the jury box.
7-161. Names of jurors serving.
7-162. Tales jurors summoned.
7-163. No juror to serve out of township.
7-164. Additional deposit for jury fees on adjournment.

Sec. 7-165. Jury sworn and impaneled; verdict; judgment.

7-166. Justice's judgment docketed; lien and execution.
7-167. Effect of judgment on appeal.
7-168. Entries made by clerk when judgment is rendered.
7-169. Justice's judgment removed to another county.
7-170. Issue and return of execution.
7-171. Levy and lien of execution.
7-172. Stay of execution.
7-173. Security on stay of execution.
7-175. Nature of undertaking.
7-176. Execution stayed upon order given.

Art. 22. Appeal.
7-177. No new trial; either party may appeal.
7-178. Appeal does not stay execution.
7-179. Manner of taking appeal.
7-180. No written notice of appeal in open court.
7-182. Defective return amended.
7-183. Restitution ordered upon reversal of judgment.

Art. 23. Forms.
7-184. Forms to be used in justice's court.

SUBCHAPTER VI. RECORDERS' COURTS.

7-185. In what cities and towns established; court of record.
7-186. Recorder's election and qualification; term of office and salary.
7-187. Time and place of holding court.
7-188. No subsequent change of judgment.
7-189. Procedure in the court.
7-190. Criminal jurisdiction.
7-191. Jurisdiction to recover penalties.
7-192. Disposition of cases when jurisdiction not final.
7-193. Disposition of cases when jurisdiction final.
7-194. Sentences to be imposed.
7-195. Appeal to superior court.
7-196. Costs paid to the municipality.
7-197. Seal of court.
7-198. Issuance and service of process.
7-199. Vice recorder; election and duties.
7-200. Clerk of court; election and duties; removal; fees.
7-201. Clerk to keep records.
7-202. Clerk to issue process.
7-203. Prosecuting attorney; duties and salary.
7-204. Jury trial, as in justice's court.
7-205. Continuances, recognizances, and transcripts.
7-206. Officers' fees; fines and penalties paid.
7-207. County to pay for offenders' work on roads.
7-208. Prosecutor may be taxed with costs.
7-209. Justice of the peace to bind defendants to recorder's court; procedure thereon.
7-210. Transfer of certain cases to recorder's court.
CHAPTER 7. COURTS

Sec. 7-211. Jurisdiction of justice of the peace after three months delay.
7-212. How municipal recorders' courts may be abolished.
7-213. Extension of jurisdiction.
7-214. Meeting of town and county authorities; election.
7-216. Resolution for extension filed with each board as records.
7-217. Jurisdiction not to extend to other municipalities.

Art. 25. County Recorders' Courts.
7-218. Established by county commissioners.
7-219. Recorder's election, qualification, and term of office.
7-220. Time and place for holding court.
7-221. No subsequent change of venue.
7-222. Criminal jurisdiction.
7-223. Jurisdiction and powers as in municipal court.
7-224. Removal of cases from justices' courts.
7-225. Defendants bound by justice to recorder's court.
7-226. Notice to accused of transfer; trial; obligation of bond.
7-227. Trials upon warrants; by whom warrants issued.
7-228. Jury trial as in municipal court.
7-229. Sentence imposed; fines and costs paid.
7-230. Appeals to superior court.
7-231. Clerk of superior court ex officio clerk of county recorder's court.
7-232. Deputy clerk may be appointed.
7-233. Compensation of clerk when no deputy appointed.
7-234. Deputy clerk to take oath of office.
7-235. Prosecuting attorney may be elected.
7-236. Fees for issuing and serving process.
7-237. Costs and fees taxed as in municipal court.
7-238. Fees taxed when county officer on salary; recorder's court fund.
7-239. Courts may be discontinued after two years.

7-240. Established for entire county.
7-241. Election of recorder.
7-242. Mayor's jurisdiction continued, when.

Art. 27. Provisions Applicable to All Recorders' Courts.
7-243. Appeals from justices of the peace.
7-244. Offenders may be sentenced to city chain-gang.
7-245. Recorders' courts substituted for other special courts.

Art. 28. Civil Jurisdiction of Recorders' Courts.
7-246. Civil jurisdiction may be conferred.
7-247. Extent of jurisdiction.
7-248. Procedure in civil actions.
7-249. Trial by jury in civil actions.
7-250. Jurors drawn and summoned.
7-251. Talesmen and challenges.
7-252. Jury as in superior court.
7-253. Appeals to superior court.

Sec. 7-254. Enforcement of judgments.
7-255. Costs in civil actions.

Art. 29. Elections to Establish Recorders' Courts.
7-256. Election required.
7-257. Municipal recorder's court.
7-258. Notice of election.
7-259. New registration may be ordered.
7-260. Manner of holding election.
7-261. Another election after two years.
7-262. Municipal courts with jurisdiction over the entire county.
7-263. Expense of elections paid.
7-264. Certain districts and counties not included.

SUBCHAPTER VII. GENERAL COUNTY COURTS.

Art. 30. Establishment, Organization and Jurisdiction.
7-265. Establishment authorized; official entitlement; jurisdiction.
7-266. Creation by board of commissioners without election.
7-267. Abolishing the court.
7-268. Transfer of criminal cases.
7-269. Transfer of civil cases.
7-270. Costs.
7-271. Judge; election, term of office, vacancy in office, qualification, salary, office.
7-272. Terms of court.
7-273. Prosecuting officer; duties, election, salary, etc.
7-274. Superior court clerk as clerk ex officio; salary, bond, etc.
7-275. Sheriff; duties; additional allowance.
7-276. Fees of clerk and sheriff.
7-277. Separate records to be kept by clerk; blanks, books and stationery.
7-278. Criminal jurisdiction, extent.
7-279. Civil jurisdiction, extent.
7-280. Election, requirement of.
7-281. Resolution by county commissioners; time for election; ballots.
7-282. Notice of election; publication.
7-283. Law governing elections; election officers; registration.
7-284. Count and return of votes; canvass of returns; effect; expense.
7-285. Application of article.

Art. 31. Practice and Procedure.
7-286. Procedure; issuance and return of process.
7-287. Trial by jury; waiver; deposit for jury fee.
7-288. Continuance if jury demanded; drawing of jury; list.
7-289. Talesmen; challenges.
7-290. Process; authentication; service; return.
7-291. Pleadings; time for filing.
7-292. Criminal appeals to superior court; cases bound over to superior court.
7-293. Amendments in pleadings and warrants.
7-295. Appeals to superior court in civil actions; time; record; judgment; appeal to supreme court.
7-296. Enforcement of judgments; stay of execution, etc.
CHAPTER 7. COURTS

Art. 32. District County Courts.

Sec. 7-297. May be established in two or more contiguous counties in same judicial district; jurisdiction.
7-298. Judge of court; election; term of office; oath of office and salary.
7-299. Present county courts may be changed to district courts.
7-300. When court to be held.
7-301. Prosecuting attorneys.
7-302. Clerks; duties and compensation.
7-303. Sheriffs; duties and compensation.
7-304. Jurisdiction.
7-305. Procedure to establish.
7-306. Practice and procedure.
7-307. Abolishing the court.

SUBCHAPTER VIII. CIVIL COUNTY COURTS.

Art. 33. With Jurisdiction Not to Exceed $3000.
7-308. Establishment.
7-309. Jurisdiction.
7-310. Juries in such court; drawing jury; challenges.
7-311. Terms; docket.
7-312. Witnesses; how summoned.
7-313. Appeals.
7-315. Judgments.
7-316. Process of the court.
7-318. Rules of practice.
7-319. Bonds for costs; duties of clerk.
7-320. Costs.
7-321. Appointment and compensation of judge; substitute; vacancies.
7-322. Compensation of clerk; vacancy; files, books, stationery, etc.
7-323. Stenographer; fees.
7-324. Procedure.
7-325. Records.
7-326. To be court of record.
7-327. Pending cases.
7-328. First session.
7-329. Discontinuance of court.
7-330. Existing laws not repealed.
7-331. Article not applicable to certain counties.

Art. 34. With Jurisdiction Not to Exceed $5000.
7-332. Establishment.
7-333. Qualification, election, and term of judge; office.
7-334. Substitute judge.
7-335. Terms of court; calendar.
7-336. Clerk of court.
7-337. Sheriff.
7-338. Record; blanks, forms, books, stationery.
7-340. Jury list; summons.
7-341. Talesmen.
7-342. Procedure, process, pleadings, etc.
7-343. Appeals.
7-344. Jurisdiction.
7-345. Stenographer; fees.
7-346. Disqualification of judge.
7-347. Pending cases, transfer.
7-348. Abolishing court.
7-349. Existing laws not repealed.
7-350. Article inapplicable to certain counties.

Art. 35. With Jurisdiction Not to Exceed $1500.

Sec. 7-351. Establishment.
7-352. Qualification of judge.
7-353. Appointment of judge; vacancies; substitute judge.
7-354. Oath of judge.
7-355. Salary of judge.
7-356. Disqualification of judge.
7-357. Clerk of court.
7-358. Oath of clerks.
7-359. Appointment and removal of deputies.
7-360. Oath and power of deputies.
7-361. Sheriff.
7-362. Stenographer.
7-363. Jury trial.
7-364. Waiver of jury trial; jurisdiction concurrent with superior court.
7-365. Waiver of jury trial; jurisdiction, concurrent with justice of peace.
7-366. Jury trial in cases instituted in superior court or before magistrate.
7-367. Jury of six; demand and deposit for jury of twelve.
7-368. Judge may impanel jury on own motion.
7-369. Drawing juries; summons of jurors; pay of jurors.
7-370. Talesmen.
7-371. When court opens; terms of court.
7-372. Jurisdiction.
7-373. Appeals from justice of the peace.
7-374. Removal of cause before justice of peace.
7-375. Pending cases, transfer.
7-376. Records; blanks, forms, books, stationery.
7-377. Processes; pleadings; procedure, etc.
7-378. Appeal to superior court; time for perfecting appeal; record on appeal; briefs; judgments; appeal to supreme court.
7-379. Stay of execution; enforcement of judgments, etc.
7-380. Court seal.
7-381. Costs and fees.
7-382. Abolishing court.
7-383. Existing laws not repealed.

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

Art. 36. County Criminal Courts.
7-384. Counties authorized to establish county criminal courts.
7-385. Established by resolution of county commissioners.
7-386. Court may be abolished by resolution.
7-387. Transfer of cases from docket of Superior Court.
7-388. Appointment of judge; associate judge.
7-389. Appointment of prosecuting attorney.
7-390. Clerk of court; term of office; fees; bond; sheriff.
7-391. Oath of judge; prosecuting attorney.
7-392. Court seal.
7-393. Jurisdiction; appeal; judgment docket.
7-394. Jury trials.
7-396. Duties of judge; bond on appeal or on being bound over.
7-397. When prosecuting attorney’s fee taxed in bill of costs.
7-398. Complete record to be kept by clerk.
7-399. Warrants returnable to court.
Sec. 7-400. Service fees to officers except where they are on salary.
Sec. 7-401. Regular and special terms; place of sessions.
Sec. 7-402. Judge and prosecuting attorney may practice law in other courts.
Sec. 7-403. Other County Court Acts not affected.
Sec. 7-404. Certain counties excepted from provisions of article.

SUBCHAPTER X. SPECIAL COUNTY COURTS.

Art. 37. Special County Courts.

Sec. 7-405. Establishment upon resolution of county commissioners.
Sec. 7-406. Qualifications of judge and solicitor.
Sec. 7-407. Appointment of judge.
Sec. 7-408. Appointment of prosecuting attorney and clerk.
Sec. 7-409. Appointment of acting attorney or judge in absence of regular official.
Sec. 7-410. Compensation of judge and solicitor.
Sec. 7-411. Oaths of judge and solicitor.
Sec. 7-412. Appointment of temporary judge, etc.
Sec. 7-413. Duties and liabilities of clerk.
Sec. 7-414. Oath of office of clerk.
Sec. 7-415. Attendance upon court by sheriff or deputies.
Sec. 7-416. Appointment of court stenographer.
Sec. 7-417. Right of jury trial in civil actions.
Sec. 7-418. Jury trial where no written pleadings are filed.
Sec. 7-419. Jury trial where written pleadings are filed.
Sec. 7-420. Jury trial where cases appealed or removed.
Sec. 7-421. Number of jurors; deposit on demand for jury trial.

Editor's Note.—The 1937 amendment increased the associate justices from four to six in pursuance of authority of the constitutional amendment proposed by Public Laws 1935, c. 825; 1936, c. 16, s. 1; and adopted at the general election of November, 1936.

Historical.—"When first established, the court was composed of three justices, appointed by the general assembly to hold office during good behavior; and the justices themselves appointed one of their number as chief justice. By the Constitution of 1868 the number was increased to five, a chief justice and four associate justices, to be elected by popular vote, and to hold office until the year 1872 and until their successors are qualified. By an amendment in 1875 the number was reduced to three, and in 1887 it was again increased to five, as the court is now constituted." 5 N. C. L. Rev. 5.

Sec. 7-422. Continuance of trial upon demand for jury; drawing and summoning of jury; compensation of jurors.
Sec. 7-423. Jury trials in criminal actions.
Sec. 7-424. Talesmen may serve as jurors.
Sec. 7-425. Sessions of court.
Sec. 7-426. Civil jurisdiction of court.
Sec. 7-427. Procedure for hearing of appeals from courts of justices of the peace.
Sec. 7-428. Transfer of cases from superior court.
Sec. 7-429. Separate records, equipment, etc., furnished by commissioners.
Sec. 7-430. Procedure in civil actions.
Sec. 7-431. Orders to stay execution; judgments.
Sec. 7-432. Seal of court.
Sec. 7-433. Costs and fees.
Sec. 7-434. Reopening of cases and modification of judgments.
Sec. 7-435. Criminal jurisdiction.
Sec. 7-436. Judges vested with jurisdiction of municipal recorders.
Sec. 7-437. Removal of cases from courts of justices of peace.
Sec. 7-438. Criminal cases bound over by justices of the peace.
Sec. 7-439. Notice to accused person and surety in cases transferred from superior court.
Sec. 7-440. Issuance of warrant in criminal cases.
Sec. 7-441. Punishment upon conviction.
Sec. 7-442. Appeals to superior court.
Sec. 7-443. Fees for issuance and service of warrants.
Sec. 7-444. Costs and fees as county funds.
Sec. 7-445. Abolition of court by resolution of commissioners.
Sec. 7-446. Counties exempt.
Sec. 7-447. Construction of article.

SUBCHAPTER I. SUPREME COURT.

Art. 1. Organization and Terms.

§ 7-1. Number of justices.—The supreme court of North Carolina shall consist of a chief justice and six associate justices, to be chosen in the manner now prescribed by law. (Rev., s. 1532; Const., Art. 4, s. 6; 1937, c. 16, s. 1; C. S. 1403.)

Editor's Note.—The 1937 amendment increased the associate justices from four to six in pursuance of authority of the constitutional amendment proposed by Public Laws 1935, c. 825; 1936, c. 16, s. 1; and adopted at the general election of November, 1936.

Historical.—"When first established, the court was composed of three justices, appointed by the general assembly to hold office during good behavior; and the justices themselves appointed one of their number as chief justice. By the Constitution of 1868 the number was increased to five, a chief justice and four associate justices, to be elected by popular vote, and to hold office until the year 1872 and until their successors are qualified. By an amendment in 1875 the number was reduced to three, and in 1887 it was again increased to five, as the court is now constituted." 5 N. C. L. Rev. 5.

§ 7-2. Election and term of office.—The justices of the supreme court shall be elected by the qualified voters of the state, as is provided for the election of members of the general assembly. They shall hold their offices for eight years. (Const., Art. 4, s. 21; C. S. 1404.)

§ 7-3. Salaries of supreme court justices.—Each justice of the supreme court shall be paid an annual salary of seven thousand five hundred dollars, and in lieu of and in commutation for expenses incident to attendance upon the court an amount equal to that allowed to each judge of the superior court, payable in equal monthly installments, as a part of his compensation. (Rev., s. 2764; Code, s. 3733; 1891, c. 193; 1903, c. 805; 1905, c. 208; 1907, cc. 841, 988; 1909, c. 486; 1911, c. 82; 1913, c. 44; 1919, c. 51; 1921, c. 35, s. 2; 1925, c. 214; 1937, c. 69, s. 1; 1939, c. 232; C. S. 3883.)

Cross Reference.—For the amount allowed superior court judges for expenses, see § 7-42.

Editor's Note.—The amendments changed the amount of salary and allowance for expenses.

Justices' Salaries Not Subject to Taxation.—See notes to Const. Art. IV, § 18.

§ 7-4. Oath of office.—The justices, before they act as such, shall, before the governor or some judicial officer, take and subscribe the oaths appointed for the qualification of public officers, and also an oath of office, which shall be certified by the officer taking the same and delivered to the secretary of state, to be safely kept. (Rev., s. 1533; Code, s. 955; R. C., c. 33, s. 3; 1818, c. 963; C. S. 1405.)

Cross References.—As to forms of oath, see §§ 11-6, 11-7, 11-11. As to penalty for failure, see § 128-5. As to constitutional requirement and form, see Const., Art. VI, § 7.

§ 7-5. Name of court; where records to be kept.—The court bears the name and style of The Supreme Court of North Carolina, and is a court of record; and the papers and records belonging
to the clerk's office thereof shall be constantly kept within the city of Raleigh. (Rev., s. 1536; Code, s. 954; R. C. c. 33, s. 2; R. S., c. 33, s. 2; 1884, c. 660; 1805, c. 674; 1818, c. 962; 1828, c. 13; C. S. 1406.)

A Court of Record.—"The Supreme Court is a court of record, and the clerk who is appointed by the court for a term of eight years, is required to keep the records of the court in his office in Raleigh." See § 5 N. C. L. Rev. 5.

Derived from Constitution.—The Supreme Court is established by, and derives its jurisdiction from, the constitution, and its judicial powers and jurisdiction so prescribed, as well as its methods of procedure, are not subject to legislatival control. Rencher v. Anderson, 93 N. C. 105.

§ 7-6. Quorum.—Four justices shall constitute a quorum for the transaction of the business of the court. (Rev., s. 1534; Code, s. 956; 1889, c. 230; 1937, c. 16, s. 2; C. S. 1407.)

Editor's Note.—Prior to the 1937 amendment three justices constituted a quorum. The court means the three (now seven) judges sitting together, consulting and advising one with the other, upon the questions commonly called for judicial decision. State v. Lane, 26 N. C. 434, 455. Upon the death of one, the remaining judges have power and authority to hold court. Id.

§ 7-7. Terms of Court.—There shall be held at the seat of government of the state in each year two terms of the supreme court, commencing on the first Monday in February and the last Monday in August.

The court shall sit at each term until all the business on the docket shall be determined or continued on good cause shown. In case no one of the justices shall attend the term during the first week thereof, at the end of that time the court shall stand adjourned to the next term, and the causes on the docket be continued. (Rev., s. 1534; Code, s. 953, 954; 1901, c. 660; 1837, c. 49; 1881, c. 178; R. C., c. 33, s. 2; R. S., c. 33, s. 2; 1804, c. 660; 1805, c. 674; 1818, c. 923; 1828, c. 13; 1842, c. 15; 1846, cc. 28, 29; C. S. 1408.)

Editor's Note.—Under the law as it existed prior to 1869, the court held three terms a year, two in Raleigh and one in Morganton. See § 5 N. C. L. Rev. 6.

When a Cause is Adjourned.—No case in or under the Supreme Court has finished the business of any one term and adjourned, its jurisdiction of a case decided at that term is continued on good cause shown. In Ruffin v. Harrison, 91 N. C. 398, it was said, "The court has no power to amend or modify the final decree, entered at the last term, upon an application like this. After final judgment the court cannot disturb it unless upon an application to rehear or for fraud, accident or mistake alleged in an independent action, or perhaps, in some cases, party might be relieved against a 'judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect' within a year after the entry of the same...." This of course does not imply that the court has no power to correct the entry of its judgments and decrees so as to make them conform to the truth or what the court did in granting them, or to set aside an irregular judgment in a proper case." State v. Marsh, 134 N. C. 184, 197, 47 S. E. 6.

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Art. 2. Jurisdiction.

§ 7-8. Original Jurisdiction. The supreme court has original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action. (Rev., s. 1537; Const., Art. IV, s. 9; C. S. 1409.)

Editor's Note.—This section, conferring jurisdiction on the Supreme Court to render an opinion in cases where there are claims against the State, has a rather unique history. The principle underlying its enactment is the well established one that a sovereign state cannot be sued without its consent. Hitherto it was questioned whether the court could lend its aid to the Legislature in determining if important questions of law or fact raised by a claim against the State was a party. Reynolds v. State, 64 N. C. 461. The realization of the necessity of having recourse to the advice of men who were experts in this particular field, and that a state constitution with which the Supreme Court was confronted, coupled with the fact that persons who asserted that they held legal claims against the sovereign State might here find a tribunal before which they might bring their petitions, led to the passage of this section. However, the jurisdiction, hereby conferred, is not without its clean-cut limitations which will appear in the cases following. See also the annotations under N. C. Const., Art. IV, § 9, nor has it power to enforce its decision made in such proceeding by process in nature of execution. Its decision is merely recommendatory. Rotan v. State, 195 N. C. 291, 141 S. E. 733.

Recovery of Taxes.—When nonresident executors have failed to proceed in the Superior Court, under § 105-406, to recover an amount they have paid as an inheritance tax to the State of North Carolina, the method by which the Legislature has authorized the State to be sued is exclusive and the recommendation of the Supreme Court may not be invoked. Rotan v. State, 195 N. C. 291, 141 S. E. 733.

Transmission to General Assembly.—Upon the decision of the Supreme Court in favor of the plaintiff upon a claim preferred against the State, the proper course is for the clerk to transmit the proceedings in the case, together with the judgment of the court, to the Governor to be communicated by him to the General Assembly. Clements v. State, 77 N. C. 142; Horne v. State, 82 N. C. 382.

State May Plead Statute of Limitations. — In proceedings under this section the State shall be entitled to plead the statute of limitations without setting forth the facts upon which the plea is based. In Ruffin v. Harrison, supra, it was said, "The Supreme Court can not enforce judgments — no power to enforce its judgments made in such proceeding by process in nature of execution; its decision is merely recommendatory. Rotan v. State, 195 N. C. 291, 141 S. E. 733.

§ 7-9. Procedure to enforce claims against the state.—Any person having any claim against the State may file his complaint in the office of the [447]
§ 7-10. Appellate jurisdiction. — The supreme court has jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over "issues of fact" and "questions of fact" is the same exercised by it before the adoption of the constitution of one thousand eight hundred sixty-eight, and the court has the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts. (Rev., s. 1539; Const., Art. IV, s. 8; C. S. 1411.)

I. In General.

II. Issues and Questions of Fact.

A. In General.

B. Jurisdictional Requisites.

C. The Principles Applied.

III. Jury Trial.

Cross Reference.

As to appeals from superior court judges, see also § 1-277.

I. IN GENERAL.

Editor's Note.—This section was first enacted by the General Assembly in 1865. Lacy v. State, 195 N. C. 394, 289, 141 S. E. 886.

In General. — In these proceedings the rights of the petitioner and the liability of the State are determined by the same laws that would govern those rights and that liability if the action were against an individual debtor. Cowles v. State, 115 N. C. 173, 179, 20 S. E. 384.

The Supreme Court, as a rule, will consider only such claims and controversies of law and will not take the burden of passing upon those claims which involve mainly issues or questions of fact, although in proper cases the Court may order that issues of fact be tried in the Supreme Court, as provided in this section. Coloon v. State, 200 N. C. 312, 314, 160 S. E. 183.

The recommendatory or original jurisdiction of the Court is confined to claims in which it is supposed that an opinion on an important question of law would be needed to assist the General Assembly in determining the merits of a claim against the State. This is true notwithstanding the broad provision of the Constitution authorizing any claim against the State may commence the proceeding by filing his complaint. Id.

The Supreme Court is given original jurisdiction to hear claims against the State, but its decisions are merely recommendatory, and no process in the nature of execution shall issue thereon. Id.

The procedure thus authorized is prescribed by this section, but this procedure must not be construed as exceeding the power conferred upon the Supreme Court by the organic law.

Construction of Section. — Insofar as this section provides for and prescribes the procedure by which a claimant may invoke the original jurisdiction of the Supreme Court, conferred by the Constitution, with respect to his claim against the State, it is valid, and enforceable in all respects; but when the procedure has been duly instituted and filed in the Supreme Court, as provided in this section, and in accordance with the provisions of the statute, the procedure by which the Court will thereafter exercise its power to hear and decide upon the claim is not controlled by the statute. When it appears that an issue or question of law is presented which can be intelligently decided, without determining facts in issue, the Court will proceed to hear and determine the issue of law. When it appears that there is no issue or question of law involved no decision will be made and the proceeding will be dismissed. When, however, in order to decide an issue or question of law involved in the case, it is necessary to try the case, the Court may follow the provisions of the statute with respect to a trial by jury of such issues. The statute is at most, in this respect, directory. Lacey v. State, 195 N. C. 284, 290, 141 S. E. 886.

Ascertainment of Facts. — The facts are ascertained by reference to the clerk of the Supreme Court or by trans-
the complaining party, even where the ruling is erroneous. Bilk v. Harris, 132 N. C. 10, 43 S. E. 477, and cases cited.

II. ISSUES AND QUESTIONS OF FACT

A. In General.

Definite—Issues of fact on these matters alleged on one side only, the decision on, and every question presented under these issues necessary to decide the matter in controversy should be presented to the jury. Kirk v. Atlanta, etc., Ry. Co., 97 N. C. 82, 2 S. E. 536. The power of the appellate court to review the facts is limited to matters exclusively of equitable cognizance under the former system, and in such cases only when the evidence is written and documentary, so that the higher court is in the same position as the court below.” S. N. C. Law Rev. 16. See also State v. Liliston, 141 N. C. 857, 867, 54 S. E. 427.

B. Jurisdictional Requisites.

When Jurisdiction Assumed.—The jurisdiction of the Supreme Court over issues of fact, under this section, will be assumed upon two conditions: 1. If the matter be of such an equitable nature as a court of equity under the former system took exclusive cognizance of. 2. If the proofs are written and documentary, and in all respects the same as the evidence on which the court below passed upon them. Worthy v. Shields, 90 N. C. 192.

Since this decision the courts have consistently followed the two foregoing propositions, and have made the following rules:

1. That, if the question presented on appeal is not strictly of an equitable nature, or (2) If the proofs are not written and documentary and in the same form as they were presented to the lower court, then it is not a case over which the Supreme Court can exercise jurisdiction. Herein lies the principle on which the court on appeal has refused to take cognizance of "issues of fact," which were in the court below, tried by a jury, for a fortiory the second proposition noted above will not have been fulfilled. The basis for the exclusion of such "issues of fact" to be tried by a jury, in the court below, are the witnesses before them, are in a better position to weigh all the material evidence and can better reach the logical solution to the issue in controversy. See Howard v. Board, 139 N. C. 675, 127 S. E. 704; Cameron v. Highway Comm'r, 188 N. C. 84, 123 S. E. 465.—Ed. Note.

C. The Principles Applied.

Judgment Must be Equitable in Nature.—The jurisdiction of the Supreme Court over "issues of fact," is restricted to interlocutory and final judgments which are exclusively equitable in their nature, and with such court the evidence was presented as at a court of equity. Young v. Rollins, 90 N. C. 125.

This jurisdiction does not extend to a case which under the former practice would have been an action at law on account of the nature or the facts involved, in which the evidence could have been corrected on appeal. State v. Scott, 84 N. C. 184.

Same.—Motion for Injunction.—On a motion for an injunction, being an appeal from the former system, and in cases where the nature of the suit is such as to present a mixed question of law and fact, it is the right and duty of the Supreme Court, under this section, on an appeal from an order granting or refusing the injunction, to determine the existence of each fact as well as of law upon which the propriety of the order depends. Jones v. Boyd, 80 N. C. 258.

Same.—Former Acquittal.—No appeal can be taken by the State to any court from the action of an inferior court in sustaining a former acquittal, although such acquittal was a mixed question of law and fact, and the court erred in not leaving it to the jury. State v. Lane, 78 N. C. 547.

Same.—Action of Covenant.—Whether an action of covenant was an action at law under the former system, but to which an equitable defense can now be made under the new system, falls within the operation of this section in which the evidence could have been corrected on appeal. State v. Alley, 84 N. C. 184.

II. Exceptions.

Same.—Estoppel.—But where, in such—case, a party has of his own accord accepted a trial by jury, he cannot afterwaords have the same facts passed upon by the court. Leggett v. Leggett, 89 N. C. 106.

§ 7-11. Power to render judgment and issue execution.—In every case the court may render such sentence, judgment or order as, in its opinion, is necessary to settle the controversy. See comment in 13 N. C. Law Rev., 343, wherein it is suggested that this section be invoked to prevent useless suits.

Affirmance as to One Defendant Dismissal as to Other.—Under the technical rule of the common law, a defendant entitled to judgment as to one defendant, in an action between two defendants, is not entitled to judgment as to the other. This has been the uniform course and practice since the decision of Worthy v. Shields, 90 N. C. 192, quoted above, in dismissing the action as to the railroad company and affirming the judgment of the lower court as to the Director General. This has been the uniform course and practice since the decision of Worthy v. Shields, 90 N. C. 192, quoted above, in dismissing the action as to the railroad company and affirming the judgment of the lower court as to the Director General.

Where a railroad company and the Director General of Railroads have both been joined as parties defendant in an action to recover for a negligent injury, and issues have been submitted as to each, and adverse verdict rendered as to each, there can be no prejudice to the Director General in dismissing the action as to the railroad company and affirming it as to the Director General. This may be done under provisions of § 1-297 and this section. Kimbrough v. Atlantic, etc., R. Co., 182 N. C. 234, 128 S. E. 9, 963; C. S. 1412.)

I. IN GENERAL.

Editor's Note.—The provisions of this section are so similar to those of the former section 1-297 that the practitioner must necessarily take notice of that section and the notes thereunder.

See comment in 13 N. C. Law Rev., 343, wherein it is suggested that this section be invoked to prevent useless suits.

§ 7-11. Power to render judgment and issue execution.—In every case the court may render such sentence, judgment or order as, in its opinion, is necessary to settle the controversy. See comment in 13 N. C. Law Rev., 343, wherein it is suggested that this section be invoked to prevent useless suits.
an aspect of the case not presented by the pleadings. Oakley v. Nopens, 95 N. C. 60, 61, 62; Bush v. Hall, 95 N. C. 82; Morrison v. Watson, 95 N. C. 479, 481. Exception in proper instances a party to a suit shall not be allowed to introduce evidence upon a point or matter in the case not presented by the pleadings, or not a matter in the course of litigation. Hill v. Director General, etc., 178 N. C. 607, 612, 101 S. E. 376. Especially is this true where the change of front is sought to be made between the superior courts. Ingram v. Yadkin River Power Co., 181 N. C. 393, 107 S. E. 229.

**Theory of Lower Court Adopted.**—A case is heard and determined in the Supreme Court according to the theory on which it was tried below. Cole v. Barringer, 171 N. C. 445, 58 S. E. 518; Warren v. Gunman, 168 N. C. 457, 84 S. E. 760.

**Sufficiency of Record Must Be Apparent.**—The Supreme Court can not consider a question not contained in the transcript. Nevertheless, by consultation with the clerk, the Supreme Court may in some cases make additions to the transcript. This rule applies to all proceedings had in the action arranged in an orderly manner. Id.

**Procedings to Modify Judgment.**—A judgment of the superior court may be modified on appeal where the plain facts are made as to the law or legal inferences are reviewable upon the face of the record. State v. Daniel, 121 N. C. 574, 28 S. E. 255.

**Judgment in Lower Court Essential.**—When the transcript does not show that any court was held, or that any judge was present or gave judgment, it is so defective that the Supreme Court has no jurisdiction to act upon it. Boardfoot v. McKeithan, 92 N. C. 561. It must also appear that the court was lawfully organized and held, and all the proceedings in the action arranged in an orderly manner. Id.

**Errors Which Have to Be Assigned.**—Under the provisions of this section, it is necessary to assign error in the record, that is, to state v. Cowan, 29 S. E. 565; Thornton v. Brady, 100 N. C. 38, 40, 5 S. E. 910. When other matters are relied upon, they must be pointed out by exception on the trial or in the case on appeal. State v. Ashley, 121 N. C. 915; State v. Deal, 117 N. C. 239. See In re Will of Roediger, 209 N. C. 170, 184 S. E. 74.

**II. EXCEPTIONS.**

In General.—On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. Merchants Nat. Bank v. Howard, 188 N. C. 543, 125 S. E. 126.

When an appeal discloses no error of law or legal inference made upon the trial, the Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. Rawls v. Lupton, 193 N. C. 423, 137 S. E. 757.

The Supreme Court cannot consider a question not considered by the trial court, and not affecting the verdict appealed from. Herring v. Warwick. 155 N. C. 345, 71 S. E. 431; Pleasants v. Johnson, 69 N. C. 249; Williamson Co. v. Canaday, 25 N. C. 349.

**Error Apparent on Record.**—The rule which forbids the hearing of an objection not taken, and which ought to have been taken, at the trial, does not embrace the case where there is a fundamental matter as to which the court was called upon to decide, injuriously to the appellant. Burion v. Wilkinson, etc., R. Co., 84 N. C. 193.


**Venue.**—In an action brought on the board of commissioners of one county, brought to the superior court of an adjoining county, objection to the venue must be taken in the trial court, otherwise the objection will be considered as waived. Edwards v. Board, 70 N. C. 571. See, also, McMinn v. Hamilton, 77 N. C. 300.

**Answer to Excluded Questions.**—Assignments of error to exclusion of questions asked can not be considered, where the record does not indicate what the answers would have been. Smith v. Commissioners, 176 N. C. 366, 79 S. E. 375; Brinkley v. Southern R. Co., 168 N. C. 435, 44 S. E. 793; Bryant Timber Co. v. Tilghman Lumber Co., 168 N. C. 154, 84 S. E. 765.

**No Presumption of Error.**—An assignment of error, to be considered, must be based upon a material question of fact previously taken and appearing in the record, for the court will not presume error. Bailey v. Justice, 174 N. C. 733, 94 S. E. 518.

Where No Exceptions Appear.**—No exceptions will be considered on appeal except as appear in the record and were made in the court below. Phipps v. Pierce, 94 N. C. 514, 515; Taylor v. Plummer, 105 N. C. 56, 11 S. E. 255.

**Decision Certified—Appeal from Interlocutory Orders.**—See section 7-12.

**Final Judgment.**—Final judgment may be rendered in the Supreme Court, Alspaugh v. WestEdge, etc., R. R., 123 N. C. 299, 31 S. E. 707; Ray v. Veneer Co., 188 N. C. 414, 124 S. E. 756.

The Decision Certified.—The requirement of this section that the Supreme Court transmit its decision means the result reached by the court, and there is no provision requiring the clerk to certify to a court below the opinion of the court. State v. Ketchy, 71 N. C. 148.

**B. Power of Superior Court.**

**Power Limited.**—The superior court has no power to modify or change a judgment or decree of the Supreme Court certified to the court below. Its powers are confined to incidental matters of detail necessary to carry the decree into effect, not inconsistent therewith. The rule that the superior courts have authority to vacate or modify decrees made in a cause, at any time before final judgment, does not apply here. Murrill v. Murrill, 90 N. C. 120.

When a final judgment is rendered in the Supreme Court upon an appeal from a final judgment in the superior court, the latter court has power to issue no other process in the case than an execution for its own costs. Grissett v. Smith, etc., R. Co., 59 C. 259.

**Judgment for Costs.**—Judgment for costs in the Supreme Court is rendered in that court, the superior court has no jurisdiction in that matter. Johnson v. Davinie, etc., R. Co., 109 N. C. 594, 13 S. E. 397; Murrill v. Murrill, 90 N. C. 120; State v. White, 120 N. C. 202, N. C. 373, 16 S. E. 421.

**Motion for New Trial.**—Where the Supreme Court has affirmed the judgment on an appeal in a criminal case and the defendant has asked for a new trial in the superior court, under this section and § 7-16, the case is in the latter court for the purpose of the execution of the sentence, and a motion for a new trial may be there entertained for disqualification of jurors and for newly discovered evidence. State v. Casey, 201 N. C. 620, 161 S. E. 81; State v. Cox, 202 N. C. 375, 162 S. E. 907.

[450]
the same according to said opinion, and the court below shall enter upon its records the opinion at length, and proceed in the cause according to the instructions. (Rev., s. 1544; Code, s. 962; C. S. 1413.)

Editor's Note.—It is to be noted that in this section it is required that the opinion shall be certified "with instructions" etc., whereas in the preceding section, the provision, applicable to criminal cases, only required that the decision be certified.

Interlocutory Order Defined.—See sec. 1-308 and notes thereof.

Procedure Explained.—The appeal, like a writ of error, does not disturb the interlocutory order, but suspends action on it, intended to carry it into effect, until its legality or invalidity shall be determined and certified to the superior court, then, if sustained, that court is required to proceed upon the judgment as already existing; or if declared erroneous, to reverse or modify it, in conformity to the law declared. Green v. Griffin, 95 N. C. 590.

Effect of Appeal.—Appeals from interlocutory or subsidiary orders, judgments and decrees made in a cause, may be taken from an interlocutory judgment or order, to the Supreme Court. Perry v. Perry, 175 N. C. 141, 95 S. E. 98.

Motions to Dismiss.—An appeal from the refusal of a motion to dismiss an action is premature and will not lie; the proper procedure is for the movant to except, reserve exceptions and appeal from the adverse decision. Bradshaw v. Citizens Nat. Bank, 172 N. C. 632, 90 S. E. 789.

Criminal Action.—In a criminal action, there is no appeal from a final judgment of the court below. (Rev., s. 1545; Code, s. 965; R. C., c. 360; 1831, c. 46; C. S. 1414.)

III. Parties.

After Final Judgment.—The Supreme Court has no power to direct or allow amendments to the record after a final judgment wherein has been rendered. Walton v. McKesson, 101 N. C. 428, 7 S. E. 566.

Different Case Presented.—The power to amend will not be exercised where the amended case is substantially different from the one tried below and set up facts sufficient to show that the amendment will not be allowed. See Huyett, etc., Mfg. Co. v. Gray, 126 N. C. 108, 35 S. E. 762.

Same—Facts Cannot Be Found.—Under the provisions of this section the Supreme Court cannot find the facts. All that the court can do is to remand the case to the end that the lower court can discover them. Bank v. Blossom, 89 N. C. 341.

Inadvertence of Judge.—While a judge cannot resettle a case, the Supreme Court, where justice requires it, may allow the mistake to be cured by allowing an amendment to be made. Hollomon v. Hollomon, 125 N. C. 29, 34 S. E. 95.

Explanation by Parol Proof.—Where a description in a deed is uncertain, the Supreme Court, where justice requires it, may allow the uncertainty to be aided by parol proof, Allen v. Sall. Walton v. Davis, 106 N. C. 571, 11 S. E. 330.

Pleading by Guardian.—Where an infant entered a certain pleading by his guardian, the objection thereto was such a technical one that it was disregarded, although the court specifically says that had the objection any force whatever, the mistake could readily be cured by allowing an amendment to be made. Hollomon v. Hollomon, 125 N. C. 29, 34 S. E. 95.

Adverse Judgment.—See sec. 1-310 and notes thereof.

I. In General.

Extent of Power.—The Supreme Court can amend as fully as it can in superior courts, and to the same extent. Perry v. Perry, 175 N. C. 141, 95 S. E. 98.

But the power given the court under this section is not an unlimited one, even though the provisions of the section have been liberally construed and the exercise of the power therein provided for, the courts have allowed the amendments in the light of the primary object which the section was enacted, namely, to further justice between the parties and not to allow an undeserving party to gain any undue advantage due to some technical omission on the part of his adversary, which should have been pleaded or included at an earlier stage of the litigation. Hence, where the amendment is of such nature that, to allow it would make the record not conform to or correspond with what was intended, the amendment is not allowed. See Huyett, etc., Mfg. Co. v. Gray, 126 N. C. 108, 35 S. E. 762.

Rule 7-18. Power of amendment and to require further testimony.—The supreme court has power to amend any process, pleading or proceeding either in form or substance for the purpose of furthering justice, on such terms as shall be deemed just at any time before final judgment; and to amend by making proper parties to any case where the court may deem it necessary and proper for the purposes of justice and on such terms as the court may prescribe. And whenever it appears necessary for the purpose of justice, the court may allow and direct the taking of further testimony in any case on appeal, or in the original action, by any of the methods herein prescribed, or may remand the case to the intent that amendments may be made, further testimony taken or other proceedings had in the court below. (Rev., s. 1545; Code, s. 965; R. C., c. 33, s. 17; 1777, c. 115, s. 75; 1785, c. 233; 1792, c. 360; 1831, c. 46; C. S. 1414.)

I. In General.

II. Pleading.

III. Parties.

IV. Case Remanded.

Cross Reference.
suit, failed to file a replication to the answer, and the parties proceeded to take proofs in the cause, this was held, a waiver by the defendant of a replication, and the court allowed the amended pleading under this section. Fleming v. Murphy, 59 N. C. 59.

Amendment of Answer.—The supreme court has the power to grant a motion by defendant to be allowed to amend his answer, but the motion is denied where the matter sought to be alleged by amendment is immaterial to the defense. Osborne v. Canton, 219 N. C. 139, 13 S. E. (2d) 265.

III. PARTIES.

The Rule Stated.—A bill can be amended as to parties in the Supreme Court. Kent v. Bottoms, 56 N. C. 69, 70, 72.

Same—Guardian ad litem. The power to appoint a guardian ad litem, Perry v. Perry, 175 N. C. 141, 95 S. E. 98. It is useless to remand the case for such appointment where the interests of the parties have been protected by the party, who has the power to appoint, to come in and make himself a party to the proceeding in the Supreme Court. Kent v. Bottoms, 56 N. C. 37, 39, 158 S. E. 729.

Contrary Party Harmful.—While an amendment substituting parties can be allowed in the Supreme Court, it will not be allowed where it will put the opposite party to a disadvantage. Hodge v. Marietta, etc., R. R., 108 N. C. 24, 12 S. E. 1041.

IV. CASE REMANDED.

In General.—The Supreme Court has the power, in a proper case, to remand causes to the end that proper amendments may be made, or further proceedings taken in the court below; Holley v. Holley, 56 N. C. 223, 1 S. E. 553.

Essentials of Transcript Lacking.—Where the transcript of the record fails to set forth facts necessary for the determination of the case, it will be remanded to the court below, as the nature of the cause may require. Bank v. Blossom, 89 N. C. 341.

Requisites of Transcript.—See section 1-264 and notes thereto.

Insanity of Plaintiff.—Where after an appeal and before a hearing, the plaintiff became insane and was committed to an asylum, it was held that the case must be remanded. Jones v. Cotten, 108 N. C. 457, 13 S. E. 161.

Jury Trial.—Upon allegation of inadvertence in including a supersedeas bond in the appeal bond, an issue therein may be remanded to the superior court to be tried by jury. Burnett v. Nicholson, 86 N. C. 728, 730.

§ 7-14. Proof of exhibits.—Exhibits or other documents relative to cases pending in the supreme court may be received by the clerk of the court, and witnesses to examine any document with the court in the same manner and under the same rules as such exhibits or documents may be proved in the superior court, and suitors in the court may have subpoenas to enforce the attendance of witnesses, who shall be liable to the same penalties and actions for nonattendance, and be entitled to the same pay for traveling, ferriage and attendance as witnesses in the superior court: Provided, that witnesses attending the supreme court shall be taxed in the bill of costs and paid by the party on whose behalf they may be summoned. (Rev., s. 1757; Code, s. 9063; R. C., c. 33, s. 21; 1820, c. 1070; 1823, c. 1282; 1842, c. 1; C. S. 1415.)

Regular Practice Explained.—Though witnesses in some instances may be summoned, it has not been the practice. Owing both to the great addition it would make to the already large and steadily increasing volume of business in this court to examine affidavits on questions of fact, the court has adhered to its settled ruling, that it will not pass upon questions of fact, but will take the findings of fact by the judge who tried the cause below as conclusive. In re Deaton, 105 N. C. 59, 63, 11 S. E. 244.

§ 7-15. Opinions and judgments to be in writing.—The justices shall deliver their opinions and judgments in writing, and the clerk shall make no entry upon the records of the court that any cause pending therein is decided, nor give to any person a certificate of such decision, nor issue execution in such suit, until after the opinion of the court shall have been delivered publicly in open court, and a written copy of the same opinion shall have been delivered to the clerk; which shall afterwards be filed among the records of the court and published in the reports of the decisions made by the court: Provided, that the justices shall not be required to write their opinions in full except in cases in which they deem it necessary. (Rev., s. 1548; Code, s. 964; 1893, c. 379, s. 5; R. C., c. 33, s. 16; 1810, c. 785; C. S. 1416.)

Editor's Note.—Under the law as it stood prior to 1868, the calling of the judge of the court, which, in in writing, "with reasons at full length upon which they are founded," the purpose and intent of the statute being to prevent per curiam opinion.

Subsequently the statute was amended and the requirement of "reasons at full length, etc." was omitted. Still later (in 1933) it was left within the discretion of the judges by the addition of the proviso to decide when the opinions would be written. This is the situation under the law as it stands today. It has been held in at least one case that even in the absence of the statutory provision placing their discretionary power in the court, that such power exists by force of the constitutional provision giving the court the right to make its own rules of practice. State v. Council, 120 N. C. 511, 39 S. E. 814. See also 5 N. C. Law Rev. 20.

Discretion of Court.—The filing of a written opinion in a case is discretionary with the Supreme Court. Parker v. Atlantic, etc., R. R., 133 N. C. 335, 45 S. E. 638.


Under the rule, opinion deemed necessary, in Wootton v. McGinnis, 201 N. C. 841, 161 S. E. 926; Thrash v. Roberts, 201 N. C. 843, 161 S. E. 925.

§ 7-16. Certificates to superior courts; execution for costs; penalty.—The clerk on the first Monday in each month shall transmit by some safe hand, or by mail, to the clerks of the superior courts certificates of the decisions of the supreme court in cases sent from such courts, which shall have been on file ten days; and thereupon the clerks respectively shall issue execution for the costs incurred in the courts from which the cases were sent; and the clerk of the supreme court shall issue execution for the costs incurred in that court, including all publications in newspapers made in the progress of the cause in that court, and by order of the same, and all postage on letters which concern the transfer of original papers. And if the clerk fail for the space of twenty days to perform the duty herein enjoined of transmitting the certificates of decisions, he shall forfeit and pay to the party or parties in whose favor the supreme court shall have decided, one hundred dollars. (Rev., s. 1549; Code, s. 968; 1887, c. 41; R. C., c. 31, s. 1; 1820, c. 1070; 1825, c. 1282; 1849, c. 1, s. 3; C. S. 1417.)

Cross Reference.—See notes to § 7-11.

Editor's Note.—This and section 7-18 are in pari materia and must be construed together. See Emery v. Raleigh, 107 N. C. 234, 15 S. E. 645.

Generally.—By virtue of this section of opinions are certified down on the first Monday in each month, provided they shall have been on file ten days. As opinions are usually filed on Tuesday, they remain not less than thirteen days and not more than forty-two days in fieri, and, in that time, if there is error (and in criminal cases it should be scrutinized in that time), it can be observed and the matter could be called to the attention of the court, which, in such cases, on sufficient cause shown, has more than once called up the
 appeals dismissed.—Suits and appeals pending in the supreme court may be dismissed on failure to prosecute the same, after a rule obtained for that purpose and served on the plaintiff or appellant, his agent or attorney, at least thirty days before the term next ensuing that of entering the rule; when, if the party shall fail to prosecute his suit or appeal, the court shall, at the election of the adverse party, dismiss the suit or appeal at the costs of the plaintiff or appellant, or proceed to hear and determine it. (Rev., s. 1543; Code, s. 967; R. C., c. 33, s. 28; 1848, c. 28; 1853, c. 450, 55 S. E. 350.

Compliance with Section Essential.—Petitions to rehear must be filed according to the requirements of this section. Strickland v. Draughon, 91 N. C. 103.

Former Decision Must Be Erroneous.—Questions of law have been considered and decided the court will not reconsider the question and reverse its former decision, unless it clearly appears that it is erroneous. School Directors v. City, 90 N. C. 503, 50 S. E. 279.

Criminal Actions.—Petitions to rehear are not allowable in criminal actions. State v. Council, 129 N. C. 511, 39 S. E. 817.

Matters in Transcript Considered.—On petition to rehear a case formerly decided, the Supreme Court will not consider matters not contained in the transcript of the record. Presnell v. Garrison, 122 N. C. 595, 29 S. E. 839.

A petition to rehear must be upon the record as it was at the former hearing. Presnell v. Garrison, 122 N. C. 595, 29 S. E. 839.

Presumption.—Rehearings of decision of cases in the Supreme Court will correct errors. Hodgin v. Peoples Bank, 125 N. C. 503, 50 S. E. 279.

Cross Reference.—See § 7-16 and notes thereto.

Failure to Docket.—An appeal is dismissed for failure to docket the record at the first term of the court at which a judgment was rendered, or within twenty days after the commencement of the succeeding term, and upon the filing of such petition the chief justice, or any one of the associate justices, may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined. (Rev., s. 1546; Code, s. 966; R. C., c. 33, s. 18; Supreme Court Rules 53, 58, 54; C. S. 1419.)

Costs.—Judgment for costs in the supreme court is rendered in that court; the superior court has no jurisdiction in such cases. Johnson v. Danville, etc., R. R., 123 N. C. 299, 31 S. E. 707.

Failure to Docket Transcript.—An appeal will be dismissed upon a failure of the appellant to docket the transcript as directed. Cox v. Kinston, etc., R. R., 177 N. C. 227, 19 S. E. 521.

Same—When Deemed Docketed.—An appeal is deemed docketed when the transcript is received by the clerk of the court. Brafford v. Reed, 124 N. C. 345, 32 S. E. 726.

Failure to Print Record.—The appeal will be dismissed where there is a failure to print the record in accordance with the rules. Bradshaw v. Stansbury, 164 N. C. 356, 79 S. E. 302.

Filing of Bond Gives Notice.—An appeal will not be dismissed upon the ground that no notice of appeal was given, where the record shows that an appeal bond was filed and approved by the court. The filing of the bond and its approval in open court is notice to the appellee. Capehart v. Higgins & Co., 90 N. C. 373.

Compliance with Statutory Regulation Essential.—Compliance with the statutory regulation as to appeals is a condition precedent, without which (unless waived) the right to appeal does not become potential. Hence, it is no defense to say that there was negligence of counsel and negligence of the party. Cozart v. Assurance Co., 142 N. C. 522, 65 S. E. 411.

The rules of court are not merely directory, and a failure of the appellant to prosecute his appeal in accordance with the rules will result in the dismissal of the appeal. Pipkin v. Green, 112 N. C. 355, 17 S. E. 534.

Where an appeal is not prosecuted according to law, the court will correct it. Hodgin v. Peoples Bank, 125 N. C. 503, 50 S. E. 279.

Court Will Correct Errors.—When a rehearing has been ordered and the judgment is erroneous, the court shall correct it. Weisel v. Cobb, 122 N. C. 67, 55 S. E. 490.

Court Will Correct Errors.—When a rehearing has been ordered and a manifest error is made to appear, the court will correct it. Hodgins v. Peoples Bank, 125 N. C. 503, 53 S. E. 769, 7 S. E. 839.

Burden of Proof.—The burden of showing error is on the petitioner. Webb v. Hicks, 125 N. C. 201, 34 S. E. 395.

Notice.—A purchaser of land conveyed by the certificate of sale is estopped upon a decision of this court, when it is proved by evidence fixed with notice of the fact that petition for rehearing could be filed at any time after
§ 7-19. Records to be made.—The court may order the clerk to record such parts of the record of cases as it may deem necessary. (Rev., s. 1541; Code, s. 961; R. C., c. 33, s. 13; 1918, c. 963; C. S. 1421.)

§ 7-20. Power to make rules of practice.—The justices of the supreme court shall prescribe and establish from time to time rules of practice for that court and also for the superior courts. The clerk shall certify to the judges of the superior courts that was sought to be reheard. Nelson v. Hunter, 145 N. C. 334, 59 S. E. 116.

§ 7-21. Supreme court to prescribe rules; rules to conform to law.—The supreme court is hereby vested with the power to prescribe rules from time to time for the making and filing of proceedings, actions, and pleadings, and of entering orders and judgments and recording the same, and to regulate the procedures in appeals to the supreme court, and in the trial of actions in the superior court, and before referees: Provided, no rule or regulation so adopted shall be in conflict with any of the provisions of this code. Such rules as may be adopted by the supreme court shall be printed and distributed by the secretary of state as are the reports of the supreme court. (Ex. Sess. 1921, c. 92, s. 1, subsec. 20; C. S. 1421(a).)

Art. 3. Officers of Court.

§ 7-22. The court may appoint acting attorney-general.—If the attorney-general should fail at any term of the supreme court to attend to the business which by law is assigned him, the court may appoint some counsel learned in the law to discharge his duties during the term. (Rev., s. 1551; Code, s. 969; R. C., c. 33, s. 23; 1846, c. 29; C. S. 1422.)

§ 7-23. Reporter.—The supreme court may employ a reporter of its decisions. (Rev., s. 1553; Code, s. 3363; 1893, c. 379, s. 4; 1897, c. 489; C. S. 1423.)

§ 7-24. Supreme court reporter; salary; offices.—The governor and council of state shall fix the salary of the supreme court reporter at not to exceed three thousand dollars a year, and shall furnish the reporter with suitable offices at a cost not to exceed five hundred dollars a year, which shall be paid direct to the lessor upon the warrant of the state auditor drawn upon the state treasurer. The reporter may employ a stenographer and clerk, at a salary to be fixed by the governor and council of state, payable monthly to the stenographer and clerk by voucher drawn by the state auditor on the state treasurer. (Rev., s. 2771; Code, ss. 3363, 3728; 1893, c. 379; 1897, c. 429; 1914, c. 107; 1910, c. 1917; 1921, c. 143; Ex. Sess. 1921, c. 29; C. S. 3861, 3889.)

§ 7-25. Clerk.—The clerk of the supreme court shall be appointed by the court, and shall hold his office for eight years. (Rev., s. 1553; Const., Art. IV, s. 15; C. S. 1424.)

§ 7-26. Clerk of supreme court; salary; fees.—The clerk of the supreme court shall receive an annual salary of three hundred dollars, to be paid semiannually, on a certificate of the justices; and, in addition thereto, the following fees, namely: For recording the papers and proceedings in the causes decided in the supreme court, which are required by law to be recorded, such compensation as may be estimated by the justices of the court at each term, not to exceed thirty cents for each page recorded, to be paid by the treasurer of the state auditor on the warrant of the state auditor drawn upon the state treasurer. (Rev., s. 2771; Code, ss. 3363, 3728; 1893, c. 379; 1897, c. 429; 1914, c. 107; 1910, c. 1917; 1921, c. 143; Ex. Sess. 1921, c. 29; C. S. 3861, 3889.)

§ 7-27. Clerk's bond and oath of office.—Before undertaking his duties, the clerk of the supreme court shall enter into bond with sufficient surety payable to the state of North Carolina, in the sum of fifteen thousand dollars, condi-
tioned for the faithful discharge of his duties and for the safe keeping of all records committed to his custody, which bond shall be lodged with the secretary of state; and he shall also before said justices, or one of them, take the oaths which are prescribed for clerks of the superior court, and shall keep his office in the city of Raleigh. (Rev., s. 290; Code, s. 958; R. C., c. 33, s. 9; 1812, c. 829, s. 2; 1818, c. 963, s. 5; 1846, c. 28, s. 3; 1799, c. 520, s. 2; C. S. 1425.)

Cross Reference.—As to action on official bonds, see § 109-14 and notes thereto. As to forms of oaths, see §§ 11-6, 11-7, 11-11. As to constitutional requirement and form, see Con., Art. VI, s. 7.

§ 7-28. Clerk to report money on hand.—The clerk of the supreme court shall, at the beginning of each fall term, produce to the court a statement on oath of all moneys remaining in his hands which have been paid into his office three years or more previous thereto, whether received directly from parties or from his predecessor in office, and is not detained in his hands by special order of the court, specifying therein the name of the person to whom the same is payable, and his address, if known; a copy of which report shall be transmitted to the state treasurer and to the auditor. (Rev., s. 1554; Code, s. 1864; R. C., c. 73; 1823, c. 1186; 1831, c. 3; C. S. 1426.)

§ 7-29. Marshal; librarian. —The Supreme Court may appoint a marshal of the Supreme Court, removable at will, who shall have the criminal and civil powers of a sheriff and shall attend upon the court during its sessions. The Supreme Court may consolidate the duties of the marshal with those of the librarian; when so consolidated the compensation of the marshal-librarian shall be fixed by the Supreme Court, with the approval of the governor. (Rev., s. 1555; Code, s. 950; 1873-4, c. 34; 1881, c. 306; 1939, c. 4; C. S. 1427.)

Art. 4. Supreme Court Library.

§ 7-30. Location.—The Supreme Court Library shall occupy the fifth floor of the Department of Justice Building. (Rev., s. 5083; 1885, c. 121, s. 7; 1913, c. 99, s. 1; C. S. 6588.)

§ 7-31. Trustees; powers; duties.—The Justices of the Supreme Court shall be, ex officio, the trustees of the Supreme Court Library and all moneys appropriated for its benefit shall be paid out under their direction and supervision. They shall have general charge and control of the library with authority to acquire, lend, exchange, and dispose of books and equipment in the interest of the library, but may, in their discretion, employ a librarian to discharge this function under such regulations and orders as they may prescribe. The trustees may employ an assistant librarian and such other assistants as may be deemed necessary for the efficient functioning of the library. (Rev., s. 5084; Code, s. 3606; 1883, c. 100; 1889, c. 482; 1937, c. 173; C. S. 1428, 6589.)

Cross Reference.—As to supreme court rule relating to duties of librarian, see Rule 41, subsection 1.

Editor's Note.—The 1937 amendment authorized the appointment of an assistant librarian.

§ 7-32. Library hours; night use.—The library shall be kept open during such hours and under such conditions as the trustees may prescribe; attorneys of North Carolina, and such other persons as the trustees may deem proper, shall be admitted to the library at night upon application and compliance with reasonable rules adopted by the trustees. (Rev., s. 5085; 1889, c. 498; C. S. 6590.)

Cross Reference.—As to supreme court rule relating to use of books in the library, see Rule 41, subsection 2.

§ 7-33. Appropriation.—In addition to the funds regularly appropriated for the library, the clerk of the supreme court shall, upon order of the librarian under the general supervision and control of the trustees, expend for the maintenance and equipment of the library the funds, in excess of the actual expenses of each examination, paid in by the board of Law Examiners from the fees of applicants. (Rev., s. 5086; Code, s. 3613; Rev., 1872-3; 1925, c. 275, s. 6; C. S. 6591.)

Editor's Note.—By the act of 1923 a provision for the expenditure of $200 for the binding of books was omitted.

Art. 5. Supreme Court Reports.

§ 7-34. Supreme court reports; contract for printing.—The Supreme Court is authorized to contract from time to time for the printing of its reports; to select a printer for the same and to prescribe such terms of contract as will insure, under the supervision of the Court, the prompt issue of the reports, as soon as practicable after a sufficient number of opinions are filed. Such contract shall be made after consultation with the division of purchase and contract after a comparison of prices for similar work in other states to such an extent as may be practicable. (Rev., s. 5093; 1905, c. 400; 1929, c. 39, s. 1; 1931, c. 261, s. 3; 1931, c. 312, ss. 14, 15; C. S. 7296.)

Cross Reference.—See § 143-49.

In General.—Upon the Supreme Court devolves the duty only of selecting the printer and directing the style and general execution of the work, the price of which is restricted to that allowed and fixed by the committee. In re Printing of the Supreme Court Reports, 153 N. C. 669, 70 S. E. 630.

§ 7-35. Supreme court reports; number printed.—Of the supreme court reports there shall be printed and bound in full sheep or buckram as many copies, not less than seven hundred and fifty, as in the opinion of the attorney-general and secretary of state may be sufficient to supply the demand. All such copies shall be delivered to the secretary of state. Advance sheets of the supreme court reports are hereby authorized to be printed, and to be sold, under the rules of the supreme court. (Rev., s. 5097; Code, s. 3632; 1893, c. 146, s. 2; 1897, c. 135; 1901, c. 401, s. 2; 1919, c. 314, s. 4; 1923, c. 25; C. S. 7297.)

Editor's Note.—The 1923 amendment added the last sentence.

Art. 6. Salaries of Supreme Court Employees.

§ 7-36. Governor and council to fix certain salaries.—The governor and council of state shall constitute a board to adjust and fix the compensation to be paid to the employees of the Supreme Court. (1921, c. 143, ss. 1, 4; Ex. Sess. 1921, c. 29; Ex. Sess. 1924, c. 124; C. S. 8861.)

Editor's Note.—Under the 1924 amendment this section was applicable to employees of the State Library.

§ 7-37. Limit of salary; certificate and payment.—The compensation fixed under § 7-36 shall not exceed three thousand dollars per annum, except
as may be elsewhere provided by law, for any individual employee, and shall be certified by the governor to the state auditor, and paid as provided by law for the payment of other salaries. (1921, c. 143, s. 2; C. S. 3861(a).)

§ 7-38. Proceedings and reports.—The proceedings of the board shall be kept by the state auditor, and reported to each regular session of the general assembly. (1921, c. 143, s. 3; C. S. 3861(b.).)

§ 7-39. Employment of additional assistants; compensation.—The governor and council of state are authorized and empowered to employ any additional clerical or stenographic help, for the Supreme Court, upon written request from the Chief Justice, and when they are satisfied that such additional help is needed temporarily, to do the departmental work efficiently, and to fix the salary of such additional help at not to exceed eighteen hundred dollars for any one person. (Ex. Sess. 1920, c. 95, s. 2; C. S. 3861(d.).)

SUBCHAPTER II. SUPERIOR COURTS.

Art. 7. Organization.

§ 7-40. Number of judges and solicitors.—The state shall be divided into twenty-one superior court judicial districts, for each of which a judge shall be chosen in the manner now prescribed by law. The state shall also be divided into twenty-one soliciitorial districts as set out in § 7-68, for each of which a solicitor shall be chosen in the manner now prescribed by law. (1913, cc. 9, 63; Const. Art. 4, s. 10; 1943, c. 134, s. 3; C. S. 1420.)

Editor's Note.—The 1943 amendment substituted "twentynone" for "twenty" in line two, and added the second sentence.

For acting twenty-first judicial district and providing for judge and solicitor thereof, see Public Laws 1917, c. 413, s. 5; 6.

Judge Appointed Prior to Creation of District.—Appointment of a judge of the superior court prior to the date when the act creating the judicial district takes effect is invalid. Stauffer v. Shuford, 138 N. C. 590, 38 S. E. 698.

§ 7-41. Election and term of office of judges.—The judges of the superior courts shall be elected in like manner as is provided for justices of the supreme court, and shall hold their offices for eight years. (Const. Art. 4, s. 21; C. S. 1430.)

Cross Reference.—For manner of electing supreme court justices, see § 7-2.

§ 7-42. Salaries of superior court judges.—The salary of each of the judges of the superior court shall be six thousand five hundred dollars per annum, and each judge shall be allowed the sum of one thousand five hundred and fifty dollars in lieu of his traveling expenses, to be paid monthly. They shall also receive one hundred dollars per week and their actual expenses incurred in attending and holding special terms of court by assignment of the governor, which expenses shall be paid by the county in which such special term is held. (Rev., s. 2765; Code, ss. 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; 1907, c. 988; 1909, c. 89; 1911, c. 82; 1919, c. 51; 1921, c. 25; s. 3; 1923, c. 227; 1927, c. 69, s. 2; C. S. 3884.)

Cross Reference.—As to compensation of judge in district having fewer than 20 regular weeks of term, see § 7-79.

Editor's Note.—The 1927 amendment increased the salary from $5,000 to $6,500.

Additional Compensation Part of Salary.—The additional compensation of one hundred dollars given to a superior court judge by this section for services in holding a special term, is a part of his salary. Buxton v. Commissioners, 82 N. C. 91.

As to taxing salaries of judges, see Const., Art. IV, § 18.

§ 7-43. Election and term of office of solicitors.—A solicitor shall be elected for each soliciitorial district by the qualified voters thereof, as is prescribed for members of the general assembly, who shall hold office for the term of four years, and prosecute on behalf of the state in all criminal actions in the superior courts, and advise the officers of justice in his district. (Const., Art. 4, s. 23; 1943, c. 134, s. 4; C. S. 1431.)

Local Modification.—Forsyth: 1927, c. 129.

Cross References.—As to when term begins, see § 163-114.

As to duty of solicitors to bring action for failure of trustee of charitable trust to file account, see § 36-20. As to duty of solicitor to appear in contempt actions, see § 5-5. As to duty to prosecute in certain violations of law by county officers, see § 151-119. As to duty to investigate in case of lynching, see § 15-98. As to duty to inform grand juries in adjoining counties in case of lynching, see § 15-128. As to duty to aid in prosecuting for violation of laws governing monopolies and trusts, see § 72-197.

Editor's Note.—The 1943 amendment, which substituted "soliciitorial" for "judicial" in line two, further provided: Wherever reference to the solicitor of a "judicial district" appears in any statute the same shall be deemed to refer to the solicitor of a "soliciitorial district."

§ 7-44. Solicitors; general compensation.—The several solicitors of the soliciitorial districts of the state of North Carolina shall each receive, as full compensation for services as solicitor, the sum of forty-five hundred dollars ($4,500.00), to be paid in equal monthly installments out of the state treasury upon warrants duly drawn thereon, which said salaries shall be in lieu of fees or other compensation, except the expenses allowed in § 7-45. (Rev., s. 2767; Code, s. 3736; 1879, c. 240, s. 12; 1923, c. 157, s. 1; 1933, c. 78, s. 1; 1935, c. 278; 1943, c. 134, s. 4; C. S. 3890.)

Editor's Note.—The amendment of 1915 increased the salary from $3,500 to $4,500.

The 1943 amendment substituted "soliciitorial" for "judicial" in line two.

In Moore v. Roberts, 87 N. C. 11, it was held that the solicitor of the criminal court of a county has no claim upon the State for such compensation as is allowed the district solicitors under this section, where the act establishing said court puts the burden of sustaining the same upon the county.

§ 7-45. Appropriation for expenses of soliciitor.—Each solicitor shall receive, in addition to the salary named in § 7-44, the sum of five hundred ($500.00) dollars per annum, which will cover all of his expenses while engaged in duties connected with his office. Said sum shall be paid in equal monthly installments out of the state treasury upon warrant duly drawn thereon. (1923, c. 157, s. 2; 1933, c. 78, s. 2; 1937, c. 248; C. S. 3890(a.).)

Editor's Note.—This section, first inserted by the act of 1923 and providing $750 for expenses, was repealed in 1933. The present section was codified from the 1937 act.

§ 7-46. Residence and rotation of judges.—Every judge of the superior court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years, but in case of the protracted illness of the judge assigned to preside in any district, or of any other unavoidable accident to him, by reason of which he shall be unable to preside, the governor may require any judge to hold one or more specified
§ 7-47. Emergency judges; duties; compensation.—The persons embraced within the provisions of section 7-51 are hereby constituted emergency judges of the superior court under article four of the constitution of this state, and are authorized to hold the superior courts of any county or district when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same, and to hold special terms when commissioned so to do by the governor, and as compensation for holding such special terms shall receive their actual expenses and in addition thereto fifteen dollars per week, to be paid by the county in which such special term is held.

§ 7-48. Vacancies filled.—All vacancies occurring by death, resignation or otherwise in the offices of justice of the supreme or judge of the superior court of the state shall be filled for the unexpired term at the next general election for members of the general assembly held after such vacancy is created. The persons elected at such election shall be commissioned by the governor immediately after the ascertainment of the result in the manner provided by law, and shall qualify and enter upon the discharge of the duties of the office within ten days after receiving such commission. (Rev., s. 1498; 1899, c. 613; Const., Art. 4, s. 23; C. S. 1434.)

§ 7-49. When judge may discharge solicitor.—When any state solicitor, authorized by election or appointment to act as prosecuting attorney for or in behalf of the state of North Carolina, in any of the courts of said state, shall appear at such court, in term time, drunk or intoxicated, or when it shall be brought to the knowledge of the judge presiding at such court that the solicitor whose duty it is to represent the state at such court is in the town in which such court is being held, drunk or intoxicated, at any time, it shall become the duty of such judge and he is hereby directed to immediately discharge such solicitor from the duties of such court, for the term then being held, and appoint some competent attorney to act as state solicitor for the term. The appointee shall be allowed all the fees and compensation belonging to the solicitor for such term. (Rev., s. 1499; 1901, c. 717; C. S. 1435.)

§ 7-50. Emergency judges; duties; compensation.—The persons embraced within the provisions of section 7-51 are hereby constituted emergency judges of the superior court under article four of the state constitution and form, see Const, Art. VI, s. 7, and the other half to the person who shall sue for the same. (Rev., s. 1497; Code, s. 924; R. C., c. 31, ss. 18, 19; 1777, c. 115; 1806, c. 694, s. 13; 1848, c. 45; C. S. 1433.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11. As to penalty for failure, see § 128-5. As to constitutional requirement and form, see Const., Art. VI, s. 7.
The provisions herein as to the amount of lifetime pay shall relate back to and become effective as of the fourth day of March, one thousand nine hundred and twenty-one, and the state treasurer is authorized and directed to pay on account of the state auditor the salary of any justice or judge as affected by such provisions, less any amount heretofore paid. (1921, c. 125, s. 1; Ex. Sess. 1921, c. 20, ss. 1, 2; 1927, cc. 133, 201; 1935, cc. 233, 400; 1937, c. 199; 1939, c. 258; 1943, c. 543; C. S. § 5884(a).)

Editor's Note.—The amendment of 1935 reduced the retirement age from seventy (70) years to sixty-five (65) years and added the phrase reading: "or twelve consecutive years on the supreme court." The 1937 amendment, inserting the provision as to disability through accident or disease provides: "The provisions of this amendatory act shall apply without regard to the age of the judge or justice affected." The 1939 amendment inserted the words "regular or special" near the beginning of the section and the words "or six years" after the words "served one full term." The 1943 amendment substituted "sixty-fifth" for "seventieth" in the fourteenth line from the end of the section. See § 7-55.

§ 7-52. Jurisdiction and powers of emergency judges.—To the end that emergency judges provided for in § 7-50 shall have the fullest power and authority sanctioned by Article Four (IV), Section Eleven (11), of the Constitution of North Carolina, such judges are hereby vested in the courts which are duly appointed to hold, with the same power and authority in all matters whatsoever that regular judges holding the same courts would have. An emergency judge duly assigned to hold the court of a particular county shall have, during said term of court, in open court and in chambers, the power and authority of a regular judge in all matters whatsoever arising in that judicial district that could properly be heard or determined by a regular judge holding the same term of court. (Ex. Sess. 1921, c. 94, s. 1; 1925, c. 8; 1941, c. 52, s. 2; C. S. § 1435(b).)

Cross Reference.—As to duty of governor to assign judges when regular judges not available, see § 7-71.

Editor's Note.—The 1941 amendment rewrote this section.

§ 7-53. Orders returnable to another judge; notice.—If any special or emergency judge has made any matters returnable before him, and subsequent thereto he should be called upon by the governor to hold court elsewhere, said judge shall make an order directing said matter to be heard before some other judge, setting forth in said order the time and place same is to be heard, and send a copy of said order to the attorney or attorneys representing the parties plaintiff and defendant in such matter. (Ex. Sess. 1921, c. 94, s. 2; C. S. § 1435(c).)

§ 7-54. Governor to make appointment of four special judges.—The governor of North Carolina may appoint four persons who shall possess the requirements and qualifications of special judges as prescribed by article four, section eleven of the constitution, and who shall take the same oath of office and otherwise be subject to the same requirements and disabilities as are or may be prescribed by law for judges of the superior court, save the requirements of residence in a particular district, to be special judges of the superior courts of the state of North Carolina. Two of the said judges shall be appointed from the western judicial division and two from the eastern judicial division, as now established. The governor shall issue a commission to each of said judges so appointed for a term to begin July first, one thousand nine hundred and forty-three, and to end June thirtieth, one thousand nine hundred and forty-five, and the said commission shall constitute his authority to perform the duties of the office of a special judge of the superior courts during the time named hereinafter. (1927, c. 206, s. 1; 1929, c. 137, s. 1; 1931, c. 29, s. 1; 1933, c. 217, s. 2; 1935, c. 97, s. 1; 1937, c. 72, s. 1; 1939, c. 31, s. 1; 1941, c. 51, s. 1; 1943, c. 58, s. 1.)

For a discussion of this statute, see Jerome on Civil Procedure, p. 37.

Editor's Note.—Prior to the amendment of 1943, this section was mandatory. It required that the governor shall appoint, etc.

The subsequent amendments re-enacted sections 7-54 to 7-61 without change except as to dates, and as specified in the note to § 7-55. For comment on the 1941 amendment, see 19 N. C. Law Rev. 473.

Judicial Notice of Appointment as Special Judge.—The Supreme Court will take judicial notice of the appointment of a special justice under the provisions of this chapter. Greene v. Stadim, 197 N. C. 672, 149 S. E. 635.

When necessary for the determination of a case on appeal, the Supreme Court will take judicial notice of the counties comprising a judicial district, and that a judge holding a term in one of the counties was a special justice appointed by the Governor under the authority of this section. Reid v. Reid, 199 N. C. 740, 153 S. E. 719.


§ 7-55. Time for appointment.—Each special judge shall be appointed by the governor on or before July first, one thousand nine hundred and forty-three, and shall be subject to removal from office for the same causes and in the same manner as regular judges of the superior court; and vacancies occurring in the offices created by §§ 7-54 to 7-61 shall be filled by the governor in the same manner for the unexpired term thereof. (1927, c. 206, s. 2; 1929, c. 137, s. 2; 1931, c. 29, s. 2; 1933, c. 217, s. 2; 1935, c. 97, s. 2; 1937, c. 72, s. 2; 1939, c. 31, s. 2; 1941, c. 51, s. 2; 1943, c. 58, s. 2.)

§ 7-56. Further appointments.—The governor is further authorized and empowered, if in his judgment the necessity exists therefor, to appoint at such time as he may determine, not exceeding four additional judges, two of whom shall be residents of the eastern judicial division and two of whom shall be residents of the western judicial division, whose term of office shall begin from his or their appointment and qualification and end June thirtieth, one thousand nine hundred and forty-five. The provisions of §§ 7-54 to 7-61 applicable to the four special judges shall be applicable to the four special judges authorized to be appointed under this section. (1927, c. 206, s. 3; 1929, c. 137, s. 3; 1931, c. 29, s. 3; 1933, c. 217, s. 3; 1935, c. 97, s. 3; 1937, c. 72, s. 3; 1939, c. 31, s. 3; 1941, c. 51, s. 3; 1943, c. 58, s. 3.)

Editor's Note.—The 1941 amendment authorized the appointment of four additional judges, the appointment of two having been previously authorized. For comment on this amendment, see 19 N. C. Law Rev. 473.

§ 7-57. Extent of authority. — The authority conferred in §§ 7-54 to 7-61 upon the governor, pursuant to article four, section eleven, of the constitution of North Carolina, to appoint such special judges shall extend to regular as well as
special terms of the superior court, with either
civil or criminal jurisdiction, or both, as may be
designated by the statutes or by the governor pursuant to law. (1927, c. 206, s. 4; 1929, c. 137,
s. 4; 1931, c. 29, s. 4; 1933, c. 217, s. 4; 1935, c. 97,
s. 4; 1937, c. 72, s. 4; 1939, c. 31, s. 4; 1941, c. 51,
s. 8; 1943, c. 58, s. 4.)

§ 7-58. Jurisdiction as of regular judges.—
To the end that such special judges shall have the
fullest power and authority sanctioned by article
four, section eleven, of the constitution of North
Carolina, such judges are hereby vested, in the
courts which they are duly appointed to hold, with
the same power and authority in all matters what-
soever that regular judges holding the same courts
would have. A special judge duly assigned to hold
the court of a particular county shall have during
said term of court, in open court and in chambers,
the same power and authority of a regular judge
in all matters whatsoever arising in that judicial
district that could properly be heard or determined
by a regular judge holding the same term of court.
(1927, c. 206, s. 5; 1929, c. 137, s. 5; 1931, c. 29, s.
5; 1933, c. 217, s. 5; 1935, c. 97, s. 5; 1937, c. 72, s.
5; 1939, c. 31, s. 5; 1941, c. 51, s. 5; 1943, c. 58, s. 5.)

No Jurisdiction When Not Holding Term of Court.—A
special or emergency judge has no authority to determine
a controversy without action at chambers when not hold-
ing a term of court. Greene v. Stadium, 197 N. C. 472,
14 S. E. 2d. See also Bohannon v. Virginia Trust Co.,
198 N. C. 702, 153 S. E. 263, and cases cited under § 7-63.

Special Judge Holding Single Term—Motion for Alimony.
—Where a special judge has been authorized under com-
mision of the Governor to hold a term of court in only
one county of a district, he may not issue an order for
alimony, attorney's fees and costs in a proceeding in an
action for divorce a vinculo, continued to be heard before
a judge regularly holding the terms of court in that dis-
trict and this being determinative of the appeal the ques-
tion is not presented as to whether it was required that
the appellant should make it appear by the Governor's
commission, or otherwise, that the regular judge assigned
was unable to attend and hold courts, etc. N. C. Const.
Art. IV, §§ 10 and 11. Reid v. Reid, 199 N. C. 740, 155
S. E. 719. Cited in Edmundson v. Edmundson, 222 N. C. 181, 199,
22 S. E. (2d) 576 (dis. op.).

§ 7-59. Salary, expenses; terms; practice of
law.—The special judges so appointed shall receive
the same salary and traveling expenses as now are,
or may hereafter be, paid or allowed to judges of
the superior court for holding their regularly as-
signed courts, and they shall hold all such regular
and special terms of court as they may be directed
and assigned by the governor to hold, without ad-
ditional compensation: Provided, that no person
named under §§ 7-54 to 7-61 shall engage in
the private practice of law. (1927, c. 206, s. 6;
1929, c. 137, s. 6; 1931, c. 29, s. 6; 1933, c. 217, s.
6; 1935, c. 97, s. 6; 1937, c. 72, s. 6; 1939, c. 31, s.
6; 1941, c. 51, s. 6; 1943, c. 58, s. 6.)

§ 7-60. Powers after commission expires.—Noth-
ing in §§ 7-54 to 7-61 shall be construed to prohibit
such special judges from settling cases on appeal
and making all proper orders in regard thereto af-
ter the time for which they were commissioned
has expired. (1927, c. 206, s. 7; 1929, c. 137, s. 7;
1931, c. 29, s. 7; 1933, c. 217, s. 7; 1935, c. 97, s. 7;
1937, c. 72, s. 7; 1939, c. 31, s. 7; 1941, c. 51, s. 7;
1943, c. 58, s. 7.)

§ 7-61. Effect on sections 7-50 and 7-51.—Noth-
ing in §§ 7-54 to 7-60 shall in any manner affect §§
7-50 and 7-51. (1927, c. 206, s. 8; 1929, c. 137, s. 8;
1931, c. 29, s. 8; 1933, c. 217, s. 8; 1935, c. 97, s.
8; 1937, c. 72, s. 8; 1939, c. 31, s. 8; 1941, c. 51, s. 8;
1943, c. 58, s. 8.)

§ 7-62. Disposition of motions where judge
disqualified.—Whenever the judge before whom
any motion is made, either at term time or at
chambers, shall disqualify himself from determin-
ing it, he may in his discretion refer the same
for disposition to the resident judge of any ad-
joining district, who shall have full power and
authority to hear and determine the cause in the
same manner as if he were the presiding judge of
the district in which the cause arose. (1939,
s. 48.)

Art. 8. Jurisdiction.

§ 7-63. Original jurisdiction. — The superior
court has original jurisdiction of all civil actions
whereof exclusive original jurisdiction is not
given to some other court; and of all criminal
actions in which the punishment may exceed a fine
of fifty dollars, or imprisonment for thirty days;
and of all such affrays as shall be committed
within one mile of the place where, and during
the time, such court is being held; and of all of-
fenses whereof exclusive original jurisdiction is
given to justices of the peace, if some justice of
the peace shall not within twelve months after
the commission of the offense proceed to take
official cognizance thereof. (Rev., s. 1500; Code,
s. 922; 1889, c. 504, s. 2; Const., Art. IV, ss. 12, 27;
1879, c. 95, s. 11; 1881, c. 210; C. S. 1486.)

I. In General.

II. Actions Ex Contractu.

A. Jurisdiction Generally.

B. Essentials.

1. The Amount.
   a. In General.
   b. Previous Remission.

2. Good Faith.

III. Actions Ex Delicto.

IV. Criminal Actions.

A. Generally.

B. Essentials of Indictment.

V. Equitable Jurisdiction.

Cross Reference.

As to jurisdiction of justices of the peace, see § 7-121.

I. IN GENERAL.

Constitutionality of Section.—The General Assembly has
constitutional authority to distribute among the other courts
prescribed in the Constitution that portion of judicial power
and jurisdiction which does not pertain to the Supreme
Court. Const., Art. IV, sec. 12; Williams v. Williams, 188
N. C. 728, 125 S. E. 452.

The constitutional jurisdiction of the superior court, gen-
erally, may be stated as intermediate between the Supreme
Court and the courts of justices of the peace. Mott v.
Board, 126 N. C. 866, 36 S. E. 330.

Distribution of Jurisdiction Question of Procedure.—The
interpretation of the Constitution and statutes as to the
distribution of jurisdiction among the superior and inferior
courts, and courts of the peace, involves no
rule of property, but only of procedure. Singer Sewing

General Jurisdiction of Superior Court.—The jurisdiction
of the superior court is general and not limited, except in the
sense that it has been narrowed from time to time by
carving out a portion of this general jurisdiction and giving

The superior court, under the provisions of this section, has exclusive original jurisdiction in all cases when it is not given to some other court. State v. Waldrop, 63 N. C. 507, 509.

The superior court is a court of general common-law jurisdiction, with power to try all actions founded on contract, where the principal sum demanded is above $200, and such other actions which have been or may be entitled by statute to be brought there, not excepted by the limits of the constitution. Walton v. Walton, 80 N. C. 26.

The superior court is one of general jurisdiction, being the highest court of original jurisdiction in the State, and it may take cognizance of all suits, which are not taken from it by statute. State v. Garland, 29 N. C. 48, 49.

A nonresident plaintiff may maintain an action against the defendant for the plaintiff's wife, as money demanded by plaintiff's wife upon insistent demand, the complaint stating the sum demanded, and a verdict is rendered for less than the demand, the plaintiff cannot be allowed to "split up" the account and recover upon each item. Jarret v. Self, 90 N. C. 478.

Action to Recover Loan.—The superior court has not original jurisdiction of an action by a stockholder in an insurance company doing business as a building and loan association, against the company, to recover an overpayment of interest on a loan, where the amount sought to be recovered does not exceed the sum of $200. Gilliam v. Life Ins. Co., 121 N. C. 369, 28 S. E. 470.

Waiver of Tort.—The superior court possesses no jurisdiction in actions in which a tort is waived and suit is brought on an implied contract for less than $200. Winslow v. Weith, 66 N. C. 432.

Less Than Statutory Amount.—In an action, founded on an implied contract, by the sheriff against his deputy for a mesneless in office, the superior court has no jurisdiction where the amount demanded is less than $200. Latham v. Rollins, 72 N. C. 454.

Where Recovery of Jurisdictional Amount Impossible.—The superior court has no original jurisdiction of a legal cause of action, founded on contract, when in no event can the plaintiff recover as much as $200. Howard v. Mutual, etc., Ins. Co., 126 N. C. 420, 42 S. E. 8.

b. Previous Remission.

The fact that plaintiff has remitted damages in excess of $200 in his action sued on in the justice's court does not necessarily oust the jurisdiction of the superior court in an action brought on the same contract there. Brock v. Scott, 159 N. C. 313, 75 S. E. 724.

But the superior court has no jurisdiction of an action to recover upon a running account of $32, where it is shown that from time to time the defendant had reduced the account by payments, whether he knew it or not, at the time the action is brought. Wiserman v. Witherow, 90 N. C. 140.

2. Good Faith.

Generally.—It is the amount demanded in good faith (definable as an honest purpose plus relation to the facts alleged in the complaint as a whole which reasonably tend to support it), that fixes the jurisdiction of the court. Thompson v. Southern Express Co., 144 N. C. 389, 57 S. E. 18; Wooten v. Biggs Drug Co., 169 N. C. 64, 85 S. E. 140.

While the sum demanded ordinarily determines the jurisdiction, yet the plaintiff must make his demand in good faith and not for the purpose of giving the court jurisdiction. Wiserman v. Witherow, 90 N. C. 140.

Bona Fide Contention.—In an action involving the construction of a contract, where it is apparent that there was a bona fide contention for more than $200, the superior court has jurisdiction. Horner School v. Westcott, 154 N. C. 518, 32 S. E. 885.

III. ACTIONS EX DELICTO.

Constitution and Statute.—Under our Constitution and statute jurisdiction is conferred upon a justice of the peace concurrent with that of the superior court of all actions of tort wherein the damages do not exceed the sum of $200. But the superior court has jurisdiction of all actions of tort wherein the damages do not exceed $500, or less. House v. Bonnal & Co., 149 N. C. 51, 62 S. E. 776, and cases cited.

Failure to Prove Allegation in Entirety.—Where a cause of action within the jurisdiction of the superior court is alleged in good faith, jurisdiction is not lost by failure to prove the allegation in its entirety, and in an action in tort the superior court has jurisdiction though the sum demanded is less than $200. Fields v. Brown, 160 N. C. 295, 76 S. E. 649.

Conversion.—The superior court has jurisdiction of an action for damages for the conversion of property where

[ 460 ]
the amount claimed is one hundred and twenty-five dollars. Asher v. Reizenstein, 105 N. C. 213, 10 S. E. 889. Deceiving and False Warranty.—An indictment for deceit and false warranty, in the sale of a horse, is cognizable in the superior court, and manifestly upon mature consideration, that the amount claimed is one hundred and twenty-five dollars. Asher v. Reizenstein, 105 N. C. 213, 10 S. E. 889. False warranty, in the sale of a horse, is cognizable in the nature of deceit, and the superior court, though the damages claimed amount only said: "It has been settled by a line of decisions in this court will have jurisdiction." Bullinger v. Marshall, 70 N. C. 520; Asher v. Gray, 88 N. C. 190; S. C., 90 N. C. 137; Harvey v. Handley, 108 N. C. 43. Proof of Guilty Knowledge.—The complaint being for a tort, sustains the jurisdiction, though the charge of a guilty knowledge of the falsity of the representations which influenced the plaintiff in making the contract of which no issue was asked to be made up. Fields v. Brown, 160 N. C. 295, 700, 70 S. E. 6. Waiver of Tort.—Plaintiff may waive the tort and sue in contract. Bullinger v. Marshall, 70 N. C. 520; McDonald v. Cannon, etc., Co., 82 N. C. 245, but where this course is pursued, it is incumbent upon the plaintiff to allege in good faith a claim amounting to more than $200. Winslow v. Weith, 66 N. C. 432. Where, in an action for damages in the sum of $125, for the conversion of certain cotton, the complaint alleges that the defendants presented two bales of cotton at a certain price per pound on the terms that the price was to be paid down and no title to pass until the price was paid, and defendant, on getting possession of the cotton, refused to pay the price, it was held, that the superior court had jurisdiction. McDonald v. Cannon, etc., Co., 82 N. C. 245. In such case the plaintiffs might have recovered damages, and sued for the price agreed to be paid (less than $200), and then a justice of the peace would have had jurisdiction of the action. Id. IV. CRIMINAL ACTIONS. A. Generally. The superior court has original jurisdiction of assaults and batteries: 1st, when a deadly weapon is used; 2nd, when serious damage is done; 3rd, when the offense was committed six months (now twelve months) before the finding of the indictment was not found, and no justice has taken jurisdiction of the offense has been taken cognizance of the crime. State v. Cunningham, 94 N. C. 824. See also, State v. Phillips, 194 N. C. 776, 10 S. E. 463. Establishments for All Crimes Included.—Having acquired cognizance of an imputed crime, which was assault with intent to commit rape, the court may proceed to dispose of the complaint and assess damages, or that same jurisdiction in this respect as that of the English High Courts of Chancery. Coxe v. Charles Stores Co., 215 N. C. 360, 1 S. E. (2d) 253. Impleader.—Where the controversy involves an action in the nature of a bill of interpleader to determine the right of two adverse claimants to a fund, jurisdiction of the superior court attached upon the ground that it is an exception of the power of the court enforceable by a bill in equity under the old system. Timber Co. v. Wells, 171 N. C. 263, 88 S. E. 327. Foreclosure of Mortgages.—Because of the equity growing out of the relation of mortgagor and mortgagee when the latter seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the superior court has jurisdiction when the amount secured is for a less sum than two hundred dollars. Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 107 S. E. 14. Subrogation.—The superior court has jurisdiction of an action by a creditor seeking to be subrogated to the rights of other creditors of the same debtor whose claims he had paid. Fidelity Co. v. Jordan, 134 N. C. 236, 45 S. E. 496. To Establish Claim against Marital Trust.—An action by a feme covert to have a lien declared for materials furnished, etc., must be brought before a justice, if the amount claimed is under $200. It is when the proceeding is brought in equity, it is not the same. State v. Earnest, 98 N. C. 740, 4 S. E. 455. Use of Deadly Weapon.—This section does not render it necessary that a bill found by the grand jury charge, a deadly weapon was used, that any serious damage was done, that six months had elapsed before the finding of the bill, or that the offense was committed within one mile of the place where the act was done. The defendant, under the plea of not guilty, may negative the existence of the jurisdictional facts. State v. Taylor, 83 N. C. 602. Matter of Defense.—Upon the trial of an indictment for simple assault, the superior court prima facie has jurisdiction, but it is open to the defendant to show that the offense was committed within six months (now twelve) of the finding of the bill. State v. Earnest, 98 N. C. 740, 4 S. E. 455. V. EQUITABLE JURISDICTION. Generally.—The superior court possesses the same equitable jurisdiction, when not limited by statute, formerly enjoyed by the Court of Equity. Seattle v. Seattle, 141 N. C. 553, 54 S. E. 445. Over Property of Infants.—The superior courts in their equity jurisdiction have inherent authority, when not restricted by statute, to pass upon the merits in controversies involving the property of minors and infants. The same jurisdiction in this respect as that of the English High Courts of Chancery. The property of infants in the nature of a bill of interpleader to determine the right of two adverse claimants to a fund, jurisdiction of the superior court attached upon the ground that it is an exception of the power of the court enforceable by a bill in equity under the old system. Timber Co. v. Wells, 171 N. C. 263, 88 S. E. 327. B. Essentials of Indictment. Charge Different from Case Made Out.—Where the indictment charges an assault with a deadly weapon, but the proof shows a simple assault, committed within less than (now six) months since the finding of the bill, the jurisdiction of the superior court is not impaired, as the case in which this would happen are limited to those in which the charge in itself is of a simple assault. State v. Fesperman, 108 N. C. 770, 771, 13 S. E. 14. Manner of Excepting to Jurisdiction.—Except to the jurisdiction of the superior court, for that six months (now twelve) had not elapsed, should be made, not by a motion to quash or in arrest of judgment, but by a prayer for instructions to the jury to acquit. State v. Earnest, 98 N. C. 740, 4 S. E. 495. Misdemeanors.—The superior court has exclusive jurisdiction of misdemeanors where the punishment is not limited to a fine not exceeding fifty dollars or imprisonment not exceeding thirty days. Washington v. Hammond, 76 N. C. 33. B. Essentials of Indictment. Twelve Month Period.—An indictment for an affray need not be made out within six months (now twelve) before the finding of the bill and that no justice has taken jurisdiction. State v. Moore, 82 N. C. 600. Failure of Justice of Peace to Assume Jurisdiction.—When the superior court takes jurisdiction of a justice of the peace fail to assume jurisdiction of, it is not necessary to aver in the indictment the fact of the justice's omission in order to confer jurisdiction on the superior court. Winslow v. Burger, 181 N. C. 241, 107 S. E. 14. Nor is it material that the offense is alleged to have been committed on a day more than six months (now twelve) before the finding of the indictment, in the indictment itself, the date is not traversable and is not fixed on the verdict. Id. Use of Deadly Weapon.—This section does not render it necessary that a bill found by the grand jury charge, a deadly weapon was used, that any serious damage was done, that six months had elapsed before the finding of the bill, or that the offense was committed within one mile of the place where the act was done. The defendant, under the plea of not guilty, may negative the existence of the jurisdictional facts. State v. Taylor, 83 N. C. 602. Matter of Defense.—Upon the trial of an indictment for simple assault, the superior court prima facie has jurisdiction, but it is open to the defendant to show that the offense was committed within six months (now twelve) of the finding of the bill. State v. Earnest, 98 N. C. 740, 4 S. E. 455. VI. CONCURRENT JURISDICTION. In all cases in which by statute original jurisdiction of criminal actions has been, or may hereafter be, taken from the superior court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof. The provisions of this section shall remain in full force and effect, unless expressly repealed by some subsequent Act of the General Assembly, and shall not be affected by implication or by general repealing clauses in any Act of the General Assembly conferring exclusive jurisdiction on inferior courts in misdemeanor cases which may be hereafter enacted. Appeal shall be, as heretofore, to the superior court from all judgments of such inferior courts: Provided,
that this section shall not apply to the counties of Allegheny, Cabarrus, Caswell, Cherokee, Clay, Craven, Cumberland, Currituck, Dare, Davidson, Edgecombe, Gaston, Gates, Graham, Granville, Guilford, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Jones, Lenoir, New Hanover, Pamlico, Perquimans, Rockingham, Rutherford, Scotland, Surry, Union and Warren. (1919, c. 299; 1923, c. 98; 1941, c. 265; C. S. 1437.)

Editor's Note.—The 1941 amendment rewrote this section.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 551. (For comment on the 1943 amendment, see 19 N. C. Law Rev. 766.)

Only One Prosecution.—Where two courts have concurrent jurisdiction of an offense, the judgment of that one which first passes judgment is a good defense against a prosecution in the other court for the same offense. State v. Shemwell, 180 N. C. 718, 104 S. E. 885.

Appeals from Justice of Peace.—In cases where bills are found in the superior court, its jurisdiction is original. But in cases of appeal from justices of the peace its jurisdiction is derivative, and it has no more or greater jurisdiction in the justice of the peace had; and if the justice had none, the superior court has none. Page v. Page, 167 N. C. 350, 353, 83 S. E. 627.

§ 7-67. Transfer of cases pending in abolished inferior court.—In case of the abolition of any court inferior to the superior court (except courts of the justices of the peace), all cases and matters then in such court, not finally disposed of, and all records of such court, shall forthwith be transferred and delivered to the superior court of the county in which such inferior court has functioned, for trial or other disposition of such cases and matters as may be necessary and proper.

The superior court to which such cases and matters are transferred shall have the power and jurisdiction to hear, deal with and dispose of the same to the same extent as would said inferior court had its existence continued. (1941, c. 117.)

Where the municipal court in which the case is originally tried is abolished pending the decision of the supreme court granting a new trial, the cause will be remanded to the superior court of the county. Barnes v. Teer, 219 N. C. 823, 15 S. E. (2d) 379.

Art. 9. Judicial and Solicitorial Districts and Terms of Court.

§ 7-68. Number of districts.—The state shall be divided into twenty-one superior court judicial districts, numbered first to twenty-first, composed of the counties hereinafter designated.

As required by the constitution, article IV, section twenty-three, as amended, the state shall be divided into twenty-one solicitorial districts, numbered first to twenty-first, which districts shall be the same as the judicial districts hereinafter designated. The solicitors elected for the twenty-one judicial districts, respectively, in the general election held on November third, one thousand nine hundred and forty-two, shall be the solicitors, respectively, of the twenty-one solicitorial districts hereby created. (1913, c. 63; 1913, c. 196; 1937, c. 413, s. 1; 1943, c. 134, s. 2; C. S. 1441.)

Editor's Note.—Prior to the 1937 amendment there were twenty districts.

The 1943 amendment added the second paragraph of this section. It also inserted “solicitorial” in the article heading.

§ 7-69. Eastern and western judicial divisions. —The state shall be divided into two judicial divisions, the Eastern and Western Judicial Divisions. The counties which are now or may hereafter be included in the judicial districts from one to ten, both inclusive, shall constitute the Eastern Division, and the counties which are now or may hereafter be included in the judicial districts from eleven to twenty-one, both inclusive, shall constitute the Western Division. The judicial districts shall
retain their numbers from one up to twenty-one, and all such other districts as may from time to time be added by the creation of new districts shall be numbered consecutively. (1915, c. 15; 1937, c. 413, s. 2; C. S. 1442.)

Editor's Note.—The 1937 amendment substituted “twenty-one” for “twenty” formerly appearing in this section.

§ 7-70. Terms of court.—A superior court shall be held by a judge thereof at the courthouse in each county. The twenty-one judicial districts of the state shall be composed of the counties designated in this section, and the superior courts in the several counties shall be opened and held in each year at the times herein set forth. Each court shall continue in session one week, and be for the trial of criminal and civil cases, except as otherwise provided, unless the business thereof shall be sooner disposed of. Each county shall have the number of regular weeks of superior court as set out in this section: Provided, however, that the schedule of courts of any county or judicial district may be revised or reformed and the number of terms of court may be increased or decreased from time to time as may appear advisable to the court calendar commission; which said commission shall be composed of the chief justice of the supreme court and four judges of the superior court, to be appointed by the governor for a period of four years each. The members of said commission shall serve without compensation other than their necessary expenses incurred in attending meetings of said commission. (1913, c. 63, 196; 1937, c. 408; C. S. 1443.)

Eastern Division

First District

The first district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Currituck—Third Monday in July, for civil cases only; first Monday in March; first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51; Ex. Sess. 1920, c. 23, s. 2; 1939, c. 59; C. S. 1443.)

Camden—First Monday after the first Monday in March and the last Monday in August. (1913, c. 196; Ex. Sess. 1913, c. 51; Ex. Sess. 1920, c. 23, s. 2; 1939, c. 59; C. S. 1443.)

Camden—First Monday after the first Monday in March and the last Monday in August. (1913, c. 196; Ex. Sess. 1913, c. 51; Ex. Sess. 1920, c. 23, s. 1; 1943, c. 378; C. S. 1443.)

Pasquotank—Eighth Monday before the first Monday in March for the trial of civil cases only; third Monday before the first Monday in March to continue for two weeks, the first week for the trial of civil cases only and the second week for the trial of criminal cases only; second Monday after the first Monday in March for the trial of civil cases only; sixth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in March for the trial of civil cases only; seventh Monday after the first Monday in March, for civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 51; 1921, c. 105; 1923, c. 232; Pub. Loc. 1925, c. 631; 1939, c. 167; 1933, cc. 3, 129; C. S. 1443.)

Perguimans—Seventh Monday before the first Monday in March, for civil cases only, for which term a special judge to be assigned by the governor; sixth Monday after the first Monday in March; eighth Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51; 1931, c. 6; 1933, c. 286; C. S. 1443.)

Chowan—Fourth Monday after the first Monday in March; eighth Monday after the first Monday in March to continue for one week, for the trial of civil cases only; first Monday after the first Monday in September; twelfth Monday after the first Monday in September. (1913, c. 196; 1931, c. 87; 1935, c. 456; 1937, c. 102; 1941, c. 307, s. 1; C. S. 1443.)

Gates—Third Monday after the first Monday in March; eleventh Monday after the first Monday in September. (1913, c. 196; 1935, c. 70; C. S. 1443.)

Dare—Twelfth Monday after the first Monday in March; seventh Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51; C. S. 1443.)

Tyrell—Seventh Monday after the first Monday in March; fourth Monday after the first Monday in September, and for this term a special Judge may be assigned; fourth Monday before the first Monday in March, for civil cases only. Upon recommendation of the local bar, the board of commissioners for the county of Tyrell, at their option, may abolish and suspend the opening and holding, in any year, of the term above provided for the week commencing on the fourth Monday before the first Monday in March, by notifying the governor and the judge scheduled to hold said term, at least thirty days prior to the date for opening same, that such term of court is not desired. (1913, c. 196; Ex. Sess. 1913, c. 51; 1919, c. 128, s. 1; Ex. Sess. 1920, c. 23, s. 1; 1921, c. 89; Ex. Sess. 1921, c. 19; 1923, c. 124; Pub. Loc. 1925, c. 389; 1937, c. 123; 1931, c. 92; 1933, c. 126; C. S. 1443.)

Hyde—Eleventh Monday after the first Monday in March; sixth Monday after the first Monday in September. (1913, c. 196; 1935, c. 70; C. S. 1443.)

In addition to the terms of court now provided by law to be held in Hyde county, the following term of court shall be opened and held in each year, except as hereinafter provided, in the manner and at the time herein set forth, to-wit: To convene on the third Monday in August of each year and to continue for one week for the trial of civil cases only. If the judge regularly assigned to the district in which said court is situate be unable to hold any term of court provided in the first sentence of this paragraph, for any cause set out in article four, section eleven of the constitution, the governor may appoint a judge to hold such term from among the regular, special or emergency judges. If, in the opinion of the board of commissioners of Hyde county, it is not advisable or necessary to hold said additional term of court, and such fact is so stated in a resolution duly adopted by a majority of said board on or before the second Monday in July next preceding the day for the convening of said term, then said term shall not be held on the third Monday in August of that year.
as provided in this paragraph. Upon the adoption of such a resolution, the clerk of said board shall immediately notify the judge, who has been assigned to hold the additional term, that the same will not be held, and no jury for the said term shall be drawn; but if no such resolution shall be adopted on or before the second Monday in July as provided above, then it shall be the duty of the board of commissioners to cause the jury to be drawn in the manner now prescribed by law for the drawing of a jury for the trial of civil cases in regular terms of the superior court. (1913, c. 196; 1935, c. 191; 1941, c. 367, s. 1; C. S. 1443.)

Beaufort—Seventh Monday before the first Monday in March for two weeks, the first week for criminal cases only, and the second week for criminal and civil cases; second Monday before the first Monday in March for civil cases only; second Monday after the first Monday in March for criminal cases only; fifth Monday after the first Monday in March for civil cases only; sixteenth Monday after the first Monday in March for the trial of criminal and civil cases; second Monday after the first Monday in September for the trial of criminal cases with a grand jury in attendance; third Monday after the first Monday in September for civil cases only; fifth Monday after the first Monday in September for civil cases only; first Monday in March; fourth Monday in March; sixth Monday before the first Monday in September, to continue for two weeks, for civil cases only; first Monday after the first Monday in September; sixth Monday after the first Monday in September; tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only.

The grand jury drawn by the commissioners of Edgecombe county for the term of court beginning on the sixth Monday before the first Monday in March of each year shall also serve as the grand jury for the term beginning on the first Monday in March and on the thirteenth Monday after the first Monday in March, and shall be charged with the same duties and clothed with the same power at each of said terms and shall receive for each term such mileage and compensation as is now provided by law. (1913, c. 196; Ex. Sess. 1913, c. 17; 1913, c. 107; 1917, c. 12; 1919, c. 133; Ex. Sess. 1921, c. 108, s. 1; 1923, c. 246; 1927, c. 128; 1941, c. 2, s. 2; C. S. 1443.)

Nash—Fifth Monday before the first Monday in March; second Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases only; first Monday after the first Monday in March; seventh Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; twelfth Monday after the first Monday in March; first Monday before the first Monday in September; second Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, and for the term of court the governor is hereby directed to appoint a judge, other than the judge holding courts of the second judicial district, to hold the same from among the regular, special or emergency superior court judges; fifth Monday after the first Monday in September, for the trial of civil cases only; twelfth Monday after the first Monday in September, to continue for two weeks, the first week to be for the trial of criminal cases and the second week for the trial of civil cases only. The court shall have jurisdiction to try and determine civil actions and civil matters at any term of superior court held in Nash county, whether said term is designated above as a civil or criminal term. Provided, that any term of said court may be canceled by the board of commissioners of Nash County when in the opinion of the clerk of the superior court of Nash County and the resident judge of the second judicial district sufficient cause exists for the cancellation of said term. (1913, c. 196; 1915, c. 63; 1919, c. 133; Ex. Sess. 1921, c. 108; 1923, c. 237; 1924, c. 46; 1933, c. 145; 1935, c. 201; 1943, c. 687; C. S. 1443.)

Wilson—Fourth Monday before the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; tenth Monday after the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; sixteenth Monday after the first Monday in March, for civil cases only; first Monday in September; fourth Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September, to continue for two weeks, for civil cases only; thirteenth Monday after the first Monday in September and for this term of court a special or emergency judge shall be assigned by the governor to hold the same. (1913, 1915, c. 63; 1919, c. 133; Ex. Sess. 1921, c. 108; 1923, c. 237; 1924, c. 46; 1933, c. 145; 1935, c. 201; 1943, c. 687; C. S. 1443.)
§ 7-70

CH. 7. COURTS—SUPERIOR § 7-70

c. 196; 1915, c. 45; 1917, c. 19; 1919, c. 133; 1921, c. 10; 1937, c. 104; C. S. 1443.)

Third District

The third district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Hertford—First Monday before the first Monday in March; sixth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases and only such criminals as are confined in the common jail or otherwise imprisoned; fifth Monday before the first Monday in September, sixth Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; 1915, c. 282; 1919, c. 142; 1923, c. 113; 1924, c. 9; 1927, c. 118; 1929, c. 217; 1931, cc. 140, 200, 1935, cc. 102, 276; 1939, c. 40; C. S. 1443.)

Bertie—Third Monday before the first Monday in March, to continue for one week for the trial of both criminal and civil cases; ninth Monday after the first Monday in March, to continue for two weeks, for trial of both criminal and civil cases; first Monday before the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases; tenth Monday after the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 16; 1915, c. 78; 1917, c. 226; Ex. Sess. 1921, c. 45; 1923, c. 185; 1931, cc. 192, 247; 1941, c. 367, s. 1; C. S. 1443.)

Northampton—Fourth Monday after the first Monday in March; Eighth Monday after the first Monday in September, each to continue for two weeks; first Monday in August to continue for one week. (1913, c. 196; 1929, cc. 158, 214; 1933, cc. 409; 1935, c. 148; 1937, c. 64; C. S. 1443.)

Halifax—Fifth Monday before the first Monday in March, to continue for two weeks; second Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; eighth Monday after the first Monday in March, for the trial of both criminal and civil cases, to continue for one week, and for this term of court the governor is hereby directed to appoint a judge to hold same from among the regular, special or emergency judges; thirteenth Monday after the first Monday in March, to continue for two weeks, for the trial of both criminal and civil cases; fourth Monday after the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 2; 1915, c. 78; 1924, c. 97; 1929, c. 169; 1941, c. 367, s. 1; C. S. 1443.)

Fourth District

The fourth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Wayne—Sixth Monday before first Monday in March, fifth Monday after the first Monday in March, twelfth Monday after the first Monday in March, second Monday before the first Monday in September, each to continue for one week; twelfth Monday after the first Monday in September, to continue for two weeks; fifth Monday before the first Monday in March, sixth Monday after the first Monday in March, thirteenth Monday after the first Monday in March, first Monday before the first Monday in September, each to continue for two weeks, for civil cases only; first Monday in March and fifth Monday after the first Monday in September, each to continue for two weeks, for civil cases only. If no regular judge is available for the two weeks' term of court beginning on the first Monday in March, or for the second week of the terms beginning on the fifth Monday before the first Monday in March, or on the sixth Monday after the first Monday in March, or on the thirteenth Monday after the first Monday in March, or on the first Monday before the first Monday in September, the governor may assign a special judge to hold said court. (1913, c. 196; 1927, c. 77; 1929, c. 132, s. 1; 1937, c. 192; C. S. 1443.)

Johnston—First Monday after the first Monday in March; third Monday before the first Monday in September, for criminal cases only; also the first Monday in March; the third Monday before the first Monday in March; the third Monday before the first Monday in March; sixth Monday after the first Monday in March; and sixth Monday after the first Monday in September, each for one week for criminal cases; and the eighth Monday before the first Monday in March, two weeks for civil cases; and ninth Monday after the first Monday in September, two weeks for civil cases. The governor shall assign some regular or special judge to hold said courts; fourteenth Monday after the first Monday in September—
ber, to continue for two weeks; second Monday before the first Monday in March; seventh Monday after the first Monday in March; and third Monday after the first Monday in September, each to continue for two weeks; and the last three terms for civil cases only; eleventh Monday after the first Monday in March, for the trial of criminal cases only. (1913, c. 196; 1927, c. 190; 1929, c. 208; 1933, c. 81; C. S. 1443.)

Harnett—Eighth Monday before the first Monday in March, one week, for the trial of criminal cases only; fourth Monday after the first Monday in March to continue for two weeks, for the trial of civil cases only; second Monday after the first Monday in March, for the trial of criminal cases only; fourth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in March, one week, for the trial of criminal cases only; fourteenth Monday after the first Monday in March, two weeks, for the trial of civil cases only; first Monday in September for the trial of criminal cases only; second Monday and the first Monday in September for the trial of civil cases only; fourth Monday after the first Monday in September to continue for two weeks, civil cases only; tenth Monday after the first Monday in September to continue for two weeks, for the trial of criminal cases only.

If no regular judge is available for any cause set out in article four, section eleven, of the constitution, for the one week term of court beginning on the second Monday after the first Monday in March, or on the first Monday in September, or for the two weeks term of court beginning on the fourth Monday after the first Monday in March, or on the fourth Monday after the first Monday in September, the governor may assign a special judge to hold said court. (1913, c. 196; 1927, c. 161, 212; 1931, c. 147; 1937, c. 105; 1941, c. 367, s. 1; C. S. 1443.)

Chatham—Seventh Monday before the first Monday in March, to continue one week for the trial of criminal and civil cases; the first Monday in March to continue one week for the trial of civil cases only; the second Monday after the first Monday in March to continue one week for the trial of civil cases only; tenth Monday after the first Monday in March to continue one week for the trial of civil and criminal cases; fifth Monday before the first Monday in September to continue for one week, for the trial of criminal and civil cases; seventh Monday after the first Monday in September to continue for one week for the trial of criminal and civil cases. (1913, c. 196; 1917, c. 228; 1919, c. 35; Pub. Loc. 1925, c. 602; 1929, c. 169; C. S. 1443.)

Lee—Fifth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; provided, that for this term the governor shall assign a judge to hold the same from among the regular, special or emergency judges; third Monday after the first Monday in March to continue for two weeks; seventh Monday after the first Monday in September; first Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases; provided, that for the last week of said term the governor shall assign a judge to hold the same from among the regular, special or emergency judges; eighth Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 24; 1917, c. 228; 1929, c. 162; 1931, c. 86; 1939, c. 194; C. S. 1443.)

Fifth District

The fifth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Pitt—Seventh Monday before the first Monday in March, for civil cases only; sixth Monday before the first Monday in March; second Monday before the first Monday in March, for civil cases only; second Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; sixth Monday after the first Monday in March and seventh Monday after the first Monday in March to constitute one term for the trial of criminal and civil cases; ninth Monday after the first Monday in March to continue for one week for the trial of civil cases; eleventh Monday after the first Monday in March, for civil cases only; twelfth Monday after the first Monday in March, for civil cases only; second Monday before the first Monday in September, for civil cases only; third Monday before the first Monday in September, for civil cases only; fourth Monday before the first Monday in September, for civil cases only; fifth Monday after the first Monday in September, for civil cases only; seventh Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September; eleventh Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases. For the terms beginning the ninth Monday after the first Monday in March and the eleventh Monday after the first Monday in September the governor may appoint a judge to hold the same from among the regular or emergency judges. (1913, c. 196; Ex. Sess. 1913, c. 25; 1915, c. 111, 139; 1917, c. 217; 1919, c. 56; Ex. Sess. 1920, c. 29; 1931, c. 159; 1929, c. 153; 1931, c. 94; 1935, c. 75; 1939, c. 43; C. S. 1443.)

Craven—Eighth Monday before the first Monday in March; thirteenth Monday after the first Monday in March, and the first Monday in September for criminal cases only; fifth Monday after the first Monday in March, for civil cases and jail cases on the criminal docket; fifth Monday after the first Monday in March to continue for three weeks for the trial of civil cases only; fourth Monday after the first Monday in September; seventh Monday after the first Monday in September for civil cases only; seventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only; tenth Monday after the first Monday in March, for civil cases only. (1913, c. 196; 1915, c. 111; 1917, c. 217; 1929, c. 166; C. S. 1443.)

Pamlico—Eighth Monday after the first Monday in March, and ninth Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1921, c. 159; C. S. 1443.)

Jones—Fourth Monday after the first Monday in March; third Monday before the first Monday in September to continue for one week for civil cases only; fifth Monday after the first Monday in November; and second Monday after the first Monday in September.

If the judge regularly assigned to the district in
which said county is situate be unable because of another regular term of court in said district, or for other cause, to hold any term of court provided in the preceding paragraph, the governor may appoint a judge to hold such term from among the regular or emergency judges. (1913, c. 196; Ex. Sess. 1913, c. 19; P. L. 1915, c. 363; 1921, c. 159; 1937, c. 29; 1939, c. 383; C. S. 1445.)

Carteret—Fourteenth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in March, and sixth Monday after the first Monday in September; thirteenth Monday after the first Monday in September, for civil cases only. (1913, c. 196; 1921, c. 159; 1929, c. 166, s. 2; C. S. 1443.)

Greene—First Monday before the first Monday in March, to continue for two weeks; sixteenth Monday after the first Monday in March; fourteenth Monday after the first Monday in September, to continue for two weeks; thirteenth Monday after the first Monday in September to continue for one week for the trial of both criminal and civil cases. And for this last mentioned term of court the governor shall assign a judge from among the regular, special or emergency judges. (1913, cc. 63, 171, 196; Ex. Sess. 1913, cc. 19, 47; 1915, c. 139; 1935, c. 109; C. S. 1443.)

Sixth District

The sixth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cross Reference.—As to provision relating to all criminal terms in sixth district, see paragraph at end of sixth district division.

Lenoir—Sixth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases; second Monday before first Monday in March to continue for two weeks, for the trial of civil cases only; fifth Monday after first Monday in March for the trial of criminal cases or civil cases, or both, to continue for one week; tenth Monday after first Monday in March, to continue for two weeks for the trial of civil cases only; fourteenth Monday after first Monday in March, to continue for two weeks for the trial of civil cases only; sixteenth Monday after first Monday in March for the trial of criminal cases only; second Monday before first Monday in September, to continue for one week for the trial of criminal or civil cases, or both; third Monday after first Monday in September, to continue for one week for the trial of criminal or civil cases, or both; fourth Monday after first Monday in September, to continue for one week, for the trial of civil cases; fifth Monday after first Monday in September, to continue for two weeks; sixth Monday after first Monday in September to continue for one week, for the trial of civil cases only, and for this term of court a special or emergency judge shall be as-
§ 7-70  CH. 7. COURTS—SUPERIOR § 7-70

signed by the governor if the regular judge is unable for any cause set out in article four, section eleven of the constitution to hold said term. Fourth Monday before the first Monday in September, to continue for two weeks, for the trial of criminal or civil cases, or both; first Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; seventh Monday after the first Monday in September, to continue for two weeks, the first week of which shall be for the trial of criminal or civil cases, or both, and the second week for the trial of civil cases exclusively. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; Ex. Sess. 1921, c. 79, s. 2; 1927, c. 178, s. 1(b); 1933, c. 234, s. 1; 1935, c. 283; 1941, cc. 351, 367, s. 1; C. S. 1443.)

At criminal terms of superior court in the sixth judicial district, civil actions which do not require a jury may be heard by consent; and at criminal terms in the county of Lenoir uncontested divorce cases may be tried by the court and a jury in all respects as at civil terms, and any order, judgment or decree may be entered in a civil action not requiring a jury trial. (1915, c. 240, s. 3; 1917, c. 13; Pub. Loc. 1925, c. 5; 1933, c. 234, s. 2; 1941, c. 367, s. 1; C. S. 1443.)

Seventh District

The seventh district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Wake—Criminal courts: Eighth Monday before the first Monday in March; first Monday in March to continue for two weeks; fourth Monday after the first Monday in March; ninth Monday after the first Monday in March; thirteenth Monday after the first Monday in March to continue for two weeks; eighth Monday before the first Monday in September; first Monday in September to continue for two weeks; fourth Monday after the first Monday in September; ninth Monday after the first Monday in September; thirteenth Monday after the first Monday in September to continue for two weeks. These terms shall be for criminal cases only, and there is scheduled a two weeks term of criminal court each for March, June, September, and December, no court for the month of August, criminal or civil, and one week of criminal court for each of the other months.

Civil courts: Seventh Monday before the first Monday in March to continue for three weeks; second Monday before the first Monday in March to continue for two weeks; second Monday after the first Monday in March to continue for two weeks; sixth Monday after the first Monday in March to continue for three weeks; tenth Monday after the first Monday in March to continue for three weeks; fifteenth Monday after the first Monday in March to continue for two weeks; second Monday after the first Monday in September to continue for two weeks; sixth Monday after the first Monday in September to continue for three weeks; tenth Monday after the first Monday in September to continue for three weeks; fifteenth Monday after the first Monday in September to continue for one week. These terms shall be for civil cases only and there shall be no term for civil cases in July or in August. (1913, c. 196; 1917, c. 116; 1919, c. 113; Ex. Sess. 1924, c. 77; 1937, cc. 163, 387; 1939, c. 378; 1941, c. 367, s. 1; 1943, c. 587; C. S. 1443.)

Franklin—Eighth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; fourth Monday before the first Monday in March, to continue for one week for the trial of criminal cases only; first Monday in March, to continue for two weeks for the trial of civil cases only; fifth Monday after the first Monday in March to continue for one week for the trial of criminal cases only; first Monday after the first Monday in September to continue for one week for the trial of civil cases only; fifth Monday after the first Monday in September, to continue for one week for the trial of criminal cases only; ninth Monday after the first Monday in September to continue for two weeks for the trial of civil cases only.

The courts provided in the above paragraph shall be held by the judge regularly riding the seventh judicial district.

At all criminal terms provided for in the second preceding paragraph, all motions and divorce cases may be heard, and, by consent, jury trials in all civil cases may be heard at said criminal terms. (1913, c. 196; 1917, c. 116; 1937, c. 387, ss. 1, 3; 1939, c. 184; 1941, c. 189; 1943, c. 699; C. S. 1443.)

Eighth District

The eighth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cross Reference.—For provisions applicable to entire eighth district, see paragraph at end of eighth district division.

New Hanover—Seventh Monday before the first Monday in March; second Monday after the first Monday in March; tenth Monday after the first Monday in March; fourteenth Monday after the first Monday in March; sixth Monday before the first Monday in September; first Monday before the first Monday in September; ninth Monday after the first Monday in September, each to continue for one week, and each to be for the trial of criminal cases only.

Fourth Monday before the first Monday in March; sixth Monday after the first Monday in March; twelfth Monday after the first Monday in March; sixth Monday after the first Monday in September; thirteenth Monday after the first Monday in September, each to continue for two weeks and each to be for the trial of civil cases only. The first Monday after the first Monday in March, and the second Monday before the first Monday in September, each for one week and each to be for the trial of civil cases only. The tenth Monday after the first Monday in September for one week for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 60; 1919, c. 167; 1921, c. 14; 1941, c. 367, s. 1; C. S. 1443.)

Pender—Eighth Monday before the first Monday in March; eighth Monday after the first Monday in March; third Monday after the first Monday in September, each to continue for one week, and each to be for the trial of both criminal and civil cases. The third Monday after the first Monday in March; seventh Monday before the first Monday in September; eighth Monday after the first Monday in September, each to continue for one week, and each to be for the trial of civil cases
§ 7-70

CH. 7. COURTS—SUPERIOR § 7-70

only. (1913, c. 196; 1921, c. 14; 1933, c. 153; 1941, c. 367, s. 1; C. S. 1443.)

Columbus—Fifth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal cases only; second Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases only; ninth Monday after the first Monday in March, to continue for one week, for the trial of criminal cases only; fifteenth Monday after the first Monday in March, to continue for one week, for the trial of criminal cases only; fourth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; eleventh Monday after the first Monday in September, each to continue for one week, for the trial of civil cases only. The courts provided in this paragraph shall be held by the judge regularly assigned to hold the courts of the eighth judicial district. (1913, c. 196; Ex. Sess. 1913, c. 61; 1917, c. 124; 1921, cc. 14, 149; Ex. Sess. 1921, c. 40; 1931, c. 246; 1937, c. 52; 1941, c. 367, s. 1; 1943, c. 541; C. S. 1443.)

Brunswick—The sixth Monday before the first Monday in March; eleventh Monday after the first Monday in March; first Monday after the first Monday in September, each to continue for one week, and each to be for the trial of both criminal and civil cases. The fifth Monday after the first Monday in March; the second Monday after the first Monday in September, each to continue for one week and each to be for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 56; 1917, c. 18; 1921, c. 14; 1941, c. 367, s. 1; C. S. 1443.)

All motions and orders, applications for injunctions, receiverships, etc., in the eighth district, may be heard at criminal terms upon five days' notice. Divorce cases may be tried at any term of court, civil or criminal. (1931, c. 14; C. S. 1443.)

Ninth District

The ninth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Bladen—Eighth Monday before the first Monday in March for the trial of civil cases, and the trial of criminal cases, where bills have been found, and cases on appeal from the recorder's court and courts of the justices of the peace; the second Monday after the first Monday in March for the trial of criminal cases only; the eighth Monday after the first Monday in March; the first Monday in September for the trial of civil cases only. Said courts to continue for one week unless the business is sooner disposed of, and grand juries to be summoned only for the March and September terms of court. At any term for the trial of criminal cases, civil cases may be tried by consent. (1913, c. 196; 1915, c. 110; 1923, c. 64; 1927, c. 166, s. 1; 1929, c. 27, s. 1; 1931, c. 96; 1933, c. 77; Pub. Loc. 1935, c. 101, s. 3; 1937, c. 159; C. S. 1443.)

If it shall appear to the board of county commissioners of Bladen County at any time before the jury is summoned for a term of superior court of Bladen County that there is not sufficient business to justify a term of such court or that there are no cases of sufficient importance to warrant the expense of a term of such court, the said board of commissioners are authorized to order that the jury for such term be not summoned, and all cases which would come on for trial at such term shall be continued. In case of the continuance of a term of superior court of Bladen County as herein provided the board of commissioners of Bladen County shall notify, or cause to be notified to the county commissioners of the district, the judge holding the courts of the district and the court stenographer of their action. (1933, c. 119.)

Cumberland—Seventh Monday before the first Monday in March; first Monday in March; the first Monday after the first Monday in March; the eighth Monday after the first Monday in March; thirteenth Monday after the first Monday in March; first Monday before the first Monday in September; fifth Monday after the first Monday in September; and the eleventh Monday after the first Monday in September, the last for two weeks; each for criminal cases only. If the regular judge is unable for any reason set forth in article four, section eleven of the constitution to hold the terms above provided for beginning on the first Monday in March, the eighth Monday after the first Monday in March, and the fifth Monday after the first Monday in September, the governor shall assign a special, emergency or other regular judge to hold said terms. Thirteenth Monday after the first Monday in March; third Monday after the first Monday in March; ninth Monday after the first Monday in September; third Monday after the first Monday in September; seventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only. At all criminal terms of court civil cases may be heard by consent of the parties, and motions may be heard upon ten days' notice to the adverse party prior to said term. (1913, c. 196; Ex. Sess. 1913, c. 33; 1931, c. 96; 1937, c. 159; 1941, c. 367, s. 1; C. S. 1443.)

Hoke—Sixth Monday before the first Monday in March; seventh Monday after the first Monday in March; second Monday before the first Monday in September, to continue for one week; tenth Monday after the first Monday in September; and fifth Monday before the first Monday in September, to continue for one week for the trial of civil cases and no longer. The board of county commissioners of Hoke County, whenever in their discretion the best interests of the county demand it, shall have and are hereby granted the power and authority, by order, to abrogate, in any year, the holding of any one of the above set forth terms of court, and when said term is so abrogated, thirty days' notice of the same shall be given by said commissioners by the publication of same in a newspaper published in said county.
The tenth district shall be composed of the following counties, and the superior courts thereof shall be held in each year at the following times, to-wit:

Alamance—First Monday before the first Monday in March, tenth Monday after the first Monday in March, third Monday before the first Monday in September, and twelfth Monday after the first Monday in September, each for one week, for the trial of criminal cases only; fifth Monday before the first Monday in March, fourth Monday after the first Monday in March, two weeks, fifth Monday before the first Monday in September, one week, first Monday in September and tenth Monday after the first Monday in September each for two weeks, all for the trial of civil cases only.

In case of conflict of any of the regularly established terms of the courts of the tenth judicial district with the terms above set out, the said terms of court herein established shall be considered special terms, and the governor may assign a special or emergency judge to hold said terms in the superior court of Alamance County when the judge holding the regular terms of court in the district is unable to hold said terms. (1913, c. 196; 1915, c. 59; 1921, c. 154; Ex. Sess. 1921, c. 36; 1929, c. 172; 1931, c. 298; C. S. 1443.)

Durham—Eighth Monday before the first Monday in March; second Monday before the first Monday in March; third Monday after the first Monday in March, for a term of two weeks; eleventh Monday after the first Monday in March; sixteenth Monday after the first Monday in March; seventh Monday before the first Monday in September; first Monday in September, for a term of two weeks; fifth Monday after the first Monday in September; thirteenth Monday after the first Monday in September, each for the trial of criminal cases only; seventh Monday before the first Monday in March, for a term of three weeks; first Monday before the first Monday in March, for a term of four weeks; fifth Monday after the first Monday in March, for a term of three weeks; eighth Monday after the first Monday in March, for a term of two weeks; twelfth Monday after the first Monday in March, for a term of three weeks; fifth Monday before the first Monday in September, for a term of two weeks; second Monday after the first Monday in September, for a term of three weeks; sixth Monday after the first Monday in September, for a term of two weeks; eighth Monday after the first Monday in September, for a term of three weeks;
§ 7-70

CH. 7. COURTS—SUPERIOR § 7-70

(1913, c. 196; 1915, c. 68; Ex. Sess. 1921, c. 36; Ex. Sess. 1924, c. 39; 1929, c. 243; 1931, cc. 224, 419; 1941, cc. 274, 367, s. 1; C. S. 1443.)

Granville—Fourth Monday before the first Monday in March, fifth Monday after the first Monday in March, tenth Monday after the first Monday in September, each term for two weeks; sixth Monday before the first Monday in September, one week; seventh Monday after the first Monday in September, one week, for civil cases only. (1913, c. 196; 1915, c. 7; Ex. Sess. 1921, c. 36; 1923, c. 181; C. S. 1443.)

Orange—Tenth Monday after the first Monday in March, fifteen Monday after the first Monday in March, fourth Monday after the first Monday in September, for civil cases only; second Monday after the first Monday in March, first Monday before the first Monday in September, fourteenth Monday after the first Monday in September.

The fourteenth Monday after the first Monday in March, to continue for one week, for the trial of criminal and civil cases and is hereby constituted a mixed term of court;

The second Monday before the first Monday in September to continue for one week for the trial of criminal and civil cases and is hereby constituted a mixed term of court;

The first Monday before the first Monday in September to continue for one week for the trial of civil cases only.

For each separate week of court there shall be separate juries summoned. If the judge regularly assigned to the district in which said county is situated is unable, because of another regular term of court in the said district, or for other causes, to hold any term of court provided for in the three preceding paragraphs, then the governor shall assign another judge to hold said term. (1913, c. 196; 1915, c. 54; 1917, c. 52; Ex. Sess. 1921, c. 36; 1927, c. 303; 1929, c. 172, s. 2; C. S. 1443.)

Person—Fifth Monday before the first Monday in March; fourth Monday before the first Monday in March; seventh Monday after the first Monday in March; fourth Monday before the first Monday in September; sixth Monday after the first Monday in September. All of said terms shall be for the trial of criminal and civil cases, except the term beginning on the fourth Monday before the first Monday in March, which shall be for the trial of civil cases only. (1913, c. 196; 1915, c. 54; Ex. Sess. 1921, c. 36; 1929, c. 23; 1941, c. 367, s. 1; C. S. 1443.)

Western Division

Eleventh District

The eleventh district will be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Alleghany—Eighth Monday after the first Monday in March, and the fourth Monday after the first Monday in September, both terms to be held by the regular judge, and both terms to be for the trial of civil and criminal cases. (1913, c. 196; 1925, c. 216; 1937, c. 413, s. 4; 1941, c. 367, s. 1; C. S. 1443.)

Ashe—Sixth Monday after the first Monday in March, and seventh Monday after the first Monday in September (both by regular judge), for the trial of criminal cases only; twelfth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; sixth Monday before the first Monday in September, to continue for two weeks, for the trial of civil cases only (regular judge): Provided, that motions and uncontested civil cases may be heard at either of the terms designated for the trial of criminal cases only. (1913, c. 196; Ex. Sess. 1913, c. 54; Ex. Sess. 1921, c. 38; 1935, c. 246; 1937, c. 413, s. 4; C. S. 1443.)

Forsyth—Eighth Monday before the first Monday in March; fourth Monday before the first Monday in March; first Monday in March; fourth Monday after the first Monday in March; ninth Monday after the first Monday in March; fourteenth Monday after first Monday in March; eighth Monday before first Monday in September; first Monday in September; fifth Monday after first Monday in September; ninth Monday after the first Monday in September; thirteenth Monday after first Monday in September; each of said terms to continue for two weeks, for the trial of criminal and civil cases; the seventh Monday before the first Monday in March, to continue for three weeks; the third Monday before the first Monday in March, to continue for three weeks; the first Monday after the first Monday in March, to continue for three weeks; the sixth Monday after the first Monday in March to continue for three weeks; the twelfth Monday after the first Monday in March to continue for two weeks; the fifteenth Monday after the first Monday in March to continue for two weeks; the second Monday after the first Monday in September, to continue for three weeks; the seventh Monday after the first Monday in September to continue for two weeks; the eleventh Monday after the first Monday in September, to continue for two weeks, each of said terms for the trial of civil cases only.

The governor shall assign a special, emergency or any regular judge to hold the following courts hereinafter provided for when the regular judge assigned to the district is unable to hold same for any cause set out in article four, section eleven, of the constitution.

The second week of the term to try civil and criminal cases of the term beginning the eighth Monday before the first Monday in March; the second week of the civil and criminal term, beginning the fourth Monday before the first Monday in March; the second week of the civil and criminal term beginning the first Monday in March; the entire civil term beginning the sixth Monday after the first Monday in March; the second week of the civil and criminal term beginning the fourteenth Monday after the first Monday in March; the third week of the term beginning the second Monday after the first Monday in September; the first week of the civil term beginning the seventh Monday after the first Monday in September. All other terms and weeks of terms shall be presided over by the regular judge assigned to hold courts in the eleventh judicial district. (1913, c. 196; 1917, c. 169; Pub. Loc. 1917, c. 575; 1919, c. 87; 1923, c. 151; Pub. Loc. 1925, c. 19; 1937, c. 197; 1929, c. 131; 1933, cc. 231, 306; 1935, c. 246; 1937, c. 158; 1937, c. 413, ss. 4, 5; 1941, c. 367, s. 1; C. S. 1443.)

Twelfth District

The twelfth district is composed of Guilford
§ 7-70

CH. 7. COURTS—SUPERIOR § 7-70

County and Davidson County. The superior court of Guilford County is composed of two divisions, the Greensboro division and the High Point division; and the superior court thereof shall be opened and held at the following times and places, to-wit:

In the Greensboro division at the county courthouse in Greensboro, for the trial of criminal cases only:

Ninth Monday before the first Monday in March, one week; sixth Monday before the first Monday in March, one week; fourth Monday before the first Monday in March, one week; first Monday in March, one week; third Monday after the first Monday in March, one week; seventh Monday after the first Monday in March, one week; eleventh Monday after the first Monday in March, one week; eighth Monday after the first Monday in March, one week; fifth Monday after the first Monday in March, one week; sixth Monday before the first Monday in March, one week; seventh Monday after the first Monday in March, one week; thirteenth Monday after the first Monday in March, one week; and fifteenth Monday after the first Monday in September, one week.

In the Greensboro division at the county courthouse in Greensboro, for the trial of civil cases only:

Eighth Monday before the first Monday in March, one week; first Monday after the first Monday in March, one week; eighth Monday after the first Monday in March, one week; twelfth Monday after the first Monday in March, one week; seventh Monday before the first Monday in September, one week; first Monday after the first Monday in September, one week; second Monday after the first Monday in September, one week; third Monday after the first Monday in September, three weeks; seventh Monday after the first Monday in September, one week; and fourth Monday after the first Monday in September, one week.

In the Greensboro division at the county courthouse in Greensboro, for the trial of criminal cases only:

Eighth Monday before the first Monday in March, three weeks; second Monday before the first Monday in March, two weeks; second Monday after the first Monday in March, one week; fifth Monday after the first Monday in March, three weeks; thirteenth Monday after the first Monday in March, one week; first Monday before the first Monday in September, two weeks; third Monday after the first Monday in September, three weeks; eleventh Monday after the first Monday in September, two weeks; and thirteenth Monday after the first Monday in September, two weeks.

In the Greensboro division at the county courthouse in Greensboro, for the trial of civil cases only:

Fourth Monday before the first Monday in March, two weeks; third Monday after the first Monday in March, two weeks; tenth Monday after the first Monday in March, two weeks; fourth Monday before the first Monday in September, one week; second Monday after the first Monday in September, one week; and the eighth Monday after the first Monday in September, two weeks.

Any of the terms of court assigned or provided as above set out to be held in either the Greensboro division or the High Point division of the superior court of Guilford County may be transferred to, and held in, the other division of the said superior court of Guilford County by order of the governor: Provided, however, that the president of the Greensboro Bar Association and the president of the High Point Bar Association recommend and agree in writing thereto.

In Davidson County at the courthouse in Lexington for the trial of criminal cases only:

Fifth Monday before the first Monday in March, one week; ninth Monday after the first Monday in March, one week; sixteenth Monday after the first Monday in March, one week; and second Monday after the first Monday in September, one week.

In Davidson County at the courthouse in Lexington for the trial of civil cases only:

Second Monday before the first Monday in March, two weeks; fifth Monday after the first Monday in March, two weeks; eleventh Monday after the first Monday in March, two weeks; first Monday after the first Monday in September, two weeks; and fourth Monday after the first Monday in September, two weeks.

In Davidson County at the courthouse in Lexington for the trial of both criminal and civil cases:

Eleventh Monday after the first Monday in September, two weeks.

If the judge regularly assigned to the district is unable to hold any term as above set out then the governor shall assign another judge to hold such term. (1913, c. 196; Ex. Sess. 1913, c. 14; 1921, cc. 22, 42; 1923, c. 169; 1927, c. 211; 1931, c. 144; 1933, cc. 14, 404; 1935, c. 184; 1939, c. 42; 1941, c. 387, s. 1; 1943, c. 682; C. S. 1443.)

Thirteenth District

The thirteenth district shall be composed of the following counties, and the superior courts shall be held at the following times, to-wit:

· Union—Second Monday before the first Monday in March to continue for two weeks for the trial of civil and criminal cases; ninth Monday after the first Monday in March for the trial of civil and criminal cases; second Monday before the first Monday in September to continue for two weeks and for the trial of civil and criminal cases; sixth Monday after the first Monday in September to continue for two weeks and for the trial of civil and criminal cases.

If it shall appear to the Board of County Commissioners of Union County thirty days prior to the convening of either of said terms hereinabove provided for that the condition of the criminal docket does not justify the assembling of the grand jury for such term, then the board of county commissioners may in their discretion direct the clerk of superior court of said county to notify such grand jurors and the solicitor of said district of such fact and that they need not appear at said term.

If it shall appear to the board of commissioners
of Union County thirty days prior to the convening of either of said terms hereinafter provided for that the civil or criminal docket, or both, do not justify the holding of such term, or the second week thereof, in the event such term be a two-weeks term, then the board of county commissioners in their discretion, and upon the recommendation of the Union County Bar Association, may notify the clerk of the superior court that said term or the second week thereof, has been dispensed with, and the clerk of said court shall not make a calendar of cases to be tried at such term, or second week thereof, as the case may be, and the judge assigned to hold the courts for said district shall be notified forthwith by said clerk that such term will not be held. (1913, c. 196; Ex. Sess. 1913, c. 28; 1915, c. 72; 1917, cc. 28, 117; 1921, c. 55; 1933, c. 112; 1939, c. 25; 1943, c. 664; C. S. 1444.)

Anson—Seventh Monday before the first Monday in March, for criminal cases only; first Monday in March for civil cases only; sixth Monday after the first Monday in March to continue for two weeks; fourteenth Monday after the first Monday in March, for civil cases only; first Monday after the first Monday in September, for civil cases only; third Monday after the first Monday in September, for criminal cases only; tenth Monday after the first Monday in September, for civil cases only. (1913, c. 196; Ex. Sess. 1921, c. 16; 1933, c. 112; 1927, c. 181; 1929, c. 157; C. S. 1444.)

Scotland—First Monday after the first Monday in March for one week, for the trial of criminal and civil cases; eighth Monday after the first Monday in March for one week, for the trial of criminal and civil cases; fourth Monday after the first Monday in September for one week, for the trial of criminal and civil cases; eighth Monday after the first Monday in September for one week, for the trial of civil cases only; twelfth Monday after the first Monday in September for two weeks, for the trial of criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 28; 1917, c. 105; 1923, c. 178; 1933, c. 116; 1937, c. 571; C. S. 1444.)

Moore—Sixth Monday before the first Monday in March, for the trial of criminal and civil cases, first Monday in March for one week, second Monday in March, for the trial of civil cases only; first Monday in September for one week, for the trial of criminal and civil cases; thirteenth Monday after the first Monday in September, for the trial of civil cases only; eleventh Monday after the first Monday in September, for civil cases only. (1913, c. 196; 1933, c. 240; C. S. 1443.)

Anson—Seventh Monday before the first Monday in March, for criminal cases only; first Monday in March for civil cases only; sixth Monday after the first Monday in March to continue for two weeks; fourteenth Monday after the first Monday in March, for civil cases only; first Monday after the first Monday in September, for civil cases only; third Monday after the first Monday in September, for criminal cases only; tenth Monday after the first Monday in September, for civil cases only. (1913, c. 196; 1933, c. 240; C. S. 1443.)
one week, for the trial of criminal cases exclusively; sixth Monday before the first Monday in March; second Monday after the first Monday in March; first Monday after the first Monday in March; fifth Monday before the first Monday in September; second Monday after the first Monday in September; thirteenth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively; eighth Monday after the first Monday in September to continue for one week for the trial of civil cases only: Provided, that when the judge regularly assigned to hold the courts of the district is unable to do so for any cause set out in article four, section eleven, of the constitution, a special or emergency judge shall be assigned by the governor to hold said courts in Gaston county, and such special or emergency judge shall have all the powers conferred upon any resident or presiding judge.

At all criminal terms of said court, civil trials which do not require a jury may be heard by consent of the parties; and at all criminal terms of said court, upon five days' notice to the adverse party, any order, application for injunction, receivership, motions, etc., may be heard in manner as at civil terms. (1913, c. 196; Ex. Sess. 1913, c. 12; 1915, c. 153; 1919, c. 187; Ex. Sess. 1920, c. 39; 1925, c. 237; 1931, c. 242; 1941, c. 367, s. 1; C. S. 1443.)

Mecklenburg—Eighth Monday before the first Monday in March; first Monday before the first Monday in March; seventh Monday after the first Monday in March; second Monday after the first Monday in March; eighth Monday after the first Monday in March, which last named term only is to continue two weeks; first Monday before the first Monday in September; fourth Monday after the first Monday in September; tenth Monday after the first Monday in September, which eight terms are for the trial of criminal cases exclusively; fourth Monday before the first Monday in March, to continue three weeks; the first Monday in March; fourth Monday after the first Monday in March; eighth Monday after the first Monday in March; second Monday after the first Monday in March; fifth Monday after the first Monday in September; eighth Monday after the first Monday in September; fourth Monday after the first Monday in September, which last named eight terms are to continue for two weeks; fifteenth Monday after the first Monday in March, and all of the last named ten terms are for the trial of civil cases exclusively: Provided, that the board of county commissioners of Mecklenburg county may in their discretion, by an order at their regular meeting held on the first Monday in March in any year, provide for the holding of a term of court for the seventh Monday after the first Monday in March, and for the trial of civil and criminal cases, either or both, at said term.

No process nor other writ of any kind pertaining to civil actions shall be made returnable to any of the criminal terms, and no business pertaining to civil actions shall be transacted at the criminal terms for Mecklenburg county.

In addition to the courts above set out for Mecklenburg county, the following terms of superior court for the trial of civil cases in Mecklenburg county shall be held, as follows: eighth Monday before the first Monday in March; sixth Monday before the first Monday in March; fourth Monday before the first Monday in March; second Monday before the first Monday in March; first Monday in March; second Monday after the first Monday in March; fourth Monday after the first Monday in March; sixth Monday after the first Monday in March; eighth Monday after the first Monday in March; tenth Monday after the first Monday in March; fourteenth Monday after the first Monday in March; twelfth Monday after the first Monday in March; seventh Monday after the first Monday in September; the sixth Monday after the first Monday in September; the eighth Monday after the first Monday in September; the seventh Monday before the first Monday in September; the tenth Monday after the first Monday in September; the twelfth Monday after the first Monday in September; and the fourteenth Monday after the first Monday in September. Said terms of court may be held contemporaneously with other courts in said county or district, shall be for two weeks each, shall be for the trial of civil cases only, and shall be held by regular, special, or emergency judges who shall be assigned by the governor, and the special or emergency judges who preside over said additional terms of court shall have all the powers conferred upon any resident or regular judge.

In addition to the courts above set out for Mecklenburg county, the following terms of superior court for the trial of criminal cases in Mecklenburg county shall be held, as follows: sixth Monday after the first Monday in March; fifth Monday before the first Monday in September; fourth Monday before the first Monday in September, each to continue for one week. The sixth Monday before the first Monday in March; the second Monday after the first Monday in March; the sixteenth Monday after the first Monday in March; the third Monday before the first Monday in September; the second Monday after the first Monday in September; and the thirteenth Monday after the first Monday in September. Said terms of court may be held contemporaneously with other courts in said county or district, shall be for two weeks each, shall be for the trial of criminal cases only, and shall be held by regular, special, or emergency judges who shall be assigned by the governor, and the special or emergency judges who preside over said additional terms of court shall have all the powers conferred upon any resident or regular judge. (1913, c. 196; Ex. Sess. 1913, c. 11, 18; 1915, c. 153; 1919, c. 187; Ex. Sess. 1920, c. 39; 1935, c. 48; 1937, c. 27; 1939, c. 9; 1941, c. 367, s. 1; C. S. 1443.)

Fifteenth District

The fifteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Iredell—Fifth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday after the first Monday in March, to continue for one week, for civil cases only; eleventh Monday after the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; fifth Monday before the first Monday in Septem-
§ 7-70

ber, to continue for two weeks, for criminal and civil cases; ninth Monday after the first Monday in September, to continue for two weeks for criminal and civil cases. (1913, c. 196; 1921, c. 121, s. 2; 1923, c. 129; C. S. 1443.)

Randolph—Second Monday after the first Monday in March, to continue for two weeks, for civil cases only; fourth Monday after the first Monday in March, for criminal cases; seventh Monday before the first Monday in September, to continue for two weeks for civil cases only; the first Monday in September for criminal cases; thirteenth Monday after the first Monday in September, to continue for two weeks for criminal and civil cases. In addition to the regular terms of superior court now provided for by law for Randolph County there shall be held in Randolph County three additional terms of superior court as follows, to-wit: On the fifth Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases only. On the sixteenth Monday after the first Monday in March for a term of one week, for the trial of civil cases only. On the seventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only. This paragraph shall not be construed to repeal or abolish any terms now provided for the fifteenth judicial district, but in case of conflict of any of the regularly established terms of court of the fifteenth judicial district with the terms created in this paragraph, the said terms of court hereby and herein established shall be considered special terms, and the governor may assign the judge to hold said terms of superior court for Randolph County, when the judge holding the regular terms of court in the district is unable to hold said terms. (1913, c. 196; Ex. Sess. 1913, c. 31; 1921, c. 121, s. 3; Ex. Sess. 1921, c. 22; 1923, c. 289; Ex. Sess. 1924, c. 23; 1925, c. 156; Pub. Loc. 1939, c. 78; C. S. 1443.)

Rowan—Third Monday before the first Monday in March, to continue for two weeks; first Monday in March, to continue for one week, for civil cases only; ninth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in September, to continue for two weeks; fifth Monday after the first Monday in September, for civil cases only; eleventh Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 5; 1921, c. 31; C. S. 1443.)

In addition to the regular terms of court now prescribed by law for Rowan County, there shall be held in Rowan County two additional terms of the superior court as follows, to-wit: On the sixth Monday after the first Monday in September to continue for one week for the trial of civil cases only; on the first Monday after the first Monday in March to continue for one week for the trial of civil cases only. This paragraph shall not be construed to repeal or abolish any terms now provided for the fifteen judicial district, but in case of conflict of any of the regularly established terms of the courts of the fifteenth judicial district with the terms above set out, the said terms of court herein established shall be considered special terms and the governor may assign a special or emergency judge to hold said terms of superior court for Rowan County when the judge holding the regular terms of court in the district is unable to hold said terms. (1933, c. 250, s. 4; 1934, c. 78; C. S. 1443.)

Cabarrus—Eighth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday before the first Monday in March, to continue for two weeks, for civil cases only; seventh Monday after the first Monday in March, to continue for two weeks, for criminal and civil cases; fourteenth Monday after the first Monday in March, to continue for two weeks, for criminal and civil cases; second Monday before the first Monday in September to continue for one week, for civil cases only; first Monday before the first Monday in September, to continue for one week, for criminal cases only; fifth Monday before the first Monday in September, to continue for one week, for civil cases only; sixth Monday after the first Monday in September, to continue for two weeks, for criminal and civil cases; tenth Monday after the first Monday in September, to continue for one week, for civil cases only; tenth Monday after the first Monday in September, to continue for one week, for civil cases only.

The governor shall assign an emergency or any other judge to hold any of the terms of the superior court of Cabarrus county when the judge holding courts in said district is unable to hold said terms. (1913, c. 196; 1921, c. 121, s. 2; 1933, c. 76; 1935, c. 177; 1939, c. 377; C. S. 1443.)

Montgomery—Sixth Monday before the first Monday in March for criminal cases: Provided, motions on the civil docket may be heard at said term, and uncontested divorce cases and, with the consent of the parties thereto, any other civil case requiring a jury may also be tried at said term. Fifth Monday after the first Monday in March, to continue for two weeks, for civil cases only. Eighth Monday before the first Monday in September, to continue for one week, for civil cases only; tenth Monday after the first Monday in September, to continue for one week, for civil cases only.

The governor shall assign an emergency or any other judge to hold any of the terms of the superior court of Montgomery county when the judge holding courts in said district is unable to hold said terms. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 183; 1917, c. 123; 1921, c. 121, s. 3; 1927, c. 193, s. 1; 1941, c. 98; C. S. 1443.)

Alexander—Fourth Monday before the first Monday in March, to continue for two weeks, for the trial of civil and criminal cases; first Monday before the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases. For these terms of court the governor may assign a judge to hold the same from among the regular, special or emergency judges. (1913, c. 196; 1921, c. 166; 1933, c. 250, s. 4; 1935, cc. 101, 252, s. 2; 1937, c. 214; C. S. 1443.)

Sixteenth District

The sixteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cleveland—Third Monday after the first Monday in March for two weeks; eleventh Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; sixth Monday before the first Monday in September for two weeks; first Monday after the first Monday in September to continue for one week for the trial of civil cases only; second Monday after the first Monday in September, one week, for the trial of civil cases only; eighth Monday after the first Monday in September for two weeks; eighth...
Monday before the first Monday in March, for one week.

For the terms commencing on the eleventh Monday after the first Monday in March, and on the first Monday after the first Monday in September, the governor may assign a judge to hold such terms from among the regular, special or emergency judges. (1913, c. 196; 1915, c. 173; 1917, c. 245; 1927, c. 154; 1931, cc. 240, 456; 1935, cc. 194, 195; C. S. 1443.)

Lincoln—Sixth Monday before the first Monday in March to continue for two weeks, the second week for civil cases only; seventh Monday before the first Monday in September; sixth Monday after the first Monday in September; the last term to continue for two weeks, the second week for civil cases only. (1913, c. 196; 1915, c. 210; 1925, c. 26; C. S. 1443.)

Burke—Second Monday before the first Monday in March, to continue for one week, for the trial of civil and criminal cases; first Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; thirteenth Monday after the first Monday in March, to continue for three weeks, for the trial of civil and criminal cases; fourth Monday before the first Monday in September, to continue for two weeks, for the trial of civil cases only; the eighth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases; eleventh Monday after the first Monday in September, to continue for one week, for the trial of civil cases only; provided, that the board of county commissioners may by resolution, adopted not less than 30 days prior to the convening of either of the last two courts, determine that the holding of such court is not necessary and cancel the same, in which case notice of such action shall immediately be given to the governor to the end that the judge assigned to said court may be relieved from such assignment. (1913, c. 196; Ex. Sess. 1913, c. 7; Ex. Sess. 1921, c. 47; c. 90, s. 1; 1923, c. 18; 1925, c. 13, ss. 1, 2; 1933, c. 311; C. S. 1443.)

Watauga—Seventh Monday after the first Monday in March, to continue for two weeks; second Monday after the first Monday in September, to continue for one week: fourteenth Monday after the first Monday in March to continue for a term of two weeks, for the trial of civil cases only. (1913, c. 196; 1921, c. 166; 1931, c. 424; 1933, c. 250, s. 2; 1935, c. 274; C. S. 1443.)

Seventeenth District

The seventeenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit: Yadkin—Fourth Monday before the first Monday in March for three weeks for the trial of criminal and civil cases; second Monday before the first Monday in September for one week for the trial of criminal cases; tenth Monday before the first Monday in September for two weeks for the trial of civil cases only. (1913, c. 196; 1921, c. 166; 1931, c. 424; 1933, c. 250, s. 2; 1935, c. 274; C. S. 1443.)

Wilkes—Seventh Monday before the first Monday in March for three weeks for the trial of civil cases only; first Monday in March for three weeks for the trial of both civil and criminal cases; eighth Monday after the first Monday in March for two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in March for two weeks for the trial of civil cases only; fourth Monday before the first Monday in September for two weeks for the trial of both civil and criminal cases; fourth Monday after the first Monday in September for two weeks for the trial of civil cases only; fourteenth Monday after the first Monday in September for two weeks for the trial of civil and criminal cases.

In the opinion of the board of commissioners of Wilkes county, it is not advisable or necessary to hold the term of court beginning on the fourteenth Monday after the first Monday in September, and such fact is so stated in a resolution duly adopted by a majority of said board on or before the second Monday in November next preceding the day for the convening of said term, then the
said term shall not be held on the fourteenth Monday after the first Monday in September of that year. Upon the adoption of such a resolution, the clerk of the board shall immediately notify the judge, who has been assigned to hold said term, that same will not be held, and no jury for the said term shall be drawn. (1913, c. 196; 1919, c. 165; 1921, c. 166; 1935, c. 105, s. 1; c. 192; 1937, c. 48; 1941, c. 367, s. 1; C. S. 1443.)

Davie—Second Monday after the first Monday in March; twelfth Monday after the first Monday in March, for civil cases only; first Monday before the first Monday in September in said court for Davie County when the judge regularly holding the courts in said district is, because of a conflict in the terms of court or for any other cause, unable to hold any of said terms. (1913, c. 196; C. S. 1443.)

Mitchell—Fourth Monday after the first Monday in March, two weeks; sixth Monday before the first Monday in September, two weeks for civil cases only; second Monday after the first Monday in September in two weeks. (1913, c. 196; 1921, c. 166; Ex. Sess. 1921, c. 33; 1927, c. 168; 1929, c. 10; 1933, c. 250, s. 3; 1935, c. 1; 1941, c. 212, s. 1; C. S. 1443.)

Avery—Fifth Monday after the first Monday in March, for two weeks, for the trial of both criminal and civil cases; ninth Monday before the first Monday in September, two weeks, for the trial of both civil and criminal cases; sixth Monday after the first Monday in September, for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 169; 1931, c. 166; Ex. Sess. 1921, c. 33; 1923, cc. 90; 1931, c. 84; 1933, cc. 155, 250, s. 1; 1941, c. 212, s. 1, 1943, c. 162; C. S. 1443.)

Eighteenth District

The eighteenth district shall be composed of the following counties and the superior courts thereof shall be held at the following times, to-wit:

Henderson—Eighth Monday before the first Monday in March to continue for two weeks for the trial of civil cases only; the first Monday in March to continue for two weeks for the trial of both criminal and civil cases; the second Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; the third Monday after the first Monday in March, to continue for two weeks for the trial of both civil and criminal cases; the fourth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; the fifth Monday after the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases; the twelfth Monday after the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases; the fourteenth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases.

At any criminal term of court in McDowell County civil actions which do not require a jury, motions, and uncontested divorce actions with jury trial, may be heard, tried and determined and proper judgment and orders entered therein. In the event the county commissioners shall find that any term for the trial of civil cases is not needed they may by resolution sent to the governor cancel the term in question. The governor shall assign an emergency, or any other judge, to hold any of the terms of the superior court for McDowell County when the judge regularly holding the courts in said district is, because of a conflict in the terms of court or for any other cause, unable to hold any of said terms. (1913, c. 196; Ex. Sess. 1921, c. 24; 1923, c. 219; 1927, c. 207, s. 1; 1935, c. 127; 1937, c. 309; 1943, c. 549; C. S. 1443.)

Polk—The fifth Monday before the first Monday in March to continue for two weeks for the trial of both criminal and civil cases; second Monday before the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1921, c. 24; 1937, c. 207, s. 1; 1935, c. 322, s. 2; 1935, c. 127; C. S. 1443.)

Rutherford—First Monday before the first Monday in March, to continue for one week for the trial of civil cases only; sixth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases only; tenth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; sixteenth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases only; third Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1921, c. 24; 1927, c. 207, s. 1; 1935, c. 322, s. 1; 1935, c. 127; 1937, c. 309; C. S. 1443.)

Transylvania—Fourth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; sixth Monday before the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases; thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1921, c. 24; 1927, c. 207, s. 1; 1935, c. 232, s. 2; 1935, c. 127; C. S. 1443.)

Yancey—Sixth Monday before the first Monday in March, to continue for one week for the trial of civil cases only; second Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; fourth Monday before the first Monday in September, to continue for two weeks for the trial of criminal and civil cases; seventh Monday after the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 38; 1915, c. 71; Ex. Sess. 1920, c. 4; Ex. Sess. 1921, c. 24; 1923, c. 222; 1927, c. 207, s. 1; 1929, c. 173; 1933, c. 478; 1935, c. 127; C. S. 1443.)
In all criminal terms of court in the eighteenth judicial district, civil actions and proceedings, which do not require a jury, may be heard by consent and any order, judgment or decree therein may be entered. (1935, c. 127.)

Nineteenth District

The nineteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Buncombe—Eighth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; sixth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases only; eighth Monday before the first Monday in September, to continue for two weeks for the trial of civil cases only; sixth Monday before the first Monday in September, to continue for one week for the trial of criminal cases only.

Fourth Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases only; second Monday before the first Monday in March, to continue for one week for the trial of criminal cases only; first Monday in March, to continue for one week for the trial of criminal cases only; second Monday after the first Monday in March, to continue for one week for the trial of criminal cases only; fourth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases only; sixth Monday after the first Monday in March, to continue for one week for the trial of criminal cases only; ninth Monday after the first Monday in March, to continue for one week for the trial of criminal cases only; eighth Monday after the first Monday in March, to continue for two weeks; tenth Monday after the first Monday in March, to continue for two weeks; fifteenth Monday after the first Monday in March, to continue for two weeks; seventh Monday after the first Monday in September, to continue for two weeks; fifth Monday after the first Monday in September, to continue for two weeks; second Monday before the first Monday in September, to continue for one week; eighth Monday after the first Monday in September, to continue for two weeks; sixth Monday after the first Monday in September, to continue for two weeks; second Monday before the first Monday in September, to continue for one week; seventh Monday after the first Monday in September, to continue for two weeks; fifth Monday after the first Monday in September, to continue for two weeks; second Monday before the first Monday in September, to continue for one week; eighth Monday after the first Monday in September, to continue for two weeks; tenth Monday after the first Monday in September, to continue for two weeks; fifteenth Monday after the first Monday in September, to continue for two weeks.

The courts provided in the preceding paragraph shall be held by special or emergency judges to be assigned by the governor, if the regular judge assigned is unable to hold said terms for any cause set out in article four, section eleven, of the constitution. The board of county commissioners shall notify the jury commission at, or before, the time of drawing the jurors for these terms of court whether the same shall be for the trial of civil or criminal cases, or what portions thereof shall be for each, and the jury commission shall draw jurors accordingly. (1913, c. 196; 1915, c. 117; 1917, c. 79; 1923, c. 31; Pub. Loc. 1925, c. 400; 1929, c. 213; 1941, c. 367, s. 1; C. S. 1443.)

Madison—First Monday before the first Monday in March, to continue for one week; third Monday after the first Monday in March, to continue for one week; seventh Monday after the first Monday in March, to continue for one week; twelfth Monday after the first Monday in March, to continue for one week; sixteenth Monday after the first Monday in March, to continue for one week; third Monday after the first Monday in September, to continue for one week; seventh Monday after the first Monday in September, to continue for one week; twelfth Monday after the first Monday in September, to continue for one week; sixteenth Monday after the first Monday in September, to continue for one week.

The board of county commissioners shall, at the time of drawing the jurors for the terms of court provided in the preceding paragraph, designate whether the terms shall be for the trial of civil or criminal cases, and draw the jurors accordingly. (1913, c. 196; 1915, c. 117; 1917, c. 79; 1929, c. 205; 1931, c. 25; 1941, c. 367, s. 1; C. S. 1443.)

Twentieth District

The twentieth district shall be composed of the
following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cherokee—Sixth Monday before the first Monday in March for civil cases only; fourth Monday after the first Monday in March; fifteenth Monday after the first Monday in March, for the trial of civil cases only. Provided, that upon request of the bar of Cherokee county the board of county commissioners need not draw a jury for this term; fourth Monday before the first Monday in September, each to continue for two weeks.

Clay—Sixth Monday before the first Monday in March, to continue for two weeks, for civil cases only; second Monday after the first Monday in March; thirteenth Monday after the first Monday in March; eleventh Monday after the first Monday in September to continue for two weeks; first Monday in March to continue for one week; sixth Monday after the first Monday in March to continue for two weeks; fourth Monday before the first Monday in March to continue for two weeks; second week for the trial of civil cases; ninth Monday after the first Monday in September, each to continue for two weeks; seventh Monday after the first Monday in March to continue for two weeks; first Monday in September, to continue for two weeks; seventh Monday after the first Monday in September to continue for two weeks; eighth Monday before the first Monday in September to continue for two weeks; tenth Monday after the first Monday in September to continue for two weeks; eleventh Monday after the first Monday in September to continue for two weeks; fourteenth Monday after the first Monday in March to continue for one week; sixth Monday after the first Monday in March to continue for one week; ninth Monday after the first Monday in March to continue for two weeks; seventeenth Monday after the first Monday in March to continue for two weeks; first Monday in March to continue for one week; second Monday after the first Monday in March to continue for two weeks; second Monday in September to continue for two weeks; second Monday in March to continue for one week; sixth Monday after the first Monday in March to continue for two weeks; fourth Monday before the first Monday in March to continue for two weeks; sixth Monday after the first Monday in March to continue for one week; ninth Monday after the first Monday in March to continue for two weeks; second Monday in March to continue for one week; seventh Monday after the first Monday in March to continue for two weeks; eighth Monday before the first Monday in March to continue for two weeks; ninth Monday after the first Monday in March to continue for two weeks; tenth Monday after the first Monday in September to continue for two weeks; seventh Monday after the first Monday in September to continue for two weeks; eighth Monday before the first Monday in September to continue for two weeks; fourth Monday after the first Monday in September to continue for two weeks; sixth Monday after the first Monday in September to continue for one week; thirteenth Monday after the first Monday in March to continue for two weeks; second Monday in March to continue for one week; first Monday in March to continue one week; sixth Monday after the first Monday in March to continue for one week; ninth Monday after the first Monday in March to continue for two weeks; fourteenth Monday after the first Monday in March to continue for two weeks; first Monday in September to continue for two weeks; seventh Monday after the first Monday in September to continue for two weeks; seventh Monday after the first Monday in September to continue for one week; twelfth Monday after the first Monday in September to continue for two weeks, each of the above terms to be for the trial of civil cases only. Provided, that at any criminal term, either regular or special, of the superior court to be held for Rockingham County, all motions in any civil actions pending before said court, and all uncontested divorce cases pending before said court, may be heard and tried by the court, and provided further, that all other civil actions and civil matters may, with the consent of the parties and the approval of the court, be heard and tried at any criminal term, either regular or special, of the superior court of Rockingham County. However, no contested civil cases shall be tried until after the criminal docket for the term has been disposed of. (1913, c. 196; Ex. Sess. 1913, c. 49; 1917, c. 107; 1933, c. 245, s. 1; 1937, c. 245; 1937, c. 106; C. S. 1443.)

The county commissioners, may, in their judgment, abrogate the term herein provided to be held on the fourteenth Monday after the first Monday in March, the jurors for this term to be drawn at the same time as those for the May term, service to be withheld pending the decision of the county commissioners. (1913, c. 196; 1933, c. 107; 1939, c. 212; C. S. 1443.)

Macon—Sixth Monday after the first Monday in March; second Monday before the first Monday in March, and thirteenth Monday after the first Monday in September, each to continue for two weeks. The board of commissioners of Macon county may, for good cause, decline to draw a jury for more than one week for any term of court provided for in this paragraph. (1913, c. 196; 1923, c. 35, s. 1; 1937, c. 245; 1937, c. 106; C. S. 1443.)

Stokes—Fourth Monday after the first Monday in March to continue for one week for the trial of criminal cases only; fifth Monday after the first

Twenty-First District

There is hereby created district number twenty-one composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Caswell—Second Monday after the first Monday in March, to continue for two weeks, the first week to be for the trial of criminal cases only, and the second week for the trial of civil cases; ninth Monday before the first Monday in September, to continue for one week for the trial of both criminal and civil cases; tenth Monday after the first Monday in September, to continue for two weeks, the first week to be for the trial of criminal cases only, and the second week for the trial of civil cases. (1913, c. 196; 1919, c. 289; 1927, c. 202; 1933, c. 45, s. 1; 1935, c. 246; 1937, cc. 107, 413, s. 5; 1941, c. 367, s. 1; C. S. 1443.)

Rockingham—First Monday after the first Monday in March to continue for one week; sixth Monday before the first Monday in March to continue for one week; sixth Monday after the first Monday in March to continue for two weeks; seventh Monday after the first Monday in March to continue for two weeks; eighth Monday before the first Monday in September to continue for two weeks; seventh Monday after the first Monday in September to continue for one week, each of the above terms to be for the trial of criminal cases only.

First Monday in March to continue one week; sixth Monday after the first Monday in March to continue for one week; ninth Monday after the first Monday in March to continue for two weeks; fourteenth Monday after the first Monday in March to continue for two weeks; first Monday in September to continue for two weeks; seventh Monday after the first Monday in September to continue for one week; twelfth Monday after the first Monday in September to continue for two weeks, each of the above terms to be for the trial of civil cases only. Provided, that at any criminal term, either regular or special, of the superior court to be held for Rockingham County, all motions in any civil actions pending before said court, and all uncontested divorce cases pending before said court, may be heard and tried by the court, and provided further, that all other civil actions and civil matters may, with the consent of the parties and the approval of the court, be heard and tried at any criminal term, either regular or special, of the superior court of Rockingham County. However, no contested civil cases shall be tried until after the criminal docket for the term has been disposed of. (1913, c. 196; Ex. Sess. 1913, c. 49; 1917, c. 107; 1933, cc. 45, 264; 1935, c. 246; 1937, cc. 156, 413, s. 5; 1939, c. 156; 1941, c. 58; C. S. 1443.)
Monday in March to continue for one week for the trial of civil cases only; sixteenth Monday in March to continue for one week for the trial of criminal cases only; first Monday in April to continue for one week for the trial of criminal cases only.

The 1941 amendments created the twenty-first judicial district composed of the counties of Caswell, Rockingham, Surry—Eighth Monday before the first Monday in March to continue for one week; third Monday before the first Monday in March to continue for one week; seventh Monday after the first Monday in September to continue for one week; for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 1; 1921, c. 142; 1923, c. 169; 1929, c. 158; 1937, c. 413, s. 5; C. S. 1443.)

There is hereby established a term of court to continue for one week in Stokes county, beginning the Monday in September following the first Monday in September to continue for one week; for the trial of criminal causes only. There shall be jurors, including a grand jury, provided for said January term of court. (January 31, 1939, c. 342.)

Surry—Eighth Monday before the first Monday in March to continue for one week; third Monday before the first Monday in March to continue for one week; seventh Monday after the first Monday in March to continue for one week; fourth Monday after the first Monday in March to continue for one week; eighth Monday before the first Monday in March to continue for one week; for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 1; 1921, c. 142; 1923, c. 169; 1929, c. 158; 1937, c. 413, s. 5; C. S. 1443.)

Editor's Note.—Public Laws 1931, c. 240, as amended by c. 456, added a new term for Cleveland County. This new term was created by combining a term of Watauga County, which was transferred to the Sixteenth Judicial District by Public Laws 1931, c. 424.

One 1937 amendment added the proviso to the first paragraph of § 7-71, § 7-71, the Governor shall assign a judge to hold any of the terms of court provided for in any of the counties of the state: Provided, that any term of superior court canceled hereunder shall be canceled at least ten days prior to the time for the convening of said court.

Upon the cancellation of any term of superior court the judge scheduled to hold said term of court shall be available for assignment by the governor to hold superior court in any other county in the state. (1943, c. 348, ss. 1, 2.)

§ 7-71.1. Governor authorized to cancel terms of court; judges available for assignment elsewhere.—The governor is authorized and empowered, upon a finding by him that any term of superior court for any of the counties of the state are not necessary due to the lack of sufficient official business to be transacted, to cancel any term of superior court scheduled to be held in any of the counties of the state: Provided, that any term of superior court canceled hereunder shall be canceled at least ten days prior to the time for the convening of said court.

Upon the cancellation of any term of superior court the judge scheduled to hold said term of court shall be available for assignment by the governor to hold superior court in any other county in the state. (1943, c. 348, ss. 1, 2.)

§ 7-71.2. Cancellation not to affect subsequent terms.—The cancellation of any term of court by the governor, as provided in § 7-71.1 shall dispense with the holding of the term of court during the year for which it is canceled, but it shall not affect the terms of court provided by law for the county during succeeding years. (1943, c. 348, s. 3.)

§ 7-72. Civil cases at criminal terms.—At criminal terms of court, motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of parties. Also motions for confirmation or rejection of referees' reports may be heard upon ten days notice and judgment entered on such reports. (Rev., s. 1507; 1901, c. 28; 1913, c. 196, s. 2; Ex. Sess. 1913, c. 23; 1915, c. 68, 240; 1917, c. 13; 1919, c. 394; C. S. 1444.)

Local Modification.—Anson, Bladen, Cumberland, Durham, Gaston, Robeson: C. S. 1444.

Failure to Give Notice.—It is required by the provisions of this section that due notice be given of motions in civil action to be heard at a criminal term of court, and where the movant has failed to give the statutory notice of his motion, and the superior court has ordered a dismissal of the action, the judgment will be reversed on appeal. Dawsins v. Phillips, 185 N. C. 608, 116 S. E. 723.

The superior court has authority to hear motions in civil actions at criminal terms only after due notice to the adverse party, and therefore when it does not affirmatively appear that due notice was given of plaintiff's motion to be allowed to amend, the granting of the motion at a term of court for criminal cases only will be held for error as being presumptively outside the authority of the court. Beck
§ 7-73. No criminal business at civil terms.—No grand juries shall be drawn for the terms of court designated by law as being for the trial of civil cases exclusively, and the solicitors shall not be required to attend upon any exclusively civil terms, unless there are cases on the civil docket in which they officially appear, and no criminal process shall be returnable to any term designated for the trial of civil actions alone. (Rev., s. 1808; 1901, c. 28, ss. 3, 7; 1913, c. 196; C. S. 1445.)

§ 7-74. Rotation of judges.—The judges of the superior court shall hold the courts of the several judicial districts successively, according to the following order and system: The judges resident in the Eastern Judicial Division shall hold the courts for the spring term, one thousand nine hundred and forty-four, as now provided by law.

Term Beginning in June.—When a term of court begins the last part of June, the judge of the superior court assigned to that district for the spring circuit has authority throughout the term of court, even though the term runs over into July, and the second week thereof starts during the month of July, since any term which begins in June "falls" between January and June within the meaning of the statute. West v. Woolworth Co., 214 N. C. 214, 198 S. E. 659.

Under Prior Law.—Before the Act of 1879, assigning the judges to the different districts, an exchange of circuits with the consent of the Governor under the Act of 1879 was not in violation of section 11, Art. IV, of the amended Constitution. State v. McGimsey, 80 N. C. 377.

Governor's Authority a Command.—The Governor can require a judge to hold a court in a county not within his own district. And when the Governor so authorizes and empowers a judge to hold such a court, expressing in the commission that it is done with his consent, and under that authority, the judge holds the court, as between the judge and the suitors in the court, the consent and authority granted by the Governor is equivalent to a command. State v. Watson, 75 N. C. 136.

Governor's Power.—When the Constitution (and this section) has clothed the Governor with the power to require a judge to hold a court in a district other than that to which he is assigned by the general law, upon certain conditions as to the fulfillment, of which the Governor must be clothed by the Governor to the court, and the Governor, even though the assent to the purpose is equivalent to a command, the Supreme Court will assume that, in fact, the emergency had arisen which would sanction the issuing of the commission, and the same will be recognized by the Governor as a command.

Injunction.—Failure of Judge to Hear Order.—If the judge before whom the order is made returnable fails to hear it, any judge resident in or assigned to or holding a court in the State may hear the same, or change the courts of some adjoining district may hear it upon giving ten days notice to the parties interested. Hamilton v. Icard, 112 N. C. 591, 17 S. E. 501.

Governor's Power.—When the Constitution (and this section) has clothed the Governor with the power to require a judge to hold a court in a county not within his own district. And when the Governor so authorizes and empowers a judge to hold such a court, expressing in the commission that it is done with his consent, and under that authority, the judge holds the court, as between the judge and the suitors in the court, the consent and authority granted by the Governor is equivalent to a command. State v. Watson, 75 N. C. 136.

De Facto Judge.—Where the Governor issues a commission to one of the judges of the superior courts, authorizing him to hold certain terms of the superior court and empowering the undersigned to discharge the duties required of him, he is, so far as the public and third persons are concerned


§ 7-75. Exchange of courts.—By consent of the governor the judges may exchange the courts in a particular county or counties; and the judges resident in the western division and the judges resident in the eastern division may exchange courts or circuits with the consent of the governor: but no judge shall hold all the courts in one district oftener than once every four years. When a judge shall die or resign, his successor shall hold the courts of the district allotted to his predecessor. (Rev., s. 1511; Code, s. 913; R. C., c. 31, s. 20; 1879, c. 11; 1915, c. 15, s. 4; Const., Art. 4, s. 11; C. S. 1447.)

Under Prior Law.—Before the Act of 1879, assigning the judges to the different districts, an exchange of circuits with the consent of the Governor under the Act of 1879 was not in violation of section 11, Art. IV, of the amended Constitution. State v. McGimsey, 80 N. C. 377.

A partial exchange of circuits between two of the judges of the superior court, with the approval of the Governor, is legal. State v. Graham, 75 N. C. 256.

Power of Legislature.—Neither does this prohibitory clause restrict the Legislature from creating an extra term of the superior court of a county and designating the extra judge to hold the same. State v. Monroe, 80 N. C. 373, 374.

Governor's Authority a Command.—The Governor can require a judge of the superior court to hold a term of the court in a county not within his own district. And when the Governor so authorizes and empowers a judge to hold such a court, expressing in the commission that it is done with his consent, and under that authority, the judge holds the court, as between the judge and the suitors in the court, the consent and authority granted by the Governor is equivalent to a command. State v. Watson, 75 N. C. 136.
a de facto judge so long as he assumes to act in that capacity, and this is so although the commission was issued within the term of court. State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

Upon Death of Judge.—Upon the death of one of the judges of the superior courts, the Governor has the authority to appoint another judge to hold one or more specified terms of the courts in the district assigned to the deceased judge. State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247. Presumption Contained.—The presumption contained in this section applies neither to the holding by any judge of the superior court of one or more regular terms of said court by exchange with some other judge, and with the sanction of the Governor, nor to the holding of special terms under section 7-78. State v. Turner, 119 N. C. 841, 25 S. E. 810.

Same.—Applies to Series of Courts.—The provision that "no judge of the superior courts" shall hold the courts in the same district oftener than once in four years, "is held to apply only to the series of courts forming a district over which a judge, in his riding, is to preside, and has no reference to the courts separately considered. State v. Speaks, 95 N. C. 689.

§ 7-76. Court adjourned by sheriff when judge not present.—If the judge of a superior court shall not appear to hold any term of a court at the time fixed therefor, he may order the sheriff to adjourn the court to any day certain during the term, and on failure to hear from the judge it shall be the duty of the sheriff to adjourn the court from day to day until the fourth day of the term inclusive, unless he shall be sooner informed that the judge from any cause can not hold the term. If by sunset on the fourth day the judge shall not appear to hold the term, or if the sheriff shall be sooner advised that the judge cannot hold the term, it shall then be the duty of the sheriff to adjourn the court until the next term. (Rev., s. 1510; Code, s. 926; 1901, c. 269; 1887, c. 13; C. S. 1448.)

Presumption of Adjournment.—Where the record recited that a regular term of a superior court was opened and held Wednesday, instead of on Monday, of the week fixed by the statutes, it will be presumed prima facie that an order for holding the court was made and that it was held. State v. Register, 208 N. C. 90, 94, 179 S. E. 450. See also note of State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, under section 7-75.

Duty of Defendant to Attend Special Term.—A defendant bound over to answer a criminal charge at a regular term is held to apply to the proceedings thereafter will be valid. State v. Watson, 75 N. C. 136, 139. This section applies neither to the holding by any judge of the courts of his district, and hold for such time as he may designate, unless the business be earlier disposed of. If the dispatch of business requires it, the Governor may order a special term of court to be held by a regular, special, or emergency judge of the superior court in any county or district during the holding of a regular term in such county or district. (Rev., s. 1512; Code, s. 914; R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; Ex. Sess. 1924, c. 100; C. S. 1450.)

Editor’s Note.—The last sentence in this section was added by the 1924 amendments.

Section Constitutional.—This section is constitutional. State v. Ketchey, 70 N. C. 621.

Particular Class of Cases.—In an appointing special terms the Governor is held bound by the certificate of the judge, so far as to confine such terms to the trial of a particular class of cases. State v. Ketchey, 70 N. C. 621.

Regular Order Presumed.—When it appears from the record that a cause was tried at a special term of a superior court, it is presumed prima facie that an order for holding it was duly made, and that it was duly held. Sparkman v. Daughtry, 35 N. C. 168.

The power of the governor to order special terms is not restricted to instances where there is an accumulation of business, nor when such fact is recited or a reason in the commission is the power of the judge restricted to the trial of a particular class of cases. State v. Register, 133 N. C. 746, 46 S. E. 21. See also note of State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, under section 7-75.

Failure of Sheriff to Adjourn Court.—The provision in this section that the sheriff shall adjourn the court from day to day until the fourth day of the term, and then for the term, in the absence of the judge who was to have held it, under the law, is subject to the provision that this shall be done "unless the sheriff shall be sooner informed that the judge, from any cause cannot hold the term," which implies the power of the judge to order an adjournment to a later day in the term. State v. Wood, 175 N. C. 809, 95 S. E. 1059.

All Matters Carried Over.—This section by operation of law carries all matters over to the next term, in the same class of cases. State v. Horton, 35 N. C. 168.

Must Appoint Judge.—When the governor has ordered such term as provided in this section to be held in any county of this State, it is the duty of the Governor to appoint the Superior Court to hold such term, and to issue to the judge appointed by him a commission authorizing him to hold such court. State v. Baxter, 208 N. C. 90, 94, 179 S. E. 450.

Plea Denying Existence of Court.—A plea of the defendant that the court was unlawfully called because the Governor was absent from the State when he attempted to order the holding of the court is properly overruled. State v. Hall, 142 N. C. 710, 55 S. E. 806.

Arraignment at Former Term.—It is not necessary that
a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. State v. Ketchey, 70 N. C. 621.

§ 7-79. Compensation of judge.—Any regular judge appointed to hold a special term of court shall attend and hold such court, and shall be paid as compensation therefor at the rate of one hundred dollars per week and his actual expenses incurred in attending such special term by the county in which the special term is held. But any such judge who is in a district having fewer than twenty regular weeks of court for the six months shall hold without extra compensation, if directed by the governor, enough extra weeks of court to make out twenty weeks for the six months. (Rev., s. 1512; Code, s. 914; 1913, c. 63; 1901, c. 167; R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; 1909, c. 85, s. 1; C. S. 1451.)

Reduction of Salary.—The Constitution provides that the salaries of the judges shall not be diminished during their continuance in office. The additional compensation of one hundred dollars given to a superior court judge, by this section, for services in holding a special term, is a part of his salary, hence, any statutory provision providing for a reduction thereof is void as being unconstitutional. Baxter v. Comm., 62 N. C. 92.

§ 7-80. Notice of special terms.—Whenever the governor shall call a special term of the superior court for any county, he shall notify the chairman of the board of commissioners of the county of such call, and such chairman shall take immediate steps to cause competent persons to be drawn and summoned as jurors for said term; and also to advertise the term at the courthouse and at one public place in every township of his county, or by publication of at least two weeks in some newspaper published in his county in lieu of such township advertisement. (Rev., s. 1513; Code, s. 915; 1868-9, c. 273; C. S. 1452.)

Neither the certificate forwarded to the executive office nor the notice sent down to the county commissioners constitutes an essential part of the record of the term. State v. Boykin, 211 N. C. 407, 12 S. E. 457, 13 S. E. 247.

The notice is directory and not mandatory under this section. State v. Boykin, 211 N. C. 407, 413, 191 S. E. 18.

And Is for the Benefit of the Public.—The notice which is required to be published under this section is designed not for the purpose of warning the jury of the coming term. These persons receive separate notices or summons. Rather, it serves the purpose of notifying the public. It follows, then, that the failure to comply with this section goes to the set-up or organization of the court itself rather than of the jury. State v. Boykin, 211 N. C. 407, 413, 191 S. E. 18.


§ 7-81. Certificate of attendance.—The clerks shall give the judge a certificate of attendance for the number of days occupied by the court, and the same shall thereupon be entitled to receive from the commissioners of the county in which the court is held the compensation of which by law. (Rev., s. 1514; Code, s. 918; 1901, c. 167; 1868-9, c. 273; 1909, c. 85, s. 1; 1913, c. 63; C. S. 1453.)

§ 7-82. Grand juries at special terms.—There shall be no grand jury at any special term, unless the same shall be ordered by the governor. (Rev., s. 1515; Code, s. 921; 1868-9, c. 273; C. S. 1454.)

In the absence of any order of the Governor that a grand jury be drawn at a special term, as provided by this section the indictment returned at said time is void. State v. Baxter, 208 N. C. 90, 129 S. E. 450.

§ 7-83. Jurisdiction.—The special terms of the superior court held in pursuance of this chapter shall have all the jurisdiction and powers that regular terms of the superior court have. (Rev., s. 1516; Code, s. 916; 1868-9, c. 273; C. S. 1455.)

Governor Not Bound to Convene Term to Particular Class of Cases.—In appointing a special term the governor is not bound by the certificate of the judge, so far as to convene a term to the trial of a particular class of cases. State v. Ketchey, 70 N. C. 621.

Jurisdiction Not Dependent upon Arraignment at Former Term.—It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. State v. Ketchey, 70 N. C. 621.

Removal of Cause.—A superior court at a special term has the same power to remove a cause to another county that it has at a regular term. Sparkman v. Daughtry, 35 N. C. 106.

Judgment by Default.—Whether at a regular or special term of the court, notice to the adverse party of a motion in term for judgment by default for want of an answer is not necessary. Reynolds v. Greensboro, etc., Co., 153 N. C. 342, 99 S. E. 248.

Court Held outside Judge's District.—A judge specially commissioned to hold court in a certain county outside his district has the same jurisdiction of matters transferred to that court, by consent, from another county, as the judge of the district comprising both counties. Henry v. Hilliard, 120 N. C. 479, 27 S. E. 130.

§ 7-84. Attendance and process at special terms.—All persons and witnesses summoned at the regular or special term, and officers or others who may be bound to attend the next regular term of the court, shall attend the special term, under the same rules, forfeitures and penalties as if the term were a regular term. (Rev., s. 1517; Code, s. 919; R. C., c. 31, s. 22; 1844, c. 10; 1848, c. 29; C. S. 1456.)

Duty of Defendant to Appear.—A defendant bound over to answer a criminal charge at a regular term of the superior court, which term is not held in consequence of the absence of the judge, is required to attend an intervening special term subsequently appointed and held. State v. Horton, 123 N. C. 695, 31 S. E. 218.


§ 7-85. Subpoenas returnable.—Subpoenas may be issue returnable on any day of any special term. (Rev., s. 1518; Code, s. 920; 1868-9, c. 273; C. S. 1457.)

Art. 11. Special Regulations.

§ 7-86. Reading the minutes.—Every morning during the term the judge presiding shall order the reading of the minutes of the court for the day preceding, and the minutes of the last day shall be read immediately preceding the final adjournment of the term. (Rev., s. 1519, Code, s. 925; 1861, c. 3; C. S. 1458.)

§ 7-87. Officer attending juries sworn.—When any officer (except such as are appointed to attend the grand jury) shall be appointed or summoned to attend any superior court the clerk, at the time of the first going out of a jury on the trial of any civil or criminal action, shall administer an oath to such officer, faithfully to attend the several juries that may be put under his care during that term, that shall be charged in the trial of any civil or criminal action; and after such officer shall be once so sworn, he shall be considered to all intents and purposes as acting upon the same oath while attending every jury that he may be called to attend during that term. (Rev., s. 1527; Code, s. 927; R. C., c. 31, s. 36; 1801, c. 592; C. S. 1459.)

Cross Reference.—As to form of oath, see § 11-11.
§ 7-88. Quakers may wear hats in court.—The people called Quakers may wear their hats in courts of judicature, as elsewhere, according to the custom of their sect. (Rev., s. 1528; Code, s. 943; R. C., c. 31, s. 151; 1784, c. 209; C. S. 1460.)

§ 7-89. Court reporters.—Upon the request of a judge holding a superior court in any county in the state, the board of county commissioners in such county shall employ a competent stenographer to take down the proceedings of the court, at a compensation not to exceed five dollars per day and actual expenses, to be paid by the county in which the court is held: Provided, that the compensation of said stenographers in counties composing the sixteenth judicial district shall not exceed ten dollars per day.

The judge is authorized to tax a reasonable fee against the losing party in every action, civil and criminal, to be turned into the county treasury towards reimbursing the county, but no fee shall be taxed against a losing party suing in forma pauperis.

Every stenographer so employed shall make three copies of the proceedings in every case appealed to the supreme court, without extra charge, and shall furnish one copy to the attorneys on each side and file one copy with the clerk of the superior court of the county in which any such case is tried, and shall obey all orders of the judge relative to the time in which any such work shall be done: Provided, that the restrictions herein against an extra charge for making copies of the proceedings in cases appealed to the supreme court shall not apply to counties composing the sixteenth judicial district.

Every stenographer so employed shall, before entering upon the discharge of his duties, be duly sworn to well, truly, and correctly take down and transcribe the proceedings of the court, except the argument of counsel, and the charge of the court thus taken down and transcribed shall be held to be a compliance with the law requiring the judge to put his instructions to the jury in writing.

This section shall not apply to any county which has a court stenographer authorized by law: Provided, that the board of county commissioners of Mecklenburg county may, by resolution approving this section, bring said county within the provisions of the same: Provided further, that this section shall not apply to the following counties: Alleghany, Brunswick, Caldwell, Camden, Carteret, Caswell, Chatham, Currituck, Dare, Davidson, Davie, Forsyth, Greene, Harnett, Haywood, Hoke, New Hanover, Orange, Pender, Person, Transylvania, Union, Watauga. (Ex. Sess. 1913, c. 69; Ex. Sess. 1921, c. 57; 1927, c. 268; Pub. Loc. 1937, c. 49; 1943, c. 75, s. 2; C. S. 1461.)

Local Modification.—Alamance: Ex. Sess. 1921, c. 2; 1935, c. 474; Burke, Lincoln, Catawba: 1929, cc. 53, 260; Halifax: 1929, c. 45, s. 5; Johnston: 1943, c. 689; McDowell: 1933, c. 85; Northampton: 1911, c. 11, s. 5; Robeson: 1935, c. 9; Surry: 1927, c. 268, s. 2; Wayne: 1927, c. 156.

§ 7-90. Official court reporter for second judicial district.—The resident judge of the second judicial district is hereby authorized and empowered to appoint an official court reporter for one or more or all of the counties in said district who shall serve at the will of the resident judge, and whose appointment may be terminated by thirty days' written notice thereof.

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

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

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

The resident judge shall likewise fix the compensation to be received by such reporter and such reporter pro tem: Provided, however, such compensation shall not exceed ten dollars per day and actual expenses upon a weekly basis.

The testimony taken and transcribed by said court reporter or said court reporter pro tem, as the case may be, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this state as the deposition of the witness whose testimony is so taken and transcribed, in the same manner, and under the same rules governing the introduction of depositions in civil actions. (1933, c. 335.)

§ 7-91. Official court reporter for fifth judicial district.—The resident judge of the fifth judicial district is hereby authorized and empowered to appoint an official court reporter for all of the counties in said district, who shall serve at the will of the resident judge, and whose appointment may be terminated at thirty days written notice thereof.

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

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

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

The resident judge shall likewise fix the compensation to be received by said reporter and said reporter pro tem, provided, however, such compensation shall not exceed ten dollars per day and actual expenses upon a weekly basis.

Said court reporter or reporter pro tem must, upon request of counsel when the presiding judge shall find as a fact that same is necessary and so order, deliver to the clerk of the superior court in which said cause is pending a transcript of the evidence in that cause within fifteen days from the adjournment of the term of court in which such evidence was taken.

The testimony taken and transcribed by said court reporter or said reporter pro tem as the case may be, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this State as the deposition of the witness whose testimony is so taken and transcribed, in the same manner, and under the same rules governing the introduction of depositions in civil actions: Provided, however, that such transcript of testimony shall be admissible in evidence only in the cause in which same was taken. (1935, c. 128.)

Local Modification.—Carteret: 1941, c. 137; Greene: 1943, c. 284.

§ 7-92. Official court reporter for sixth judicial district. — The resident judge of the sixth judicial district is hereby authorized and empowered to appoint an official court reporter for one or more, or all of the counties in said district, whose term of office shall be for a period of five years from and after qualification: Provided, however, that said judge shall have the right to remove said reporter for cause at any time.

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

Before entering upon the discharge of the duties of said office, said reporter shall take and subscribe before the oath provided by law for public officers, and shall in addition thereto take and subscribe an oath in words substantially as follows: "I ................., do furthermore solemnly swear that I will, to the best of my ability, discharge the duties of the office of court reporter in and for the sixth judicial district, and will faithfully transcribe the testimony offered in said courts as the presiding judge may direct, or as I may be required to do under the law, so help me God." Said oath shall be filed in the office of the clerk of the superior court of the county in which said reporter resides, and recorded and indexed by him on the minute docket of said court.

In case of sickness, or for other cause, if said reporter fails to attend upon any of the courts of said district, the presiding judge may appoint a reporter pro tem, for said court, and said appointment shall appear upon the minutes of said term, and said reporter shall take and subscribe the oath referred to above, which oath shall be filed with the clerk.

The resident judge shall likewise fix the compensation to be received, by said reporter, and said reporter pro tem, provided, however, such compensation shall not exceed ten dollars per day and actual expenses upon a weekly basis.

Said court reporter or reporter pro tem must, upon request of counsel when the presiding judge shall find as a fact that same is necessary and so order, deliver to the clerk of the superior court in which said cause is pending a transcript of the evidence in that cause within fifteen days from the adjournment of the term of court in which such evidence was taken.

The testimony taken and transcribed by said court reporter, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this State as the deposition of the witness whose testimony is so taken and transcribed, in the same manner, and under the same rules governing the introduction of depositions in civil actions. (1931, c. 154, s. 5; 1935, c. 420.)

SUBCHAPTER III. COMMISSION FOR IMPROVEMENT OF LAWS.


§ 7-93: Repealed by Session Laws 1943, c. 746.

Editor's Note.—The duties of the commission created by the repealed section were similar to those theretofore conferred on the Judicial Conference by c. 244 of the Public Laws 1925, which was repealed by Public Laws 1931, c. 451. The Act of 1925 was amended by Public Laws 1927, c. 39. The repealed sections of this article were codified from Public Laws 1931, c. 98.

§ 7-94: Repealed by Session Laws 1943, c. 746.

Editor's Note.—The repealed section related to the members of the former commission. This consisted of the attorney-general, the chairman of each of the committees on judiciary of the senate and the house of representatives of the general assembly, two members appointed from the justices of the supreme court and the judges of the superior courts, two members who were active practitioners in the trial and appellate courts, three members who were appointed from the faculties of law in the various universities in the state, and two members, not attorneys at law, who were men of proven ability in other occupations.

§§ 7-95 to 7-100: Repealed by Session Laws 1943, c. 746.
SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

Art. 13. In Counties with a City of at Least Twenty-five Thousand Inhabitants.

§ 7-101. Established by county or city or both.
—The Board of County Commissioners in the various counties having a county seat with twenty-five thousand or more inhabitants of the State, or the governing authorities in cities of twenty-five thousand or more inhabitants shall have authority to establish a "Domestic Relations Court," which court may be a joint county and city court, as provided in section 7-102 or a court for the county or city as may be determined by the governing authorities. (1939, c. 343, s. 1.)

Local Modification.—Durham, Edgecombe, Gaston, Guilford, Nash, New Hanover, Pitt, Wayne: 1929, c. 343, s. 10; Buncombe: 1929, c. 343, s. 10; 1941, c. 308, s. 2; Forsyth: 1929, c. 343, s. 10; 1931, c. 221, s. 2; Wake: 1929, c. 343, s. 10; Pub. Loe. 1941, c. 239.

Cross Reference.—As to establishment and jurisdiction of juvenile court, see § 110-21 et seq.

§ 7-102. Vote on establishment of court; any other city in county with required population may have such court.—In case the Board of County Commissioners and governing authorities of a particular city decide to establish a joint city and county Domestic Relations Court, they, voting as separate bodies, shall determine whether or not such Domestic Relations Court shall be established. If both bodies, shall vote for its establishment, each of them shall record the resolutions in their minutes and upon such consent by both boards, the court shall be established. In counties in which the said joint court is thus established by the Board of County Commissioners and the governing authorities of the county and city such establishment of the court shall not prevent any other city within the territorial limits of the county and having more than twenty-five thousand inhabitants, establishing its own court under section 7-101. (1939, c. 343, s. 2.)

§ 7-103. Jurisdiction.—Said Domestic Relations Court shall have, and is hereby vested with all the power, authority, and jurisdiction heretofore vested by law in the juvenile courts of North Carolina, and said power, authority, and jurisdiction being as fully vested in the Domestic Relations Court as if herein particularly set forth in detail; and in addition thereto the said Domestic Relations Court shall have exclusive original jurisdiction over the following classes of cases:

(a) All cases where any adult is charged with abandonment, non-support, or desertion of any minor child, or where either spouse is charged with abandonment, non-support, or desertion of the other.

(b) All cases involving voluntary desertion of any juvenile by its mother.

(c) All cases involving the custody of juveniles, except where the case is tried in Superior Court as a part of any divorce proceeding.

(d) All cases where assault, or assault and battery, on a juvenile is charged against an adult, or where husband or wife is charged with assault, or assault and battery, upon the other.

(e) All cases in which an adult is charged with causing or being responsible for delinquency, dependency, or neglect of a juvenile.

(f) All bastardy cases within said county.

(g) All cases wherein any person is charged with receiving stolen goods from any juvenile, knowing them to be stolen.

(h) All cases involving violation of the North Carolina School Attendance Law as set forth in Public Laws of North Carolina, one thousand nine hundred and nineteen, chapter one hundred, and Public Laws of North Carolina, one thousand nine hundred and twenty-three, chapter one hundred and thirty-six; and in §§ 115-302 to 115-312, inclusive; and such other laws relative to school attendance as may hereafter be enacted.

(i) In either case where either parent institutes a divorce action when there is a minor child or children, it shall be the duty of the Clerk of the Superior Court to refer the case for investigation as to the child, or children, to the Domestic Relations Court, and the Judge of the Domestic Relations Court shall make his recommendations to the Judge of the Superior Court as to the disposition of the child, or children, for the consideration of the Judge of the Superior Court in disposing of the custody of the said child or children. (1929, c. 343, s. 3; 1941, c. 308; 1943, c. 470, s. 1.)

Cross References.—As to establishment and jurisdiction of juvenile court, see § 110-21 et seq. For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note.—The 1941 amendment struck out former subsection (a), relating to the adoption of juveniles, and re-lettered the subsequent subsections in alphabetical order.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 453.

The 1943 amendment substituted "minor child" for "juvenile" in line three of subsection (b).

Issuance of Process and Hearing Complaints.—There is no statutory provision referring specifically to issuance of process, but the statute indicates that the same persons who would issue process in other courts having jurisdiction of the offenses of which the domestic relations court is given jurisdiction, would be authorized to issue process for the domestic relations court, and hence hear complaints. 15 N. C. Law Rev. 113.

§ 7-104. Election of judge and term of office; vacancy appointments; judge to select clerk; juvenile Court officers may be declared officers of new Court.—It shall be the duty of the Board of Commissioners of any county and the governing board of any city, in which a joint Court of Domestic Relations is established, as provided in this article, or of the governing authorities of any city or county in which an independent Domestic Relations Court shall be established, as provided in this article, acting jointly, in the first instance, or independently, in the second instance, to elect a Judge of the Domestic Relations Court and to fix his salary and provide for the payment of same, his term of office to run from the time of his election to the second Monday in July in each odd numbered year and until his successor shall have been elected and qualified. The regular term of office shall be for a term of two years and until his successor is elected and qualified. If any vacancy should occur in said office during the two years' term, for any cause, it shall be filled for the unexpired term in the same manner and by the same bodies as provided for the election of said Judge.

It shall be the duty of the Judge of the Domestic Relations Court to appoint a Clerk for

[ 486 ]
§ 7-105  CH. 7. COURTS—DOMESTIC RELATIONS  § 7-111

said court, the salary of said Clerk to be fixed, provided for, and paid by the Board of County Commissioners of any of such counties and the governing board of any of such cities, acting jointly, or independently when a joint county and city court is not established.

And the officers of the Juvenile Court of any of such cities and of any of such counties, as now constituted by law may be declared to be officers of the Domestic Relations Court.

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

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

Local Modification.—Forsyth: 1931, c. 221, s. 2; Mecklenburg: 1937, c. 239.

Editor's Note.—The 1943 amendment added the last paragraph of this section.

§ 7-106  Procedure, practice and punishments. —The procedure, practice, and punishments imposed in the Domestic Relations Court as established in this article shall be the same as now provided by law in courts now having original jurisdiction of the various offenses or causes enumerated in this article, and the Judge of the said Domestic Relations Court is hereby granted the power to prescribe such rules and fix such modes of procedure, as, in his discretion, will best effect the purposes for which said court is created.

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

Editor's Note.—The 1943 amendment added the second paragraph of this section.

§ 7-107  Right of appeal to Superior Court; trial de novo.—Wherever in this article criminal jurisdiction is conferred upon the Domestic Relations Court there shall be the same right of appeal from this court as from Recorder's Courts or other inferior criminal courts to the Superior Court, and the same rules and regulations of such appeals from inferior courts shall apply to appeals from this court, and in the Superior Court the trial shall be de novo. This provision shall apply also to the trials in bastardy cases, and cases involving the custody of juveniles. (1929, c. 343, s. 7; 1943, c. 470, s. 4.)

Editor's Note.—The 1943 amendment made this section applicable to cases involving the custody of juveniles.

§ 7-108  Offenses before Court to be petty misdemeanors; demand for jury trial; appearance bonds.—All the offenses for the trial of which the Domestic Relations Court is given jurisdiction are hereby declared to be petty misdemeanors punishable as now prescribed by law. On the trial before such Domestic Relations Court, if a jury trial is demanded, the cause shall be transferred for trial to some criminal term of the Superior Court of the counties in which the Domestic Relations Court is situated. The defendant or defendants shall be held under an adequate bond to secure his or their attendance at the criminal term of the Superior Court to which the record is transferred. If in the exercise of the jurisdiction hereinafter conferred upon the Domestic Relations Court, it should appear that a felony has been committed, said court shall have jurisdiction and authority upon proper investigation to bind over the alleged felon in all cases in which probable cause is found, to the Superior Court of the county, under proper bond and recognizances. (1929, c. 343, s. 8.)

§ 7-109  Pending cases in Juvenile Court transferred to new Court.—All causes pending in the Juvenile Court of the county or city at the time of the organization of any Domestic Relations Court within said county or city, shall be transferred to the Domestic Relations Court for final adjudication. (1929, c. 343, s. 9.)

§ 7-110  Cases transferred from Superior Court. —Upon the establishment of a domestic relations court as authorized in this article, the clerk of the superior court shall immediately transfer from the superior court to such domestic relations court all actions pending in the superior court of which the domestic relations court has jurisdiction as in this article conferred, whether such actions are untried or tried and retained for judgment, sentence or further orders, and the domestic relations court shall immediately have jurisdiction of such actions and shall thereafter try, enter further orders or dispose of such actions in the same manner and to the same extent as if said actions had been initiated in said domestic relations court. (1941, c. 208, s. 1.)

§ 7-111  Discontinuance of Court.—After the establishment of any domestic relations court by any county commissioners or by the governing authorities of a particular city, or the establishment of a joint county-city court of domestic relations, such board, governing authorities, or both, may, by resolution or resolutions, discontinue any such court. (1941, c. 208, s. 2½.)
§ 7-112. Constitution, article seven, abrogated; exceptions. — All the provisions of article seven of the constitution inconsistent with this chapter, except those contained in sections seven and twelve are hereby abrogated, and the provisions of this article substituted in their place; subject, however, to the power of the general assembly to alter, amend or abrogate the provisions of this article, and to substitute others in their stead, as provided in section thirteen of article seven of the constitution. (Rev., s. 1409; Code, s. 819; 1876-7, c. 144, s. 7; C. S. 1462.)

§ 7-113. Election and number of justices. — At every general election held for members of the general assembly there shall be elected in each township three justices of the peace, and for each township in which any city or incorporated town is situated, one justice of the peace for every one thousand inhabitants in such city or town, who shall hold office for a term of two years from and after the first Monday in December next after their election. (Rev., s. 1409; Code, s. 819; 1876-7, c. 141; 1895, c. 157; 1905, c. 113; 1907, c. 228; 1909, c. 177, 716; C. S. 1463.)

§ 7-114. Oath of office; vacancies filled. — Every person elected or appointed a justice of the peace, before his term of office begins or within thirty days thereafter, shall take and subscribe the prescribed oaths of office before the clerk of the superior court, who shall file the same. All elections of justices of the peace by the general assembly or by the people shall be void unless the persons so elected shall qualify as herein directed. All original vacancies in the offices of justice of the peace occurring before qualification as provided in this section shall be filled for the term by the governor. All other vacancies shall be filled by the clerk of the superior court. (Rev., s. 1411; Code, s. 821; 1901, c. 37; C. S. 1467.)

Cross Reference. — As to forms of oaths, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

Section Constitutional. — This section is not unconstitutional. Gilmer v. Holton, 98 N. C. 25; Sprague v. C. S. 1468.)

Duty of Clerk. — It is the duty of the clerk to administer the oath to the justices elected or appointed. Gilmer v. Holton, 98 N. C. 25; S. E. 812.

Appointed by Clerk. — The authority of the clerks of the superior courts to appoint justices of the peace is confined to vacancies caused by death, resignation or other causes contrary to this section, unless reelected or re-appointed, shall be guilty of a misdemeanor and upon conviction be punishable in the discretion of the court, as provided for in other misdemeanors. (1917, c. 40; 1927, c. 116; C. S. 1468.)

§ 7-115. Governor may appoint justices. — The governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as justices of the peace, who shall hold their office for four years from and after the date of their appointment; and, on exhibiting their commission to the clerk of the superior court of the county in which they are to act, shall be duly qualified by taking before said clerk an oath of office and the oaths prescribed for other officers. The governor shall issue to each justice of the peace so appointed a commission, a certificate of which shall be deposited with the clerk of the court and filed among the records, and he shall note on his minutes the qualifications of the justice of the peace.

Any commission so issued by the Governor or his predecessor shall be revokable by him in his discretion upon complaint being made against such justice of the peace and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission.

Whenever the Governor shall have revoked the commission of any justice of the peace appointed by him, or his predecessor in office, it shall be his duty to file with the clerk of the court in the county of such justice of the peace a copy of said order and mail a copy of same to said justice of the peace.

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

§ 7-116. Forfeiture of office. — When any justice of the peace removes out of his township and does not return therein for the space of six months, he thereby forfeits and loses his office; and any such justice presuming to act thereafter, contrary to this section, unless reelected or re-appointed, shall be guilty of a misdemeanor. (Rev., ss. 1412, 3589; Code, s. 822; C. S. 1469.)

§ 7-117. Resignation. — Justices of the peace wishing to resign must deliver their letters of resignation to the clerk of the superior court, who shall file the same. (Rev., s. 1413; Code, s. 823; C. S. 1470.)

§ 7-118. Removal and disqualification for crime. — Upon the conviction of any justice of the peace of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state. (Rev., s. 1414; Code, s. 926; C. S. 1471.)

Criminal Liability. — The functions of a justice of the peace are ministerial, in preserving the peace, hearing charges against offenders and issuing warrants thereon, examining the parties and bailing or committing them for trial, and in the exercise of such functions, if he act corruptly, oppressively or from any other bad motive, he is liable to indictment. State v. Sneed, 81 N. C. 817.

§ 7-119. Justice may hold other office. — Any justice of the peace may accept a civil office or appointment of trust or profit, under the authority of the United States, the duties of which confine him to the county where he is resident. (Rev., s. 1415; Code, s. 825; Const., Art. 14, s. 7; C. S. 1475.)
Justice of Peace May Also Be Recorder of City Court.—Under Const. Art. 14, sec. 7, excepting a justice of the peace from the inhibition against one holding two offices of trust or profit, one may be both a justice of the peace and the recorder of a city recorder's court. State v. Lord, 145 N. C. 479, 59 S. E. 556.

§ 7-120. Validation of official acts of certain justices of the peace.—Each and all of the official acts of justices of the peace appointed by chapter three hundred twenty-one, Public Laws of one thousand nine hundred thirty-one, after the expiration of their terms on April first, one thousand nine hundred thirty-two, and before March twenty-first, one thousand nine hundred thirty-nine, including all judgments rendered, probates taken, marriages performed, and any and all other acts whatsoever, are hereby in all respects valid, ratified and confirmed. (1939, c. 268.)

Art. 15. Jurisdiction.

§ 7-121. Jurisdiction in actions on contract.—Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, except—
1. Wherein the sum demanded, exclusive of interest, exceeds two hundred dollars.
2. Wherein the title to real estate is in controversy. (Rev. s. 1419; Const., Art. IV, s. 27; Code, s. 584; C. S. 1473.)

I. Actions Ex Contractu.
II. Title to Land in Controversy.

Cross Reference.—See § 123-1; Const., Art. XIV, s. 7, and annotations thereto.

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I. Actions Ex Contractu.

Cross Reference.—See §§ 7-63, 7-124 and notes. As to petition of insolvent debtor before justice of peace for discharge from imprisonment, see §§ 23-25 to 23-27.

II. Title to Land in Controversy.

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II. Title to Land in Controversy.
to recover land of the jurisdiction of the justice is excluded where the relation is that of mortgagor and mortgagee or vendor and vendee. Hughes v. Mason, 84 N. C. 473.

Foreclosure of Mortgage.—Because of the equity growing out of the refusal of the mortgagee to agree to the conditions of the mortgage, the former seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the superior court has jurisdiction, when the amount secured is for less than two thousand dollars, to grant a writ of assistance. Quaring Machinery Co. v. Burger, 181 N. C. 241, 107 S. E. 141.

Landlord and Tenant Act.—A court of a justice of the peace has no jurisdiction under the landlord and tenant act to try title to real estate where it appears that the plaintiff has been wronged or that there are equities involved as to the land and a justice of the peace has no jurisdiction. Parker v. Allen, 84 N. C. 466.

That the vendee, in a contract for the sale of land, remained silent, when the contract was mutatis mutandis void, the title to the land was a question of equity, and the superior court should have intervened. Boone v. Drake, 109 N. C. 79, 13 S. E. 724.

In an action by a purchaser of land with warranty to recover a sum of money paid by him to free the land from a lien, the deed will be introduced to prove the covenants, the title to realty is involved, and a justice would not have jurisdiction. Hann v. Fletcher, 189 N. C. 729, 128 S. E. 328.

Right of Equitable Creditor.—A justice of the peace has no jurisdiction to sell a lease of land, under which the lessee had settled, on fifty acres, claim to purchase an equitable interest in himself. Davis v. Davis, 83 N. C. 71.

In a proceeding before a justice of the peace under the Landlord and Tenant Act, a defendant who does not deny the lease, but (

**II. TITLE TO LAND IN CONTROVERSY.**

See section 7-124 and sections following and notes thereto.

**Jurisdiction.**—Justices of the peace can take no jurisdiction over a cause in which title to land is in controversy. Brown v. Sootherland, 142 N. C. 325, 55 S. E. 108. This is prohibited by the Constitution as well as impliedly by this section. Forsythe v. Bullock, 74 N. C. 135, 137.

Mere allegation of the defendant that title is in controversy will not oust justices' jurisdiction. The matter must appear by the admission of the parties. Jerome v. Setzer, 175 N. C. 391, 95 S. E. 616.

**Title Must be Between Parties to Action.**—The question of title, which arrests further proceedings before the justice, must appear between the parties to the action. Jurisdiction once acquired cannot be divested by the intervention of a stranger to the suit, asserting a paramount title. Davis v. Davis, 83 N. C. 71.

**Action Dismissed for Costs.**—If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs. Pasterfield v. Sawyer, 135 N. C. 254, 43 S. E. 599; Edwards v. Cowper, 94 N. C. 421, 6 S. E. 792, 793.

**Notes Given for Purchase Price of Land.**—A justice of the peace has jurisdiction of an action to recover a balance due on a notes given to the justices of the peace is not exclusive, and hence the justice of the peace has no jurisdiction over certain classes of cases. These cases are also cognizable in the superior court since the jurisdiction herein given to the justices of the peace is exclusive, and they fall within what may be termed the residuary clause contained in section 7-63.

**Generally.**—In actions ex contractu justices of the peace have jurisdiction, when the sum demanded does not exceed two hundred dollars, but in actions ex delicto, their jurisdiction is limited to cases wherein the value of the property in controversy does not exceed fifty dollars. (Rev. s. 1420; Const., Art. 4, s. 27; Code, s. 887; C. S. 1474.)

**Cross Reference.**—See §§ 7-63, 7-121 and notes.

**Editor's Note.**—Section 7-63 sets out the limits wherein the superior court has jurisdiction over certain classes of cases. These cases are also cognizable in the superior court since the jurisdiction herein given to the justices of the peace is exclusive, and they fall within what may be termed the residuary clause contained in section 7-63.

**Generally.**—In actions ex contractu justices of the peace have jurisdiction when the sum demanded does not exceed two hundred dollars, but in actions ex delicto, their jurisdiction is limited to cases wherein the value of the property in controversy does not exceed fifty dollars. Noville v. Dew, 94 N. C. 43. Jurisdiction of the peace is limited by the section for suits between mortgagor and mortgagee or between superior courts of actions for torts where the value of the property in controversy does not exceed fifty dollars. Harvey v. Hambrigg, 98 N. C. 446, 4 S. E. 187.

**We think that the decisions of this court, already made, lead necessarily to the conclusion, that the clause of this section comprehends, and was intended to comprehend, all actions ex delicto; that the term 'property in controversy, here used as determinative of jurisdiction, by correct interpretation, means the value of the injury complained of and involved in the litigation; and where a plaintiff, in good faith, states or limits his demand in actions of this character, the justice of the peace has no jurisdiction.**
of the peace in an action in which he has no jurisdiction is void. Noville v. Dew, 94 N. C. 43.

Remittance of Excess Will Not Give Jurisdiction.—Where, in an action of claim and delivery, it appears that the value of the property claimed is at least twice the jurisdiction of the justice, and the plaintiff cannot confer jurisdiction by a remitter. Noville v. Dew, 94 N. C. 43. See section 7-123.

§ 7-125. Priority of Proceedings as Determining Jurisdiction.—Where two or more courts have equal and concurrent jurisdiction of a case, that court in which suit is first brought has preference in the jurisdiction of the other courts. Childs v. Martin, 69 N. C. 126.

Irregular Proceedings.—Where jurisdiction is concurrent, and a case is carried by appeal to the superior court, and the appeal is disposed of by the court of last resort without the issue of judgment, the court will have cognizance of the matter by virtue of its original jurisdiction of the subject matter of the action, and by the consent the parties thereto. Irregular proceedings cannot be reversed on appeal to a court of record which will have jurisdiction of the action.

Remittance of Counterclaim on Appeal.—A justice of the peace has jurisdiction of an action on contract to recover the amount by which the salary paid plaintiff in the "President's Re-employment Agreement" failed to equal the amount stipulated in the "President's Re-employment Agreement." A voluntary remittance of the excess amount to the justice of the peace in an action in which he has no jurisdiction is void. Noville v. Dew, 94 N. C. 43.

Failure to Use Statutory Formula.—Objection to a failure by the plaintiff to state in the complaint the date of the salary paid plaintiff in the "President's Re-employment Agreement," voluntarily signed by defendant employer, when the amount demanded does not exceed two hundred dollars. James v. Sartin Dry Cleaning Co., 208 N. C. 412, 181 S. E. 341.

§ 7-124. Title to real estate in controversy as a defense.—In every action brought in a court of a justice of the peace, where the title to real estate comes in controversy, the defendant may, either with or without other matter of defense, set forth, in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. (Rev. s. 1428; Code, s. 836; C. S. 1476.)

Cross Reference.—See § 7-121 and notes.

Answer in Writing Necessary.—The title to real estate cannot be drawn into controversy by the defendant on a trial in a justice's court except by delivering to the justice an answer in writing that such title will come in question. Evans v. Williamson, 79 N. C. 87.

The evidence at the trial must tend to show that the title is in issue. Fosterfield v. Sawyer, 132 N. C. 258, 43 S. E. 799. And the trial will proceed until it is apparent that this is true. McDonald v. Ingram, 124 N. C. 272, 32 S. E. 677.

Mere allegation of defendant: that title is in controversy, see note of Jerome v. Setzer, 175 N. C. 391, 95 S. E. 616, under section 7-121 analysis II.

Judgment in Action in Which Defenses Should Have Been Set Up as Bar to Subsequent Action Thereon.—A possessory action in ejectment in the court of a justice of the peace terminates in that court upon an issue of title to lands or of equitable rights therein being raised by the defendant, and in the Superior Court the defendant is required to set up his equities, if any he have, and where he fails to do so an independent action by him thereon is barred by the prior judgment, it being assumed that the court rendering the judgment had jurisdiction of the parties and the subject-matter of the action. Ogburn v. Booker, 197 N. C. 687, 159 S. E. 330.

§ 7-125. Title to real estate in controversy, action dismissed.—If it appears on the trial that the title to real estate in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs. (Rev. s. 1423; Code, s. 837; C. S. 1477.)

Cross Reference.—See §§ 7-121, 7-124 and notes.

"Real Estate" Defined.—The words "real estate" in this section mean freehold estate. Foster v. Perry, 77 N. C. 160, 162.

Alienation in Writing Not Required.—It is not necessary that an allegation in writing that the title to real estate is in controversy be made. Edwards v. Cowper, 99 N. C. 421, 422, 6 S. E. 792. But the trial will proceed until it is apparent that this is true. McDonald v. Ingram, 124 N. C. 272, 32 S. E. 677.

Duty of Justice to Dismiss Action.—When it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action. Hudson v. Hodge, 139 N. C. 358, 51 S. E. 955.

Stated in Nesbitt v. Turrentine, 83 N. C. 536, 537; Wright v. Harris, 116 N. C. 460, 17 S. E. 69.

§ 7-126. Another action in Superior Court.—When an action, before a justice, is dismissed upon answer, and proof by the defendant, that the title to real estate is in controversy in the case,
the plaintiff may prosecute an action for the same cause in the superior court, and the defendant shall not be admitted in that court to deny the jurisdiction by an answer contradicting his answer in the justice's court. (Rev., s. 1423; Code, s. 838; C. S. 1478.)

Purpose of Section.—The last clause of this section was passed to prevent the hardship, which would necessarily arise if the defendant could have action dismissed by a magistrate on his plea that title to real estate is in question, and then, when suit is brought by the same plaintiff for the same cause of action in the superior court, he should be allowed to plead that title to the land did not come in controversy, and have the cause dismissed there. To prevent such absurdity this statute was passed, so that if, on defendant's motion, it is adjudged in the magistrate's court that title to the land did not come in controversy, such finding shall be conclusive between same parties in the new action. Peck v. Calhoun, 104 N. C. 425, 10 S. E. 511.

Dismissal upon Answer Essential.—Recourse may not be had to the provisions of this section where it does not appear that the action before the justice was dismissed upon answer and proof by defendant that the title to real estate was in controversy. Brown v. Sutherlaut, 142 N. C. 225, 59 S. E. 108. See also, note of Evans v. Williamson, 79 N. C. 87, under section 7-124.

Where, however, there is a failure to file the written answer with the defendant, the magistrate may enter judgment for the plaintiff upon such answer in the superior court and denying jurisdiction. Evans v. Williamson, 79 N. C. 87.

§ 7-127. Justice may act anywhere in county.—A justice of the peace may issue a summons or other process anywhere in his county, but he shall not be compelled to try a case in the township for which he was elected or appointed. (Rev., s. 1425; Code, s. 824; C. S. 1479.)

Issuance of Process When Justice Out of Township.—A justice may issue process while he is anywhere in his county, provided he hears the matter in his own township. Dictum in Davis v. Sanderlin, 119 N. C. 84, 87, 25 S. E. 815.

§ 7-128. Punishment for contempt in certain cases.—If any person shall profanely swear or curse in the hearing of a justice of the peace, holding court, the justice may commit him for contempt, or fine him not exceeding five dollars. (Rev., s. 1426; Code, s. 848; R. C. c. 115; 1741, c. 50; C. S. 1460.)

Cross References.—As to courts and officers empowered to punish for contempt, see § 5-8. As to penalty of witness refusing to testify in action against railroad before a justice of the peace, see § 7-146.

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

(Rev., s. 1427; Const., Art. 4, s. 27; Code, s. 892; 1859, c. 504, s. 2; C. S. 1481.)

Cross References.—As to jurisdiction of justice of peace to require defendant to enter recognition to keep the peace, see § 15-32. For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note.—This section must be construed in connection with section 7-63 which defines the jurisdiction of the inspector of justice, to which reference is made. See State v. Cunningham, 94 N. C. 824, 826; see also note of this case under section 7-63, analysis line, "Criminal Actions," IV.

Generally.—Until the expiration of six months (twelve) from the commission of the offense justices of the peace have exclusive jurisdiction of all misdemeanors where the punishment cannot exceed a fifty-dollar fine or thirty days imprisonment; after the expiration of the six months (twelve) their jurisdiction is concurrent with that of the superior court. State v. Roberts, 98 N. C. 756, 3 S. E. 682.

Concurrent Jurisdiction.—In criminal actions, as in civil actions, although the justice of the peace has been given "exclusive" original jurisdiction in certain instances, other courts have been granted jurisdiction concurrent with that of the justice of the peace. See, for example, §§ 7-190 and 7-220.

Constitutionality.—This section is constitutional. State v. Johnson, 64 N. C. 581.

Legislative Power.—It is not competent for the Legislature to confer upon justices of the peace jurisdiction of which the punishment by law may exceed the limit as fixed by this section (and the Constitution). State v. Fesperman, 118 N. C. 770, 13 S. E. 14.

Where Punishment Unlimited.—Where the punishment under the particular statutes under which the defendant is being tried is unlimited or is not limited to a fine of $50, or imprisonment for thirty days, it is not a case within the jurisdiction of the justice of the peace. State v. Addington, 121 N. C. 535, 27 S. E. 968.

Pleading.—In the case falling within the provisions of this section the pleadings must show affirmatively everything necessary to constitute the jurisdiction relied upon. State v. Johnson, 64 N. C. 581.

Same.—When Jurisdiction Concurrent.—It is not necessary for a bill of indictment charging assault with a deadly weapon, or with intent to commit rape, to show affirmatively that the jurisdiction of the superior court has been exercised in the manner in which it was used. State v. Sinclair, 120 N. C. 603, 27 S. E. 77.

It is material to show whether or not a deadly weapon was used because it is a material fact in deciding whether the jurisdiction of the superior court has jurisdiction. State v. Murphy, 101 N. C. 697, 701, 5 S. E. 142.

Same.—Where Question of Law or Fact.—Whether the weapon used was a deadly weapon is a question of law, where there is no dispute about the facts. State v. Sinclair, 120 N. C. 603, 27 S. E. 77. But where the deadly character of the weapon is to be determined by the relative size and condition of the parties and their armament, when the weapon was deadly is a question of fact. State v. Archbell, 139 N. C. 537, 51 S. E. 538.

Serious Damage.—The serious injury as used in this section must be such physical injury as gives rise to great bodily pain; mental anguish alone is not serious injury within the meaning of this provision. State v. Nash, 19 N. C. 623, 11 S. E. 874.

Where it was shown that the defendant assaulted the prosecuting witness with his fist, knocked him down, jumped on him and beat him in a cruel manner, stunning him and inflicting injuries, but it did not appear that the injuries were permanent, it was held, that this was "serious damage," and a justice of the peace had no jurisdiction of the offense. State v. Shelly, 98 N. C. 673, 4 S. E. 530.

Same.—Manner of Excepting.—Exception to the jurisdiction of the superior court, or that no serious damage was done,
or no deadly weapon was used, and six months (now twelve) had not elapsed, should be made, not by a motion to quash or in arrest of judgment, but by a prayer for instruction to the jury to acquit. State v. Earnest, 98 N. C. 740, 4 S. E. 495.

And it may be also taken advantage of under a plea of not guilty. State v. Reaves, 8 N. C. 553; State v. Berry, 87 N. C. 60.

Simple Assault.—In a case of simple assault where no deadly weapon is used and no serious damages inflicted, a justice of the peace has jurisdiction. State v. Johnson, 94 N. C. 83.

Upon the trial of an indictment for simple assault, the superior court prima facie has jurisdiction, but it is open to the defendant to show that the offense was committed within six months (now twelve) of the finding of the bill. State v. Earnest, 98 N. C. 740, 4 S. E. 495.

Same — Former Conviction and Acquittal. — A plea of former conviction or acquittal before a justice of the peace for a deadly weapon or inflicted serious injury, in which case, the latter that the defendant making the plea had, in fact, used a deadly weapon or inflicted serious injury, in which case, the justice not having jurisdiction, the proceedings before him would be a nullity. State v. Hibbertson, 113 N. C. 633, 18 S. E. 321.

Under this section a magistrate has original jurisdiction of simple assault and on appeal from an acquittal a plea of former jeopardy is good. State v. Myrick, 292 N. C. 688, 288 S. E. 803.


Art. 16. Dockets.

§ 7-130. Justice shall keep docket.—A civil and a criminal docket shall be furnished each justice, at the expense of the county, by the board of county commissioners, in which shall be entered a minute of every proceeding had in any action before such justice. (Rev., s. 1416; Code, s. 831; C. S. 1482.)

Not a Court of Record.—A justice's court is not a court of record. Smith Building, etc., Co. v. Pender, 173 N. C. 55, 91 S. E. 524; Williams v. Bowling, 111 N. C. 295, 16 S. E. 179.

This has been the ruling in a great number of cases but in Harris v. Singlelter, 391 N. C. 583, 587, 137 S. E. 724, it is intimated that under the requirements of this section, a justice's court is partly one of record.—Ed. Note.

While the court of a justice of the peace is not a court of record, nevertheless, its judgments are conclusive until reversed, modified or vacated in some proceeding instituted for that purpose; and such court has the same jurisdiction as a superior court to vacate judgments rendered by it as superior courts possess over judgments rendered by them. Whitehurst v. Transportation Co., 109 N. C. 342, 13 S. E. 937.

While the courts of justices of the peace are not, strictly speaking, courts of record, their powers and exercise may manifest the powers of such tribunals. Bailey v. Hester, 101 N. C. 538, 540, 8 S. E. 164.

§ 7-131. Entries to be made.—The justice shall enter all his proceedings in a case tried before him in his docket. No part of such proceedings must be entered on the summons, on the pleadings, or on any other paper in the case. (Rev., s. 1470; Rule 14; Code, s. 840; Rule 13; C. S. 1483.)

Fince of Docketing. — A judgment of a justice of the peace, not docketed within a year from the date of its rendition, is dormant and its lost validity can not be restored by docketing the same in the superior court, but only by a new action upon it. Cowen v. Withrow, 114 N. C. 558, 559, 12 S. E. 647.

§ 7-132. Dockets filed with clerk.—Each justice of the peace, as often as he has filled his docket, shall file the same with the clerk of the superior court for his county. (Rev., s. 1417; Code, s. 827; C. S. 1484.)

§ 7-133. Dockets, papers, and books delivered to successor.—When a vacancy exists, from any cause, in the office of a justice of the peace, whose docket is not filed, or when such justice goes out of office by expiration of his term, such former justice, if living, and his personal representative, if dead, shall deliver such docket, all law and other books furnished him as a justice of the peace, and all official papers, to the clerk of the superior court for his successor, who is authorized to hear and determine any unfinished action on said docket, in the same manner as if such action had been originally brought before such successor. (Rev., s. 1418; Code, s. 828; 1885, c. 372; C. S. 1485.)

Art. 17. Fees.

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

Justices of the peace in the counties of Montgomery, Onslow, Macon, Swain, Greene, Hyde, Cherokee, Rowan, Anson, Bertie, Nash, Chowan, Alamance, Wake, Transylvania, Watauga.
Pender, Lee, Lenoir, Perquimans, Rockingham, Stokes, Johnston, Halifax, Duplin, Chatham, Forsyth, Wilkes, Gates, Tyrrell, Brunswick, Stanly, Columbus, Edgecombe, Franklin, Vance, Mitchell, Orange, Buncombe, Jackson, Alexander, McDowell, Clay, Hertford, Davidson, Northampton, Wayne, Jones, Cabarrus, Rob- enson, Richmond, Randolph, Polk, Henderson, Harnett, Bladen, Burke, Granville, Person, Haywood, Caldwell, Cumberland, and Madison shall receive the following fees, and none other:

For attachment with one defendant, thirty-five cents, and if more than one defendant, fifteen cents for each additional defendant; transcript of judgment, fifteen cents; summons, thirty cents; if more than one defendant in the same case, for each witness, fifteen cents; trial when issues are joined, one dollar; and if no issues are joined, then a fee of fifty cents for trial and judgment; taking an affidavit, bond, or undertaking, or for an order of publication, or an order to seize property, thirty-five cents; for jury trial and entering verdict, one dollar; execution, thirty-five cents; renewal of execution or order of garnishment of property, thirty-five cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, seventy-five cents; warrant of commitment, fifty cents; taking deposition or order of commission, per one hundred words, fifteen cents; garnishment for taxes and making necessary return and certificate of same, thirty-five cents. (Rev., s. 2788; Code, ss. 2135, 37-18; 1870-1, c. 130, s. 9; 1883, c. 368, 1885, c. 86; 1903, c. 225; 1907, c. 967; 1917, c. 260; 1921, c. 113; Ex. Sess. 1921, cc. 38, 64, 67; 1923, cc. 98, 114, 238; 1929, cc. 13, 59, 1931, cc. 51, 303; C. S. 3923.)

Local Modification.—Henderson: c. 194, s. 324; Jones: c. 1943, c. 315, s. 2; Orange: c. 1935, s. 358; Wake: c. 1937, c. 136; 1941, c. 165; Westminster: c. 1927, e. 166.

Editor’s Note.—The amendment of 1935 added Caldwell and Onslow Counties. The Acts of 1931 added Cumberland and Person Counties.

The fee of the recorder of a city who is ex officio justice of the peace for the trial of an offense should, in proper instances, be taxed against the defendant as a part of the costs, upon the trial in the superior court, upon appeal. State v. Lord, 145 N. C. 479, 59 S. E. 656.


§ 7-135. Action begun by summons.—Civil actions in these courts shall be commenced by the issuing of a summons. (Rev., s. 1444; Code, s. 830; 1869-9, c. 159, s. 9; C. S. 1486.)

Cross Reference.—As to summons and process generally, see § 1-88 et seq.

Service by Publication.—In attachment and publication on a nonresident defendant before a justice of the peace, where defendant’s property within the jurisdiction of the court has been levied on, a summons is not required. Mills v. Hansel, 168 N. C. 631, 85 S. E. 17. As to service by publication generally, see § 1-98 and the notes thereto.

§ 7-136. Issuance and contents of summons.—The summons shall be issued by the justice and signed by him. It shall run in the name of the state, and be directed to any constable or other lawful officer, commanding him to summon the defendant to appear and answer the complaint of the plaintiff at a place, within the county, to be therein specified, and at a time to be therein named, not exceeding thirty days from the date of the summons. It shall also state the sum demanded by the plaintiff or the value of the property sued for, where specific property is claimed. (Rev., s. 1445; Code, s. 832; 1874-5, c. 294; C. S. 1487.)

To Whom Directed.—The summons in a civil action before a justice of the peace must be directed to "any constable or other lawful officer." McKee v. Angel, 90 N. C. 60, 62.

Special Officer.—A special officer may be deputized to serve the summons issued by a justice of the peace, where the sheriff and coroner are interested. Baker v. Brem, 127 N. C. 322, 57 S. E. 454.

Signing.—Where a justice of the peace, because of bad faith, requests his secretary to sign his name to the summons, which she does in his presence and under his supervision, the summons is valid, and when the summons is issued in an action in arrest and bail and defendant is later arrested for his property unsatisfied, the manner of the issuance of the summons will not support an action for false imprisonment. Johnson v. Chambers, 219 N. C. 769, 14 S. E. (2d) 789.

Amount Must Be Stated.—In an action before a justice of the peace, if on contract, the summons should state the amount demanded, if for a tort, it should state the amount of damages claimed, and if for the recovery of specific property, the value of the property, and such statement in the summons gives the justice prima facie jurisdiction. Noville v. Dew, 94 N. C. 45, 44. A defect in this particular will not be cured by the insertion of the necessary averment in the subsequent process. Leathers v. Morris, 101 N. C. 184, 187, 7 S. E. 783.

Same—Omission by Inadvertence.—Where it is made to appear that the court would have jurisdiction if the summons had contained the proper averments, but the omission was caused by mistake or inadvertance, it may, pending the action, permit the necessary amendment. Leathers v. Morris, 101 N. C. 184, 187, 7 S. E. 783.

Same—Conclusiveness as Fixing Jurisdiction.—Where the amount claimed in the summons issued by a justice was $200, and no other complaint was filed, and the amount asserted in evidence amounted to $242, it was held that if the plaintiff stated that he remitted the excess over $200, it was sufficient that the justice had jurisdiction. Cromer v. Marsh, 122 N. C. 563, 29 S. E. 836. See section 7-63, analysis line, "Previous amendment." II, p. 61.

Failure to Serve Summons.—A summons issued by a justice and summons and warrant of attachment, and publication of the warrant was made, but the summons was not served, a judgment rendered thereon is void for insufficiency of service of summons. Ditmore v. Goins, 128 N. C. 325, 29 S. E. 61.

After Thirty Days.—When personal service of summons in attachment cannot be made for the absence from the county of a nonresident defendant having property therein, publication of summons is sufficient if made after the expiration of thirty days subsequent to service of attachment—in this case, one day thereafter—computed from the time of granting the attachment. Mills v. Hansel, 168 N. C. 631, 85 S. E. 17.

Presumption as to True Date.—A summons is presumed to be the true date of its issue, but it is competent to show that it was not in fact then issued. Currie v. Hawkins, 118 N. E. 593, 594, 24 S. E. 476.

§ 7-137. Service and return of summons.—The officer to whom the summons is delivered shall execute the same within five days after its receipt by him or immediately, if required to do so by the plaintiff. Before proceeding to execute it, he must be entitled to require of the plaintiff his fees for the service. When the service is made, he shall immediately return the summons, with the date and manner of the service, to the justice who issued the same. (Rev., s. 1446; Code, s. 833; C. S. 1488.)

Cross References.—See §§ 7-136, 7-137 and notes. As to summons and process generally, see § 1-88 et seq. and notes.

In General.—The same requirements as to a proper service of summons in a civil action issuing from the court of a justice of the peace, must be observed by the process officer as from the superior court, section 7-149, Rule 16, and where a copy thereof is not served at the time of its reading to the defendant, the service is invalid, and the action will be dismissed on special appearance and motion, when the defendant has preserved this right by a like motion in

To Whom Returnable.—A summons issued by one justice of the peace cannot be made returnable before another (except in cases of bastardy). Williams v. Bowling, 111 N. C. 295, 296, 16 S. E. 176.

§ 7-138. Process issued to another county.—No process shall be issued by any justice of the peace to any county other than his own, unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside in the county of which the suit shall be entered, in which case, only, he may issue process to any county in which any nonresident defendant resides. (Rev., s. 1447; Code, s. 871; 1876-7, c. 287; C. S. 1489.)

In General. — This section being a restricted legislative grant of power when exercised, must be strictly pursued. Durham, etc., Co. v. Marshburn, 122 N. C. 411, 414, 29 S. E. 411. See also, Fishier v. Bullard, 109 N. C. 574, 13 S. E. 793.

The language of the statute would seem to make the question of jurisdiction, or the right to serve process on a defendant outside the county of the justice, to depend somewhat upon the good faith of the plaintiff in joining the defendants as parties. In certain cases, perhaps, it may be so plain that the plaintiff has no real or bona fide claim against the defendant, who is a resident of the county in which the suit is pending, that the question of misjoinder may be presented as one of law. Marler v. Wadesboro Clothing Co., 150 N. C. 519, 64 S. E. 366.

Amendment as to Resident Defendant.—Where the summons is directed to a resident of a county other than his own, and the defendant resides in the county, and on the trial the summons was amended on striking out the name of the resident defendant, it was held, that the justice should dismiss the action. Wooten v. Maultsby, 69 N. C. 462.

To Whom Addressed.—When a justice of the peace issues process for nonresident defendants, it must be issued (addressed) to the officer of the county where it is to be served. Durham, etc., Co. v. Marshburn, 122 N. C. 411, 414, 29 S. E. 411.

Section Not Applicable to Foreign Corporations.—It is not applicable to foreign corporations. Fleming Co. v. Southern R. R., 145 N. C. 37, 58 S. E. 793.

The Municipal Court of the city of Greensboro has no jurisdiction under chapter 128, Private Laws of 1931, to determine a cause upon a contract, involving less than $200.00, when the sole defendant is not a resident of Guilford County, and summons is served in Lee county as this section and § 7-139 are applicable. Miles Co. v. Powell, 205 N. C. 30, 169 S. E. 828.

§ 7-139. Civil process in inferior courts.—The process of any recorder's court, county court, or court of the justices of the peace, where the suit is pending, that the question of misjoinder arising therefrom may be presented as one of law. Marler v. Wadesboro Clothing Co., 150 N. C. 519, 64 S. E. 366.

Amendment as to Resident Defendant.—Where the summons is directed to a resident of a county other than his own, and the defendant resides in the county, and on the trial the summons was amended on striking out the name of the resident defendant, it was held, that the justice should dismiss the action. Wooten v. Maultsby, 69 N. C. 462.

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Application.—This section applies only where a justice's summons has been issued against a defendant residing in another county. Williams v. Iron Belt, etc., Association, 151 N. C. 597, 42 S. E. 697.

§ 7-140. Endorsement of process to another county.—In all civil actions in courts of justices of the peace where one or more of the defendants may reside in a county other than that of the plaintiff, it shall be lawful for the clerk of the superior court of the county in which the action is brought to certify, under the seal of his court, on the process or a duplicate thereof, that the justice of the peace who issued the same is an acting justice of the peace in his county. And in all such cases it shall be the duty of any sheriff or constable to whom it may be directed to certify, under the seal of his court, on an entry of the date of its reception, and to execute and deliver any process as provided for the service of civil process in courts of justices of the peace, and return it by mail to the justice of the peace from whose court it issued. (Rev., s. 1450; Code, s. 873; 1870-1, c. 60, s. 2; C. S. 1492.)

Cross Reference.—See §§ 7-138, 7-190 and notes.

§ 7-141. Certificate of clerk on process for another county.—In all cases referred to in § 7-140 it shall be lawful for the clerk of the superior court of the county in which the action is brought to certify, under the seal of his court, on the process or a duplicate thereof, that the justice of the peace who issued the same is an acting justice of the peace in his county. And in all such cases it shall be the duty of any sheriff or constable to whom it may be directed to certify, under the seal of his court, on an entry of the date of its reception, and to execute and deliver any process as provided for the service of civil process in courts of justices of the peace, and return it by mail to the justice of the peace from whose court it issued. (Rev., s. 1450; Code, s. 873; 1870-1, c. 60, s. 2; C. S. 1492.)

Cross Reference.—See §§ 7-138, 7-190 and notes.

§ 7-142. Judgment against defendant in another county.—No justice of the peace shall enter a judgment under §§ 7-140 and 7-141 against any defendant who may be a nonresident of his county, unless it shall appear that the process was duly served upon him at least ten days before the return day of the same. (Rev., s. 1451; Code, s. 874; 1876-7, c. 57; C. S. 1493.)

Section Not Jurisdictional.—The provision of this section, that a justice of the peace shall not enter a judgment against a nonresident defendant unless it shall appear that process was duly served at least ten days before the return day, is not jurisdictional; and where, upon special appearance of defendant for the purpose of dismissing the action, he was given more than ten days thereafter to answer or defend, which he refused to do, the justice's judgment will not be disturbed. Bank v. Carlile, 174 N. C. 624, 94 S. E. 297.

Application.—This section applies only where a justice's summons has been issued against a defendant residing in another county. Williams v. Iron Belt, etc., Association, 151 N. C. 597, 42 S. E. 697.

§ 7-143. Service on foreign corporation.—Whenever any action of which a justice of the peace has jurisdiction shall be brought against a foreign corporation, which corporation is required to maintain a process agent in the state, the summons may be issued to the sheriff of the county in which such process agent resides, and when certified under the seal of his office by the clerk of the superior court of the county in which the justice issuing such summons resides to be under the hand of such justice, the sheriff of the county to which such summons shall be issued shall serve the same as in other cases and make due return thereof. No justice of the peace shall enter a judgment in such cases against any such foreign corporation unless it shall appear that the process was duly served upon such process agent at least twenty days before the return day of the same. The summons may be made returnable at a time to be therein named, not exceeding forty days from the date of such summons: Provided, this section shall not apply to actions commenced in a county where the defendant has an officer or agent upon whom process may be served: Provided, that when any foreign corporation has no process agent in this state, but has an agent to whom process may be served, such process may be served upon him at any place in this state at which he is found. Provided further, that when the process is served upon a process agent within the terms of this section, and that this proviso shall apply to existing claims as well as those arising hereafter. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides in this state, or when it cannot be made personally within the state upon the president, treasurer, or secretary thereof. (Rev.,
§ 7-144. Attendance of witnesses.—The justice, on application of either party, shall, by a subpoena or by an order in writing, on the process, direct the constable or other officer to summon witnesses to appear and give testimony at the time and place appointed for the trial. Each witness failing to appear shall forfeit and pay eight dollars to the party at whose instance he was summoned, and shall be further liable to such party for all damage sustained by nonattendance. The fine herein imposed may be recovered, on motion, before the justice who tried the action, unless the witness on a notice of five days, by affidavit or other proof, show sufficient excuse for his failure to attend. (Rev., s. 1458; Code, s. 847: C. S. 1495.)

Cross Reference.—As to power to punish for contempt, see §§ 5-6, 5-8.

In General.—The power to punish for contempt is inherent in all courts and is essential to their existence. State v. Aiken, 113 N. C. 651, 653, 18 S. E. 690.

Duty to Attend Court.—The duty of attending court in obedience to a subpoena is incident to citizenship. State v. Massey, 104 N. C. 579, 16 S. E. 698.

No Bond Authorized.—A justice of the peace is not authorized to put a witness under bond to appear at a subsequent trial before the justice. Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 434, 40 S. E. 191.

§ 7-145. Subpoena issued to another county.—The justice of the peace, in all civil cases, may issue subpoenas to counties other than their own; such subpoenas shall be authenticated by the same manner as provided by law for the authentication of process. When so authenticated the sheriff, constable or other officer to whom the same is directed shall execute and return the same as provided for the return of process: Provided, that where witnesses attend in counties other than their own under such subpoena they shall receive the same per diem and mileage as witnesses who attend the superior courts: Provided further, that before issuing such subpoenas the party wanting the same may show by affidavit that the want of such subpoena will debar the party from appearing at a subsequent trial before the justice. Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 434, 40 S. E. 191.

§ 7-146. Subpoena duces tecum in case against railroad.—When any action is brought against a railroad company before a justice of the peace, the justice before whom such action is made returnable shall have power to issue a subpoena to any railroad company within the limits of the state, commanding the president or any officer, director, agent, or any one in the employment of such company, to appear before him at the time and place of trial and to produce such books, cards and other papers as the justice shall deem proper, and to give evidence in said cause; and each witness summoned as aforesaid failing or refusing to appear and testify and produce the books and papers aforesaid in obedience to such writ shall be deemed guilty of a contempt of court and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 1455; 1885, c. 221, s. 2; C. S. 1497.)

Art. 19. Pleading and Practice.

§ 7-147. Removal of case.—In all proceedings and trials, both criminal and civil, before justices of the peace, the justice before whom the writ or process is returnable shall have jurisdiction to remove the cause, and to determine whether either party to the action before evidence is introduced, move the same to some other justice residing in the same township, or to the justice of some neighboring township if there be no other justice in said township; but no cause shall be more than once removed. (Rev., s. 1455; Code, s. 907; 1880, c. 15; 1883, c. 66; 1917, c. 48; C. S. 1498.)

Local Modification.—Mecklenburg: 1933, c. 278.

Cross Reference.—For statutes authorizing removal to inferior court other than that of another justice of the peace, see §§ 7-224, 7-274, 7-374, 7-475.

Duty of Justice.—It is the duty of a justice of the peace, upon affidavit and motion (now a written request) for a removal being filed, to remove the case to another justice residing in the same township, State v. Iive, 118 N. C. 1227, 24 S. E. 539; and if there be no other justice in the same township he can remove the case to the justice of a neighboring township.

Same.—Removal to Improper Justice.—If the case is removed to a justice of a neighboring township when there is another justice in the same township in which the action is commenced, the justice to whom the case is thus removed has no jurisdiction, and his judgment is void. State v. Iive, 118 N. C. 1227, 24 S. E. 539; State v. Warren, 100 N. C. 489, 490, 492, 5 S. E. 662.

Not Applicable to Mayor's Court.—The provisions of this section apply only to courts of justice of the peace and in a prosecution for violation of a town ordinance before a mayor, the defendant is not entitled to a removal. State v. Joyner, 127 N. C. 541, 37 S. E. 201.

§ 7-148. Removal in case of death or incapacity.—If any justice of the peace dies or becomes incapacitated by removal, resignation or other cause, having any action, civil or criminal, pending before him, which has not been finally determined, such action shall not be discontinued, but the plaintiff in such civil action, and any one on behalf of the state in such criminal action, may remove such action for further and final determination before any other justice of the peace of the same township in which the original action was pending, or before any justice of the peace of the same county when there is no other in the township, by filing the papers in said action with the justice to whom the same is removed and by giving ten days notice to the defendant of such removal; and if the plaintiff in any civil action shall fail to give such notice of removal within ten days from the happening of the death, removal, or resignation, or incapacity of such justice, then the defendant in such action may remove the same by giving like notice to the defendant; and if no notice is given by either party to such action within twenty days, then such action shall stand discontinued without prejudice.

The justice of the peace before whom such action may be removed shall proceed to try and determine the same, but he shall demand no fees or costs which have theretofore been properly advanced by any party to such action. After such removal either party shall be entitled to all the rights
given in § 7-147. (Rev., s. 1456; 1905, c. 121; C. S. 1499.)

Cross Reference.—For statutes authorizing removal to inferior court other than that of another justice of the peace, see §§ 7-224, 7-239, 7-374, 7-457.

§ 7-149. Rules of practice: Rule 1, Pleadings. The pleadings in these courts are—
1. The complaint of the plaintiff.
2. The answer of the defendant. (Rev., s. 1457; Code, s. 840; C. S. 1500.)

Rule 2. Complaint. The complaint must state, in a plain and direct manner, the facts constituting the cause of action. (Rev., s. 1459; Code, s. 840, Rule 3; C. S. 1500.)

Generally.—When the parties come to trial in a justice's court, the justice should require the plaintiff to state in a plain and direct manner the facts constituting the cause of action. Smith v. Newberry, 140 N. C. 385, 53 S. E. 244.

Where two causes of action were set forth in a warrant before a justice of the peace (treated as a complaint), the judge properly submitted the issue upon the cause of action which was sustained by the evidence. Smith v. Newberry, 140 N. C. 385, 53 S. E. 244.

Rule 3. Answer. The answer may contain a denial of the complaint of any part thereof, and also a statement, in a plain and direct manner, of any facts constituting a defense or counterclaim. (Rev., s. 1460; Code, s. 840, Rule 4; C. S. 1500.)

The pendency of another action for the same cause, may be set up in the answer, with other defenses, and any issue arising thereon may be submitted at the same time as the others growing out of the pleadings, with instructions to the justice that, if found for the defendant, the others need not be considered. Montague v. Brown, 104 N. C. 161, 10 S. E. 92.

Same—Waiver.—Unless this defense is set up in the answer or in some way insisted on, before the trial on the merits, it will be considered as waived. Blackwell v. Dibrell Bros. & Co., 103 N. C. 270, 9 S. E. 192.

Rule 4, Demurrer. Either party may demur to a pleading of his adversary, or to any part thereof, when it is not sufficiently explicit to enable him to understand it, or contains no cause of action or defense, although it be taken as true. (Rev., s. 1461; Code, s. 840, Rule 11; C. S. 1500.)

Rule 5, Order on demurrer. If the justice deems the objection well founded, he shall order the pleading to be amended on such terms as he may think just; and if the party refuse to amend, the defective pleading shall be disregarded. (Rev., s. 1462; Code, s. 840, Rule 12; C. S. 1500.)

Rule 6, Pleadings, oral or written. The pleadings may be either oral or written; if oral, the substance must be entered by the justice on his docket; if written, they must be filed by the justice, and a reference to them be made on his docket. (Rev., s. 1458; Code, s. 840, Rule 2; C. S. 1500.)

In General.—While we liberally construe pleadings filed in the court of a justice of the peace, they must substantially conform to the statutory requirements, i. e., there shall be a complaint and answer; if oral, the justice may enter the substance on his docket, and, if written, the pleadings may be filed and reference made to them on the docket; the answer may state the facts constituting a defense or counterclaim. Baxter v. Irvine, 155 N. C. 277, 73 S. E. 883.

Written Pleadings.—Where the parties to an action before a justice of the peace have elected to file written pleadings, the rule that material allegations in the complaint not denied by the answer shall be admitted. Parker v. Horton, 176 N. C. 143, 96 S. E. 998.

Oral Pleadings.—In actions before justices of the peace the pleadings may be oral, but if so, the substance of them must be entered on the docket, and contain, in a plain and distinct manner, the ground of the action; and if the facts relied on as a defense be new matter, notice of them also, must be given on the docket, in a plain and direct manner. Montague v. Brown, 104 N. C. 161, 10 S. E. 92.

Applied in Home Bldg., etc., Ass'n v. Moore, 207 N. C. 151, 177 S. E. 303.

Rule 7. No particular form for pleadings. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is meant. (Rev., s. 1463; Code, s. 840, Rule 5; C. S. 1500.)

Technical Accuracy Not Required.—The pleadings in a justice's court need not be in any particular form or drawn with technical accuracy, but are sufficient if they "enable a person of common understanding to know what is meant," and they may not "be quashed or set aside for want of form, if the essential matters are set forth thereon," and ample powers are given the Court to amend either in substance or form, at any time before or after judgment in the trial of a cause should be liberally construed so as to prevent a failure of justice because of mere informality or irregularity, especially when the case is tried before a justice of the peace, where this section expressly provides that the pleadings are not required to be in any particular form and are sufficient when they "enable a person of common understanding to know what is meant." Wilson v. Batchelor, 182 N. C. 92, 108 S. E. 355.

Rule 8. No judgment by default. Where a defendant does not appear and answer, the plaintiff must still prove his case before he can recover. (Rev., s. 1464; Code, s. 840, Rule 6; C. S. 1500.)

Rule 9, Action on account or note. In an action or defense, founded on an account, or an instrument for the payment of money only, it is sufficient for a party to deliver the account or instrument to the justice and state that there is due him thereon from the adverse party a specified sum, which he claims to recover or set off. (Rev., s. 1465; Code, s. 840, Rule 7; C. S. 1500.)

Note for Purchase of Land.—Where an action to recover interest due upon a note, according to its terms, is cognizable in the court of a justice of the peace, his jurisdiction is not ousted by reason of the note having been executed for the purchase of land. Parker v. Horton, 176 N. C. 143, 96 S. E. 994.

Rule 10, Account or demand exhibited. The justice may at the joining of issue require either party, at the request of the other, at that or some other specified time to exhibit his account or demand, or state the nature thereof as far as may be in his power; and in case of his default, the justice shall preclude him from giving evidence of such parts thereof as have not been so exhibited or stated. (Rev., s. 1469; Code, s. 840, Rule 10; C. S. 1500.)

Rule 11, Variance. A variance between the pleadings and the allegations in a pleading shall be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled to his prejudice thereby. (Rev., s. 1466; Code, s. 840, Rule 8; C. S. 1500.)

Rule 12, No process quashed for want of form. No process or other proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the fur-

1—32 [497]
§ 7-149

CH. 7, COURTS—JUSTICES OF THE PEACE § 7-149

therance of justice, on such terms as shall be deemed just, at any time either before or after judgment. (Rev., s. 1467; Code, s. 908; R. C., cc. 3, 62, s. 92; 1794, c. 414; C. S. 1500.)

Docket Incomplete.—In bastardy proceedings the justice of the peace before whom the trial is had shall take the denial of the defendant and file it in the docket before passing the case to the next officer, and not on the docket in such respect the Superior Court judge on appeal should allow the denial to be entered nunc pro tunc.

State v. Currie, 161 N. C. 275, 76 S. E. 694.

In State v. Mills, 181 N. C. 530, 533, 106 S. E. 677, the court said: "A clear analysis of this section (which was sec. 1399 of the Code) is made by Justice Ashe in State v. Vaughan, 91 N. C. 532, showing that the exercise of the power is discretionary, and that the power itself, by gradual amendment of the statute, is very extended to matters of form and substance, whereas formerly it related only to matters of form and was confined to civil actions."

Applicable to Final Judgments Only.—Our statutes requiring a motion for a rehearing before a justice of the peace within ten days, etc., this section, rule 12, and § 7-379, allowing fifteen days for appeal from the justice's judgment, etc., apply to final judgments regularly entered, and not judgments irregularly taken upon defective service, or void for lack of service of summons on the defendant, or other proper process to bring him before the court.


Power Not Reviewable. — The discretionary power to amend a justice warrant in a criminal action, in a different offense in substance from that at first intended. (Rev., s. 1468; Code, s. 840, Rule 9; C. S. 1500.)

Nature of Amendment Allowable.—The superior court has the power to amend a justice warrant in a criminal action, in form or substance, but the amendment must not change the nature of the offense intended to be charged so as to charge a different offense in substance from that at first intended.


Amendment of Indictment.—An indictment before a justice of the peace may be amended by the trial judge properly allowed an amendment discarding the overlapping language of the indictment, when the warrant of arrest of the defendant was defective due to the omission of certain words, it was held to be within the discretion of the court to permit an amendment inserting such words.

State v. Poythress, 174 N. C. 809, 93 S. E. 919.

Words Omitted.—Where a warrant was defective due to the omission of certain words, it was held to be within the discretion of the court to permit an amendment inserting the omitted words.

Laney v. Mackey, 144 N. C. 630, 631, 67 S. E. 386.

Alllegation of Value Omitted.—Where, in an action of account, the defendant alleged a judgment entered against him on the basis of the plaintiff's claim, and not a sum in excess of a counterclaim, Rand v. Harris, 83 N. C. 486.

Money Paid into Court.—Money tendered and deposited with the court by the defendant with costs attached, as a condition of an amendment the payment of costs to the adverse party. (Rev., s. 1468; Code, s. 840, Rule 9; C. S. 1500.)

Money Not Reviewable. — The discretionary power to amend a complaint conferred upon a justice of the peace having jurisdiction of the action is only subject to review by the Superior Court when the amendment substantially changes the nature of the controversy. (Rev., s. 1467; Code, s. 840, Rule 12, Pleadings amended. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when such amendment substantial justice will be promoted.

Holt, 195 N. C. 240, 141 S. E. 585.

Amendment of Indictment.—An indictment before a justice of the peace may be amended by the trial judge upon the return of process and before answer, to the adverse party, in consequence of such an amendment, an adjournment shall be granted.

State v. Lord, 151 N. C. 149, 56 S. E. 386.

Rule 13, Amendments pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when such amendment substantial justice will be promoted.

If the amendment be made after the joinder of the issue, and it appears to the satisfaction of the adverse party, in consequence of such an amendment, an adjournment shall be granted.

Rule 14, Tender of judgment. The defendant may, on the return of process and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceeding had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly.

If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer.


In General.—The tender, made under the provision of this section must be a proposition (made before any defence has been put in) to pay the plaintiff or any person for him, continue such action from time to time for trial; but such continuance shall not exceed thirty days. (Rev., s. 1473; Code, s. 840, Rule 17; C. S. 1500.)

When a justice of the peace continues a criminal action for malicious prosecution upon a request of the prosecuting witness, and more than thirty days has passed without a trial, in which the prosecutor has remained inactive, the criminal proceeding is terminated under rule 15 of this chapter on civil procedure, respecting forms of actions, parties to actions, the times of commencing actions, and the service of process, shall apply to justices' courts.

Winkler v. Lenoir, etc., Rock Lines, 195 N. C. 673, 143 S. E. 213.

Rule 15, Continuance. Any justice before whom an action is brought may, on sufficient excuse therefor shown on the affidavit of either party or any person for him, continue such action from time to time for trial; but such continuance shall not exceed thirty days. (Rev., s. 1473; Code, s. 840, Rule 15; C. S. 1500.)

Cross Reference.—See § 7-135 and notes.

Appointment of Next Friend.—There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in a justice's court, the appointment should be by the Justice of the Peace using the same care and circumstances as in investigating the fitness of the person to be appointed as is required, by the Clerk, in actions properly brought in the Superior Court. Houser v. Bonsal & Co., 149 N. C. 51, 62 S. E. 775.

Rule 17, Attachment proceedings. The chapter on civil procedure is applicable to proceedings by attachment before justices of the peace, in all cases founded on contract wherein the sum demanded does not exceed two hundred dollars, and where the title to real estate is not in controversy. (Rev., s. 1474; Code, s. 853; C. S. 1500.)

Cross Reference.—As to attachments generally, see § 1-440 et seq.

Purpose.—The issuance of a warrant of attachment by a justice of the peace having jurisdiction of the action is only for the purpose of acquiring jurisdiction over a defendant
Chapter 7. Courts—Justices of the Peace

§ 7-150. Parties entitled to a jury trial.—When an issue of fact shall be joined before a justice, on demand of either party thereto, he shall cause a jury of six men to be summoned, who shall try the same.

§ 7-151. Jury trial waived.—A trial by jury must be demanded at the time of joining the issue of fact, and if neither party demand at such time a jury, they shall be deemed to have waived a trial by jury.

Art. 20. Jury Trial

§ 7-150. Parties entitled to a jury trial.—When an issue of fact shall be joined before a justice, on demand of either party thereto, he shall cause a jury of six men to be summoned, who shall try the same.

§ 7-151. Jury trial waived.—A trial by jury must be demanded at the time of joining the issue of fact, and if neither party demand at such time a jury, they shall be deemed to have waived a trial by jury.

The “Due Process” Clause.—The requirements of the Federal Constitution that no person shall be deprived of his property without due process of law does not imply that all disputes involving the right to property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court.

The “Due Process” Clause.—The requirements of the Federal Constitution that no person shall be deprived of his property without due process of law does not imply that all disputes involving the right to property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court.

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§ 7-155. Fees deposited for jury trial.—Before a party is entitled to a jury he shall deposit with the justice the sum of three dollars for jury fees, and the justice shall pay to all persons who attend, pursuant to the summons, as well to those who do not actually serve as to those who do serve, twenty-five cents each, to be included in the judgment as part of the costs, in case the party demanding the jury recover judgment, but not otherwise. The justice shall refund to the party the fees of all jurors who do not attend. (Rev., 1432; Code, s. 869; C. S. 1506.)

§ 7-156. Jury drawn and trial postponed.—When a trial by jury is demanded, the justice shall immediately, in the presence of the parties, proceed to draw the names of twelve jurors from division marked number one of the jury box; and the trial of the cause shall thereupon be postponed to a time and place to be fixed by the justice. (Rev., s. 1433; Code, s. 858; C. S. 1507.)

Constitutional Provisions.—The method by which jurors are to be selected and summoned is not provided for in the constitution; but there is no limitation therein upon the power of the General Assembly to regulate it. State v. Brittain, 143 N. C. 668, 57 S. E. 352.

§ 7-157. Summoning the jury.—A list of the jurors so drawn shall be immediately delivered by the justice to any constable, or other lawful officer, with an order indorsed thereon, directing him to summon the persons named in the list to appear as jurors at the time and place fixed for the trial; and it is the duty of the officer to proceed forthwith to summon such jurors, or so many of them as can be found, according to the order; and he shall make return thereof at the time and place appointed, stating in his return the names of the jurors summoned by him. For performing the aforementioned duties, he shall receive the fee allowed by law for summoning jurors. The preceding sentence shall not apply to the counties of Beaufort, Brunswick, Cabarrus, Edgecombe, Forsyth, Gaston, Gates, Guilford, Halifax, Martin, McDowell, Orange, Pasquotank, Rowan, Transylvania, and Wake. (Rev., s. 1434; Code, s. 859; 1935, c. 309; C. S. 1508.)

§ 7-158. Selection of jury.—At the time and place appointed, and on return of the order, if the trial be not further adjourned, and if adjourned, then at the time and place to which the trial shall be adjourned, the justice shall proceed, in the presence of the parties, to draw from the jurors summoned the names of six persons to constitute the jury for the trial of the issue. (Rev., s. 1435; Code, s. 860; C. S. 1509.)

§ 7-159. Challenges.—Each party shall be entitled to challenge, peremptorily, two of the persons drawn as jurors. (Rev., s. 1436; Code, s. 861; C. S. 1540.)

§ 7-160. Names returned to the jury box.—The scrolls containing the names of jurors not summoned, if any, and of those summoned but not drawn, and of those drawn but challenged and set aside, must be returned by the justice to his jury box, in division marked number one: Provided, that the scrolls containing the names of such as are not legally liable or legally qualified to serve as jurors shall be destroyed. (Rev., s. 1437; Code, s. 865; C. S. 1511.)

§ 7-161. Names of jurors serving.—The scrolls containing the names of the jurors who serve on the trial of an issue must be placed in the jury box in division marked number two, until all the scrolls in division marked number one have been drawn out. As often as that may happen, the whole number of scrolls shall be returned to division marked number one, to be drawn out as in the first instance. (Rev., s. 1441; Code, s. 868; C. S. 1512.)

§ 7-162. Tales jurors summoned.—If a competent and indifferent jury is not obtained from the twelve jurors drawn, as before specified, the justice may direct others to be summoned from the bystanders, sufficient to complete the jury. (Rev., s. 1438; Code, s. 863; C. S. 1513.)

§ 7-163. No juror to serve out of township.—No person is compelled to serve as a juror in a justice's court out of his own township, except as a talesman. (Rev., s. 1439; Code, s. 867; C. S. 1514.)

§ 7-164. Additional deposit for jury fees on adjournment. — No adjournment shall be granted after the return of the jury, unless the party asking the same shall, in addition to the other conditions imposed on him by law or by the justice, deposit with the justice, to be immediately paid to the jurors attending, the sum of twenty-five cents each, such amount to be in no case included in the judgment as part of the costs. On such adjournment, the jurors shall attend at the time and place appointed, without further summons or notice; and the fees for the jury, deposited with the justice in the beginning, shall remain in his hands until the jury are impaneled on the trial, and shall be then immediately paid to the jurors or to the party entitled thereto. (Rev., s. 1442; Code, s. 870; C. S. 1515.)

§ 7-165. Jury sworn and impaneled; verdict; judgment.—The jury shall be sworn and impaneled by the justice, who shall record their verdict in his docket and enter a judgment in the case according to such verdict. (Rev., s. 1443; Code, s. 864; C. S. 1516.)


§ 7-166. Justice's judgment docketed; lien and execution.—A justice of the peace, on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the superior court clerk of the county where the judgment was rendered. And in such case he shall also deliver to the party against whom such judgment was rendered, or his attorney, a transcript of any stay of execution issued, or which may thereafter be issued, by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of such court.
The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket; and from that time the judgment shall be a judgment of the superior court in all respects for the purposes of lien and execution. The execution thereon shall be issued by the clerk of the superior court to the sheriff of the county, and shall have the same effect, and be executed in the same manner, as other executions of the superior court; but in case a stay of execution upon such judgment shall be granted, as provided by law, the execution shall not be issued thereon by the clerk of the superior court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the superior court clerk’s office of any other county, and with like effect, in every respect, as if from the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript. (Rev., s. 1479; C. S. 839; C. S. 1517.)

Cross Reference.—As to removing judgment of justice of peace to another county for execution, see § 7-169.

Generally.—A judgment in a justice’s court does not create a lien upon the property of the defendant. To have this effect a transcript of the judgment must be filed and docketed in the office of the superior court clerk of the county wherein the judgment is rendered. Ledbetter v. Osborne, 66 N. C. 379, 380.

Judgment in Different Counties.—The fact that a judgment given by a magistrate, or of the transcript, can be made only before the tribunal which gave it; no court has original power to amend the records of another court. McAden v. Banister, 63 N. C. 479.

Presumed Regular.—Though the signature of the justice of the peace is not attached to the judgment, it is presumed from the term of the certificate of authentication that it was entered up regularly and in proper form. Surratt v. Crawford, 87 N. C. 372, 374.

Priorities.—If a number of justice’s judgments be docketed in the superior court, they will, under this section, be a lien upon the land of the defendant from the time when they were docketed, and will have a priority over a judgment obtained in court by another person against the same defendant. Perry v. Morris, 65 N. C. 479.

Same.—Its Nature in Superior Court.—If the judgment as actually docketed is the only authority for the execution named; the form of the docketed judgment depends upon that of the transcript actually sent. McAden v. Banister, 63 N. C. 479.

§ 7-167. Effect of judgment on appeal.—In cases of appeal to the superior court from a justice’s judgment docketed in such court, when judgment is rendered in the superior court on such appeal, the lien acquired by the docketing of such justice’s judgment shall merge into the judgment of the superior court, and continue as a lien from the date of the docketing of such justice’s judgment, and be superior to any other judgment docketed subsequent to the date of the justice’s judgment, except prior attachment liens and judgment on the same. Any clerk of the superior court shall carry forward and tax into the judgment of the superior court all costs incurred in the justice’s court, including transcript and docketing, as well as all costs incurred in the superior court, and shall issue execution only on the judgment rendered in the superior court, and not upon the justice’s judgment. When the judgment of the superior court is satisfied, it shall be a satisfaction of the justice’s judgment, and the clerk shall note such satisfaction on the record of the justice’s judgment. (Rev., s. 1479; 1903, c. 179; C. S. 1518.)

Effect of Appeal.—An appeal from a judgment of the justice of the peace does not deprive the plaintiff of the right to have the judgment docketed and order it taken away by the lien of the judgment. Durham v. Anderson, 128 N. C. 297, 38 S. E. 832.

§ 7-168. Entries made by clerk when judgment is rendered.—Whenever a transcript of a judgment taken before a justice of the peace is docketed on the judgment docket of the superior court and the same is afterwards reversed, modified, or affirmed in the superior court on appeal by a final judgment, the clerk of said court shall within ten days thereafter enter on the judgment docket where the said transcript was first docketed, the word “reversed,” “modified,” or “affirmed,” as the case may be, and further refer to the book and page where can be found the judgment reversing, modifying, or affirming the former judgment. Any clerk failing to perform such duties as are required of him in this section shall pay to any person all such damages as he may have sustained by such failure. (Rev., s. 1479; 1907, c. 880; C. S. 1519.)

§ 7-169. Justice’s judgment removed to another county.—Any person who may desire to have a justice’s judgment in his favor removed to another county to be enforced against the goods and chattels of the defendant must obtain from the justice who rendered the judgment a transcript thereof, under his hand; and must further procure a certificate from the clerk of the superior court of the county wherein the judgment was rendered, under the seal of his court, that the justice who gave the judgment was, at the rendition thereof, a justice of the county. On such transcript of the judgment, thus certified, any justice in any other county may award execution for the sum therein expressed. (Rev., s. 1480; Code, s. 846; C. S. 1520.)

Cross Reference.—As to execution issuing on judgment rendered in a justice’s court when docketed in the office of the clerk of the superior court, see § 7-166.

§ 7-166. Docketing in Different Counties.—The fact that a judgment docketed in one county is afterwards docketed in another, does not deprive it of the lien it had on the defendant’s land in the first county. Perry v. Morris, 65 N. C. 221.
Docketing in the county where the judgment was rendered is necessary before the same can be docketed in another county. McAden v. Banister, 63 N. C. 479.

§ 7-170. Issue and return of execution.—Execution may be issued on a judgment, rendered in a justice's court, at any time within one year after the rendition thereof, and shall be returnable sixty days from the date of the same. (Rev., s. 1481; Code, s. 840, Rule 14; C. S. 1521.)

Failure to Docket.—The lost vitality of a judgment not docketed within one year from its rendition cannot be restored by placing it on the docket of the superior court. Cowen v. Withrow, 114 N. C. 555, 19 S. E. 645; Woodard v. Paxton, 101 N. C. 26, 28, 7 S. E. 469, nor will such docketing in the superior court arrest the running of the statute of limitation. Daniel v. Laughlin, 67 N. C. 433, 434.

Same—Rights of Purchaser.—A purchaser under an execution on a judgment of a peace of the justice docketed after the lapse of one year acquires no title although he be a stranger, renders, and without notice. Cowen v. Withrow, 114 N. C. 555, 19 S. E. 645.

Execution may be issued by the justice of the peace unless the cause has been removed to the superior court. Bailey v. Hix, 118 N. C. 534, 208 S. E. 961, 207, 38 S. S. 832. But no stay of execution shall be granted by the justices in the following manner: For any sum not exceeding twenty-five dollars, one month; for any sum above twenty-five dollars and not exceeding fifty dollars, three months; for any sum above fifty dollars and not exceeding one hundred dollars, four months; for any sum above one hundred dollars, six months. But no stay of execution shall be allowed in any action wherein judgment is rendered on a former judgment taken before a justice of the peace. (Rev., s. 1483; Code, s. 842; 1868-9, c. 272; C. S. 1523.)

§ 7-173. Security on stay of execution.—The party praying for a stay of execution shall, within ten days after the trial, give sufficient security, approved by the justice, for payment of the judgment, with interest thereon till paid, and cost; and the acknowledgment of the surety, entered by the justice in his docket and signed by the surety, shall be sufficient to bind such surety. If the judgment be not discharged at the time which execution has been stayed, the justice who awarded the judgment shall issue execution against the principal, or surety, or both. (Rev., s. 1484; Code, s. 843; C. S. 1524.)

Generally.—An undertaking that the appellant shall pay all costs that may be awarded against him on an appeal from a justice's court, and that if the judgment or any part thereof be affirmed, or the appeal dismissed, the appellant shall pay the judgment, in the amount of the same, as may be rendered in the superior court against the judgment is in compliance with the statute, and does not restrict the obligation to pay the judgment (if affirmed) as rendered in the justice's court, but the signers are bound to pay such as may be rendered in the superior court against the appellant. It is not necessary, to bind the appellant party to a suit, that he should sign the undertaking. Walker v. Williams, 88 N. C. 7.

Judgment Remains Unimpaired.—Although the execution on the judgment may be stayed on giving it undertaking as herein provided for, the force and effect of the judgment remains unimpaired. Dunham v. Andres, 128 N. C. 207, 38 S. E. 832.

§ 7-174. Stay of execution on appeal.—In all cases of appeal from justices' courts, if the appellant desires a stay of execution of the judgment, he may, at any time, apply to the clerk of the appellate court for leave to give the undertaking as provided in a subsequent section; and upon giving the undertaking being given, shall make an order that all proceedings on the judgment be stayed. Instead of before the clerk of the appellate court, the appellant may give the undertaking before the justice who tried the cause, who shall indorse his approval thereon. (Rev., ss. 1485, 1486; Code, ss. 882, 883; 1869-70, c. 187; C. S. 1525.)

Mortgage as Substitute for Undertaking.—There is no statutory provision that allows a mortgage of real or personal property to be given in lieu of the undertaking on appeal from a justice's judgment. In the case of Comron v. Standland, 103 N. C. 207, 9 S. E. 317. Yet, if the defendant give and the plaintiff accept such mortgage, it is valid and can be enforced. The stay of the execution is a valuable and sufficient consideration to support the mortgage. Id.


In an action on a bond given to stay execution on an appeal from a justice's judgment, it is not necessary to allege that the plaintiff has sustained damage on account of the appeal. McMinn v. Patton, 92 N. C. 271.

§ 7-175. Nature of undertaking.—The undertaking shall be in writing, executed by one or more sufficient sureties, to be approved by the justice or clerk making the order, to, the effect that if judgment be rendered against the appellant, the sureties will pay the amount together with all costs awarded against the appellant, and
when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties. And in the event that said defendant shall prior to entry of the final judgment be adjudicated a bankrupt, then and in that event, the surety or sureties on said bond shall remain bound as if they were co-debtors with the defendant and the plaintiff may continue the prosecution of the action against said sureties, as if they were co-defendants in the cause. (Rev., s. 1487; Code, s. 884; 1879, c. 68; 1933, c. 251, s. 1; C. S. 1529.)

Editor's Note.—By Public Laws 1933, c. 251, was added the sentence, appearing at the end of this section, which provides for liability of sureties in case defendant is adjudicated a bankrupt.

Substantial Compliance, Sufficient.—A literal compliance with the provisions of this section is unnecessary—a substantial compliance is sufficient. McMinn v. Patton, 92 N. C. 57.

Surety's Liability Attaches When Final Judgment Rendered against Principal.—The liability of a surety on a bond given in accordance with this section to stay execution of a judgment of the justice of the peace pending appeal, as provided by § 7-174, attaches when or if the final judgment is rendered against the principal, and wherein the principal has been relieved of liability by a discharge in bankruptcy pending the appeal, plaintiff's claim being filed in the schedule of bankruptcy. The judgment of the justice of the peace pending appeal, as provided by § 7-174, is prospective in effect and does not apply to bonds executed prior to the 1933 amendment, see 11 N. C. Law Rev., 221.

§ 7-176. Mortage as substitute for undertaking, see note of Com- r on, 180, 205 N. C. 464, 171 S. E. 738.

Effect of Bankruptcy.—Where a judgment was rendered against the defendant before a justice of the peace, and an undertaking as provided for by this section, and pending the appeal, the principal is adjudicated bankrupt, it was held, that the sureties were not liable. Laffoon v. Kerner, 138 N. C. 281, 50 S. E. 654.

The Laffoon case, supra, was decided prior to the 1933 amendment, this section is prospective in effect and does not apply to bonds executed prior to the 1933 amendment, see Rule 21 of § 7-149.

§ 7-177. No new trial; either party may appeal.—A new trial is not allowed in a justice's court. A new trial may be allowed for serving the notice of appeal. State v. Fleming, 209, 211, 38 S. E. 132.

§ 7-178. Appeal does not stay execution.—No appeal shall prevent the issuing of an execution on a judgment, or work a stay thereof, except as provided for by giving an undertaking and obtaining an order to stay execution. (Rev., s. 1490; Code, s. 875; 1876-7, c. 251, s. 6; C. S. 1529.)

An appeal from a justice of the peace does not vacate the judgment nor does it suspend the operation. Dunham v. Anders, 128 N. C. 207, 211, 38 S. E. 632.

§ 7-179. Manner of taking appeal.—The appel- laent shall, within ten days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear and answer, he shall have fifteen days, after personal notice of the rendition of the judgment, to serve the notice of appeal herein provided for. (Rev., s. 1491; Code, s. 876; 1876-7, c. 251, s. 7; C. S. 1530.)

This section contemplates and applies to causes of which the court has acquired jurisdiction, and does not affect a case which comes under the provisions of § 7-180, entered against him when the court for lack of service was without jurisdiction to make any orders in any way affecting the rights of person or property. Graves v. Reidville Lodge, 182 N. C. 330, 332, 152 S. E. 152.

Justice of Peace Included.—The principal both as to the right and procedure for a defendant against whom service of summons has not been made, or the same waived, to have the judgment set aside and the courts of justice having jurisdiction of the peace as well as to those of more extensive jurisdiction. Graves v. Reidville Lodge, 182 N. C. 330, 332, 152 S. E. 152.

Duty of Justice.—A justice of the peace who takes a case under advisement and later renders judgment must notify the parties thereof to afford them opportunity to appeal in accordance with the provisions of the statute. Blocker v. Bullard, 196 N. C. 696, 146 S. E. 807.

Time.—An appeal must be taken to the next term of the appellate court. Hahn v. Guilford, 87 N. C. 177.

The section excepting a justice of the Peace in a bastardy proceeding either the woman or the defendant may appeal to the Superior Court, but the appeal must be taken to the next term. There is no right to dispense with this requirement. Helsabeck v. Grubbs, 171 N. C. 377, 88 S. E. 713. The "next term" means any term, civil or criminal, which begins after the expiration of the ten days allowed for serving the notice of appeal. State v. Fleming, 204 N. C. 40, 42, 167 S. E. 483.

The carbon copy of a letter from the secretary of the Industrial Commission to the attorney for the defendant is not notice of appeal as herein contemplated and cannot be construed as a compliance with this section and § 7-180, Higdon v. Nantahala Power, etc., Co., 207 N. C. 39, 41, 175 S. E. 713.

Service of Notice.—Where judgment is given on process not personally served, but served by publication, and the defendant does not appear at the trial, the defendant is entitled to take fifteen days notice of judgment in which to serve notice of his appeal. Thompson v. Lynchburg Noti- tion Co., 160 N. C. 519, 76 S. E. 470.

Service—Cancellation.—Although, with an appeal from a justice of the peace is regularly docketed in due time in the superior court, and proper notice of the appeal has not been given, a judge may, in his discretion, permit notice of appeal to be cancelled and give him time to waive an appeal lost by delay and to permit the same to be docketed at a subsequent term to the one to which it should have been returned. Davenport v. Grisson, 113 N. C. 38, 39, 152 S. E. 710.

Service—Time of Service.—In an appeal from a justice of the peace to the superior court, notice must be served by an officer (unless service is accepted on the appeal taken at the trial), and within ten days both upon the
Justice who tried the case and upon the appel-lee, and upon failure to give such notice, unless the judge, in his discretion, permits the notice to be given at the trial, the appeal shall be dismissed. State v. Johnson, 109 N. C. 383, 13 S. E. 843.

Same—Excusable Neglect.—Where the judgment is rendered in the absence of either party and such absence is occasioned by sickness or excusable neglect, relief may be had by filing a affidavit before the justice, setting forth the reasons therefor, within ten days after judgment. Gambill v. Garrett v. Garrett, 28 N. C. 201. See also, Dunc v. Patrick, 156 N. C. 246, 72 S. E. 220.

Actual Service.—Where the defendant is actually served with summons he is bound to take notice of the rendition of judgment. Suttie v. Jones, 85 N. C. 208, 209.

Service by Officer.—The notice of an appeal from a justice of the peace, when the notice is not given on the trial, must be served by an officer. Clark v. Deloatch Mills Mfg. Co., 110 N. C. 373, 75 S. E. 519.

Appeals under Workmen's Compensation Act shall, in so far as is reasonable and consonant with the language of the act and legislative intent, conform to this section. Summer v. Chesian Nitrate Sales Corp., 218 N. C. 431, 11 S. E. (2d) 394.

§ 7-170. No written notice of appeal in open court.—Where any party prays an appeal from a judgment rendered in a justice's court, and the adverse party is present in person or by attorney, and at the time of the prayer, the appellant shall not be compelled to give any written notice of appeal either to the justice or to the adverse party. (Rev., s. 1492; Code, s. 877; 1869-70, c. 187; 1876-7, c. 251, s. 8; C. S. 1531.)

Party Present.—Where the party is present when the appeal is prayed for, no written notice is required. State v. Crouse, 86 N. C. 617, 620.

Applicability of Estoppel.—Where the defendant upon judgment being rendered against him in a justice's court appealed in open court, and afterwards told the justice not to send up the papers in apt time, the justice had no power to grant a motion to set aside his judgment for want of jurisdiction. Forbes v. McGuire, 116 N. C. 449, 21 S. E. 178.

Remedy Where Justice Fails in His Duty.—A motion in the superior court for a record or an attachment under this section is the remedy given an appellant for the failure of the justice to send up an appeal, and it is no legal excuse for the appellant to show that he had paid the justice his fees and those of the clerk, and that the justice had failed to docket it as required by the statute. The appellant would thus make the justice his agent and for his neglect has the right to demand satisfaction. MacKenzie v. Davidson County Develop. Co., 151 N. C. 276, 55 S. E. 1003.

Failure to Sign Return.—The failure of a justice of the peace to sign the return of notice of appeal does not vitiate the proceedings in the superior court, where the appellant had given notice of appeal and paid the justice's fee, and the appeal made to motion for any purpose, but made a general appearance in the superior court at the trial in person and by attorney. Hawks v. Hall, 139 N. C. 176, 51 S. E. 857.

§ 7-182. Defective return amended.—If the return be defective, the judge or clerk of the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with the order by attachment. (Rev., s. 1494; Code, s. 879; C. S. 1533.)

Defective Return.—If the justice's return is defective, the judge may direct a further or amended return. Hawks v. Hall, 139 N. C. 176, 51 S. E. 857.

§ 7-183. Restitution ordered upon reversal of judgment.—If the judgment appealed from, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing of the appeal on a previous notice of six days. If the order be obtained before the judgment of reversal is entered, the amount may be included in the judgment. (Rev., s. 1495; Code, s. 886; C. S. 1534.)

Involuntary Payments.—This section only applies where there has been an involuntary payment of or on the judgment. Couvel v. Gregory, 110 N. C. 50, 40 S. E. 849. See the dissenting opinion, holding that payment of a collectible judgment rendered by a court of competent jurisdiction is involuntary.

Art. 23. Forms.

§ 7-184. Forms to be used in justice's court.—The following forms, or substantially similar ones, shall be sufficient in all cases of proceedings in civil actions, provided for in this article:

[No. 1] Summons

North Carolina, County. Township.

A. B. 

Before .

against .

C. D. 

Justice of the Peace.

State of North Carolina, to any constable or other lawful officer of County—Greeting:

We command you to summon C. D. to appear before G. W. H., Esq., one of the justices of the peace for the county of , on the day of , at his office (or elsewhere, as the justice may appoint the place of trial), in .

Township, to answer A. B. in a civil action for the recovery of . . . . dollars; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this . . . . day of , . . . .

G. W. H...

Justice of the Peace.
Summons on Allowing Application to Rehear

Whereas, A. B., plaintiff above named (or C. D., defendant above named), has applied by affidavit, which is filed, for a rehearing in the above-entitled action, wherein judgment was rendered against the said plaintiff (or defendant), in his absence, at the trial thereof, before the undersigned on the .... day of ......., 19....; and such application having been allowed, and the cause opened for reconsideration;

Now, therefore, we command you to summon the said plaintiff (or defendant) to appear before G. W. H., Esq., one of the justices of the peace for the county of ......., on the .... day of ......., 19...., at ......., in said county, when and where the complaint will be reheard and the same proceedings be had as if the case had not been acted on; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this .... day of ......., 19....

G. W. H. Justice of the Peace.

Affidavit to Obtain Attachment

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of ...... dollars (state any cause of action founded on contract, specifying the amount of the claim and the grounds thereof).

2. That the said defendant (State any fact or facts, so as to bring the case within one of the classes in which an attachment may issue. The facts must be stated positively and affirmatively, not merely upon information and belief, except where a fact is alleged with a particular intent. The intent in such case may be stated as on information and belief. See No. 4.)

Sworn to and subscribed before me, this .... day of ......., 19....

G. W. H. Justice of the Peace.

Another Form of Affidavit to Obtain Attachment

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to plaintiff in the sum of ...... dollars for goods sold and delivered to said defendant by the plaintiff on or about the .... day of ......., 19....

2. That the said defendant has departed from this state, or keeps himself concealed therein, with intent, as defendant is informed and believes, to avoid the service of a summons (or with intent, etc., to defraud defendant's creditors).

(Sworn to, etc., as in No. 3.)

A. B. Justice of the Peace.

Affidavit against a Foreign Corporation

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant above named is indebted to the plaintiff in the sum of ...... dollars, for the use and occupation of certain premises, by permission of plaintiff, from the .... day of ......., 19...., until the .... day of ......., 19....

2. That the defendant is a foreign corporation, created under the laws of the state of .......

3. That the cause of action stated arose in this state.

(Sworn to, etc., as in No. 3.)

Undertaking upon Attachment

Whereas, the plaintiff above named is about to apply for a warrant of attachment against the property of the above-named defendant:

Now, therefore, we, J. W. B., of .... County, and W. D. M., of .... County, undertake in .... dollars (the sum must be at least two hundred dollars), that if the said warrant be granted, and the defendant recover judgment in this action, or the attachment be set aside by order of the court, the plaintiff shall pay all costs that may be awarded to defendant in the same, and all damages which he may sustain by reason of such attachment.

J. W. B. W. D. M.

Signed and delivered in the presence of G. W. H., Esq., this .... day of ...., 19....

G. W. H. Justice of the Peace.

Warrant of Attachment

State of North Carolina, to any constable or other lawful officer of .... County—

Greeting:

It appearing by affidavit to the undersigned that a cause of action exists in favor of the plaintiff against the defendant for the sum of ...... dollars, and that the defendant is not a resident of this state (or otherwise, as the fact may be), and the plaintiff having given the undertaking as required by law:

Now, therefore, you are commanded forthwith to attach and safely keep all the property of the above-named defendant C. D. in your county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, with costs and expenses; and have you this warrant before G. W. H., one of the justices of the peace for your county, at his office in said county, on the .... day of ......., 19...., with your proceedings hereon.
Witness our said justice, this ........ day of
........, 19........
G. W. H........
Justice of the Peace.

[No. 8]

Officer's Return to be Indorsed on Attachment
I, O. P. M., constable (or sheriff) of ........ County, do hereby return that, by virtue of the
within attachment, I have seized and taken into
my possession the tangible personal property (or,
have levied on the real estate, as the case may be)
of the defendant within named, specified in the
inventory hereto annexed.
Dated this ....... day of ....... , 19........
O. P. M........
Constable (or Sheriff).

[No. 9]

Inventory of Property Attached to Above Return
(Title as in No. 1 or No. 5)
I do hereby certify that the following is a true
and just inventory of all the property seized or
levied on by me under a warrant of attachment,
issued in the above-entitled action by G. W. H.,
Esq., with a statement of the books, vouchers,
papers, rights and credits taken into my custody
by virtue of said warrant. (Insert list of prop-
erty by items.) I do further certify that the fol-
lowing property mentioned in the above in-
ventory is perishable, and that the expense
of keeping the same until the termination of the
suit would exceed one-fifth of its value; and I do
hereby apply to this court for authority to sell
the same. (Insert a list of perishable property.)
Dated this ....... day of ....... , 19........
O. P. M........
Constable (or Sheriff).

[No. 10]

Order Directing Sale of Perishable Property
(Title as in No. 1 or No. 5)
It appearing by the inventory returned by O.
P. M., constable (or sheriff), under the warrant
of attachment granted in this action, that the
following property mentioned in said inventory is
perishable, to wit: (Insert here the list of perish-
able property.)
It is therefore ordered that the said property
be sold by the said officer at public auction, at
such time and place as he shall deem advisable,
and that the said officer give notice of such sale
as the sale of personal property on execution.
It is further ordered that the proceeds of such
sale be retained by said officer, and disposed of in
the same manner as the property itself, if the
same had not been sold.
Dated this ....... day of ....... , 19........
G. W. H........
Justice of the Peace.

[No. 11]

Notice of Levy on Property not Capable of Manual Delivery
To H. B. .............:
Take notice that by warrant of attachment is-
 sued in this action, a certified copy of which is
herewith attached to you, I have levied upon,
and do hereby levy upon, your indebtedness,
amounting to ....... dollars or thereabouts, to
the defendant above named. (Describe as par-
cularly as possible the shares, debts or property
levied upon.)
Dated this ....... day of ....... , 19........
O. P. M........
Constable (or Sheriff.)
The officer will indorse on the copy of the
attachment served with the above notice the fol-
lowing certificate:
I do hereby certify that the within is a true copy
of the warrant of attachment in my possession,
issued in this action, and of the whole thereof.
Dated this ....... day of ....... , 19........
O. P. M........
Constable (or Sheriff.)

[No. 12]

Order Directing Third Person (H. B.) to Ap-
pear and be Examined
(Title as in No. 1 or No. 5)
It appearing to me by the certificate of O. P. M.,
constable (or sheriff) of said county, that the
said officer, with a warrant of attachment against
the property of C. D., the defendant in this action,
has applied to H. B. for the purpose of levying
upon a debt owing to the defendant by said H. B.
(or upon property of said defendant held by said
H. B., or otherwise), and that the said H. B. re-
fuses to furnish said officer with a certificate
designating the amount of the debt owing by said
H. B. to the defendant, or the amount and de-
scription of the property held by said H. B. for
the benefit of the defendant:
Now, therefore, I do order and require the said
H. B. to attend before me at my office on the ....
day of ....... , 19........, and be examined on oath
concerning the same.
Dated this ....... day of ....... , 19........
G. W. H........
Justice of the Peace.

[No. 13]

Attachment to Enforce Obedience to Above Order
(Title as in No. 1 or No. 5)
State of North Carolina, to any constable or
other lawful officer of ..........County —
Greeting:
Whereas, it appears that H. B. was duly served
on the ....... day of ....... , 19........,
with an order issued by G. W. H., Esq., one of
our justices of the peace for said county, requir-
ing said H. B. to attend before said justice at his
office, in said county, on the ....... day of .......,
19........, and be examined on oath concerning a
certain debt owing to the defendant, named in
the above action, by the said H. B. (or property
held by the said H. B. for the benefit of the de-
fendant, or otherwise, as the case may be);
And whereas, the said H. B., in contempt of said
order, has refused or neglected, and doth still re-
fuse or neglect, to appear and be examined on
oath, as in said order he is required to do:
Now, therefore, we command you that you
forthwith attach the said H. B., so as to have his
body before G. W. H., Esq., one of our justices of the peace for your county, on the ______ day of ______, 19____, at his office, in said county, then and there to answer, touching the contempt which he, as is alleged, hath committed against our authority; and further, to perform and abide by such order as our said justice shall make in this behalf. And have you then and there this writ, with a return, under your hand, of your proceedings thereon.

Hereof fail not, at your peril.
Witness, our said justice, this ______ day of ______, 19____.
G. W. H...... Justice of the Peace.

Cross Reference.—As to power to punish for contempt, see § 5-6.

[No. 14]

Undertaking on Discharge of Attachment

>Title of the cause as in No. 1

Whereas, the property of the above-named C. D. has been attached, and the defendant desires a discharge of said attachment on giving security according to law:

Now, therefore, we, B. B., of ______ County, and D. D., of ______ County, undertake in the sum of ______ dollars (the sum named must be at least double the amount claimed by plaintiff), that if the said attachment be discharged we will pay to the plaintiff, on demand, the amount of the judgment that may be recovered against the defendant in this action.

Dated this ______ day of ______, 19____.
(Signed) B. B... D. D....

Signed and delivered in the presence of G. W. H., Esq., this ______ day of ______.
G. W. H...... Justice of the Peace.

Acknowledgment and Affidavit of Sureties

North Carolina, ______ County.

On this ______ day of ______, 19____, before me personally appeared the above named B. B. and D. D., known to me to be the persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

And the said B. B. and D. D., being severally sworn, each for himself, says that he is a resident of the State of North Carolina and a householder (or freeholder) therein.

B. B.... D. D....

Sworn and subscribed before me the day above written.
G. W. H...... Justice of the Peace.

[No. 15]

Order Vacating Attachment on Security being Given

>Title as in No. 1 or No. 5

The defendant having appeared in this action and applied to discharge the attachment on giving security, and the said defendant having delivered to the court an undertaking in due form of law, which has been duly approved by the court:

It is ordered that the attachment issued in this action on the ______ day of ______, 19____, and the same is hereby vacated and discharged, and the defendant is released therefrom in all respects. It is further ordered that any and all proceeds of sales and money collected by O. P. M., constable (or sheriff), and all property attached, now in said officer's possession, be paid and delivered to the said defendant or his agent.

Dated this ______ day of ______, 19____.
G. W. H...... Justice of the Peace.

[No. 16]

Form of Publication to be Made by Plaintiff in Attachment

>Title as in No. 1

[Amount sued for] due by note (or otherwise as the fact may be). Warrant of attachment returnable before G. W. H., Esq., a justice of the peace for ______ County, North Carolina, at his office (or otherwise as the case may be), on the ______ day of ______, 19____., when and where the defendant is required to appear and answer the complaint.

Dated this ______ day of ______, 19____.
A. B..........., Plaintiff.

[No. 17]

Affidavit for Arrest on Debt Fraudulently Contracted

>Title as in No. 1

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of ______ dollars on an inland bill of exchange, drawn on the ______ day of ______, 19____., by defendant on the First National Bank of Charlotte, North Carolina, payable at sight to the order of plaintiff.

2. That on the ______ day of ______, 19____., the defendant applied to the plaintiff to purchase a bill of goods amounting to ______ dollars, which the plaintiff offered to sell to the defendant for cash; that the defendant, contriving to defraud the plaintiff, represented that he had money on deposit at said bank for more than the amount of the proposed purchase, and offered to give plaintiff a sight draft on said bank; that the plaintiff, relying upon the representations of the said defendant, and solely induced thereby, sold and delivered a bill of goods amounting to ______ dollars to the defendant, who thereupon drew the sight order on said bank above referred to; that on the ______ day of ______, 19____., the plaintiff presented said draft at said bank for acceptance, when the same was not accepted for want of any funds in said bank to the credit of the defendant; that notice of nonacceptance was given to the defendant, who has wholly refused to pay the draft or any part thereof; that the representations made as aforesaid by the defendant were, and each and every of them was, as deponent is informed and believes, untrue; and that the defendant, as deponent is informed and believes, did not have, nor expect to have, any funds on deposit at said bank at the making of the
representations above mentioned, but said defendant was then and is now wholly insolvent.

A. B. ......

Sworn to and subscribed before me, this day of ......., 19....

G. W. H. ..........

Justice of the Peace.

[No. 18]

Undertaking on Arrest
(Title as in No. 1)

Whereas, the plaintiff above named is about to apply (or has applied) for an order to arrest the defendant, C. D.;

Now, therefore, we, J. J., of ......., County, and P. P., of ......., County, undertake, in the sum of ......., dollars (the sum must be at least one hundred dollars), that if the said defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of his arrest in this action.

J. J. ......

P. P. ......

Signed in my presence, this day of ......., 19....

G. W. H. ..........

Justice of the Peace

[No. 19]

Order of Arrest
(Title as in No. 1)

North Carolina, ......., County, ......., Township.

To any constable or other lawful officer of said county:

For the causes stated in the annexed affidavit, you are required forthwith to arrest C. D., the defendant named above, and hold him to bail in the sum of ......., dollars (the sum should be the amount of the plaintiff's claim), and to return this order before the undersigned at his office in said county, on the day of ......., 19....; of which return you will give notice to plaintiff or his attorney.

Dated this day ......., 19....

G. W. H. ......

Justice of the Peace

[No. 20]

Undertaking of Bail on Arrest
(Title as in No. 1)

Whereas, the above named defendant, C. D., has been arrested in this action;

Now, therefore, we, B. B., of ......., County, and D. D., of ......., County, undertake, in the sum of ......., dollars (the sum should be the same as mentioned in the order of arrest), that if the defendant is discharged from arrest he shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce judgment therein.

B. B. ......

D. D. ......

Signed in my presence, this day of ......., 19....

G. W. H. 1. ........

Justice of the Peace.

[No. 21]

Notice of Exception to Bail
(Title as in No. 1)

To O. P. M., constable (or sheriff) of the county of .......,:

Take notice, that the plaintiff does not accept the bail offered by the defendant in this action (and if the undertaking is defective in form or otherwise, add also), and further he excepts to the form and sufficiency of the undertaking.

Yours, etc.,

A. B. ......., Plaintiff.

(or M. W. N. ......., Attorney for Plaintiff.)

Dated this day ......., 19....

[No. 22]

Notice of Justification of Bail
(Title as in No. 1)

To A. B., Plaintiff (or M. W. N., attorney for plaintiff):

Take notice, that the bail in this action will justify before G. W. H., Esq., a justice of the peace for said county, at the office of said justice, in said county, on the day of ......., 19....

Dated this day ......., 19....

G. W. H. ......

(or, M. W. N. ......., Attorney for C. D.), Defendant.

[No. 23]

Notice of Other Bail
(Title as in No. 1)

Take notice that A. B., of ......., County (physician), and Y. Y., of ......., County (farmer), are proposed as bail, in addition to (or in place of) B. B. and D. D., the bail already put in; and that they will justify (conclude as in last form).

Date, etc.

[No. 24]

Justification of Bail
(Title as in No. 1)

On this day ......., 19...., before G. W. H., Esq., a justice of the peace for said county, personally appeared B. B. and D. D. (or R. S. and Y. Y., as the case may be), the bail given by the defendant C. D. in this action, for the purpose of justifying pursuant to notice; and the said B. B., being duly sworn, says:

1. That he is a resident and householder (or freeholder) in this state;

2. That he is worth the sum of ......., dollars (the amount specified in the order of arrest), exclusive of property exempt from execution.

And the said D. D., being duly sworn, says:

(As with the other bail.)

(And so on with each bail offered.)

Examination taken and sworn to before me, day of ......., 19....

G. W. H. ......

Justice of the Peace

[No. 25]

Allowance of Bail
(Title as in No. 1)

The bail of the defendant, C. D., within men-
tioned, having appeared before me and justified, I do find the said bail sufficient, and allow the same.

Dated this ...... day of .......... 19......
G. W. H....... Justice of the Peace.

[No. 26]
Subpoena to Testify

State of North Carolina, .......... County.
To S. T. ......, greeting: (the justice may insert any number of necessary names.)
You (and each of you) are commanded to appear personally before G. W. H., Esq., a justice of the peace for said county, at his office in said county, on the ...... day of .........., 19......, to give evidence in a certain civil action now pending before said justice, and then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the defendant (or plaintiff). Herein fail not, under the penalty prescribed by law. Witness our said justice, this ...... day of .........., 19......
G. W. H....... Justice of the Peace.

[No. 27]
N. B.—The justice may, instead of a formal subpoena, indorse on the summons or other process an order for witnesses, substantially as follows:
The officer to whom the within process is directed will summon the following persons as witnesses of the peace for the defendant: ..........; and the following as witnesses for the defendant: ..........; and will notify all such witnesses to appear and testify at the time and place within named for the return of this process.
Dated this ...... day of .........., 19......
G. W. H....... Justice of the Peace.

[No. 28]
Subpoena Duces Tecum

If any witness has a paper or document which a party desires as evidence at the trial, the justice will pursue the form No. 26 as far down as the asterisk (*) and then add the following clause:
And you, S. T., are also commanded to bring with you and there produce as evidence a certain bond (describe particularly) which is now in your possession or under your control, together with all papers, documents, writings or instruments in your custody, or under your control. (Conclude as in form No. 26.)

[No. 29]
Form of Oath of Witness

You swear that the evidence you will give as to the matters in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth. So help you, God.

[No. 30]
Proceedings against Defaulting Witness

When a witness, under subpoena, fails to attend, the justice will note the fact in his docket by some such entry as the following:
R. P., a witness summoned on behalf of the plaintiff, called and failed.
If the party who suffers by default of the witness wishes to move for the penalty against him, he will serve substantially the following notice on the witness:

(Title as in No. 1)
To R. P.:
Take notice, that on the ...... day of .........., 19......, the plaintiff in the above action will move G. W. H., Esq., the justice before whom the trial of said action was had, on the ...... day of .........., 19......, for judgment against you for the sum of .......... dollars, forfeited by reason of your failure to appear and give evidence on said trial as you were summoned to do.
Dated this ...... day of .........., 19......
A. B. .........., Plaintiff.

The justice will enter the proceedings on the foregoing notice on his docket as follows:

A ...... B ...... Motion for penalty against
C ...... D ...... R. P., defaulting witness.
...... day of .........., 19......, A. B., above named, appears, and according to a notice filed and duly served on R. P., moved for the penalty of .......... dollars forfeited by the said R. P. by reason of his failure to attend and give evidence on the trial of a cause, wherein A. B. was plaintiff and C. D. was defendant, tried before me at my office on the ...... day of .........., 19......, as appears by entry duly made on my docket: when and where the said R. P., a witness summoned on the part of the plaintiff in that action, was called and did fail.

R. P. appears and assigns for excuse "high water," and offers his own affidavit, which is filed. He also offers as a witness in his behalf S. S., who, being duly sworn, testifies that (state what S. S. says about the condition of the water at the time). R. P., having no other evidence, closed the case on his part. Whereupon A. B. offered M. Y. as a witness, who, being sworn, testifies (state what witness says).

Neither party having any other evidence, and after hearing all the proofs and allegations submitted for and against the motion, it is adjudged, on motion of A. B., that A. B. do recover of R. P. the sum of .......... dollars, penalty forfeited by reason of the premises, and the further sum of .......... dollars, costs of this motion.

[No. 31]
Form of a Venire

The justice will make a list of the persons drawn by him as jurors, and indorse thereon substantially as follows:

To O. P. M., constable of ........ County:
You are hereby directed to summon the persons named within to appear as jurors before me at my office in your county, on the ...... day of .........., 19......, for trial of a civil action now pending between A. B., plaintiff, and C. D., defendant, then and there to be tried. And have you then and there the names of the jurors you shall summon, with this precept.
Dated this ...... day of .........., 19......
G. W. H....... Justice of the Peace.
Form of Oath to Constable in Charge of the Jury

You swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and a verdict to give thereon according to the evidence in the cause. So help you, God.

Summons against Defaulting Juror to Show Cause

State of North Carolina, to any constable or other lawful officer of ......... County—

Greeting:

We command you to summon R. S. to appear before G. W. H., Esq., a justice of the peace for your county, at his office in said county, on the ....... day of ........., 19 ....... to show cause why he, the said R. S., should not be fined according to law for his nonattendance as a juror before our said justice at his office in said county on the ....... day of ........., 19 ....... in a certain cause then and there pending, in which A. B. was plaintiff and C. D. was defendant; and have you then and there this precept, with the date and manner of your service thereof.

Witness, our said justice, this ....... day of ........., 19 .......

G. W. H. ........ Justice of the Peace.

Demurrer to Complaint

(Title as in No 1.)

The defendant demurs to the complaint in this action, for that the said complaint does not state facts sufficient to constitute a cause of action (or, for that the said complaint is not sufficiently explicit to enable this defendant to understand it.)

(Signature of defendant or defendant's attorney.)

Demurrer to Answer

(Title as in No 1 or No. 5)

The plaintiff demurs to the answer of the defendant, for that the facts stated in the answer are not legally sufficient to constitute a defense to this action (or, for that the said answer is not sufficiently explicit to make this plaintiff understand it.)

(Signature of plaintiff or plaintiff's attorney.)

Judgment upon Demurrer

NOTE.—If the justice thinks the objection raised by the demurrer to the pleadings is well founded, he will make this entry on his docket:

"Demurrer to the complaint (or to the answer) filed, heard and sustained; and whereupon it is ordered that the said pleading be amended without cost (or upon payment of costs, as the case may be)."

This order to amend the defective pleading is a matter of course, and is the only judgment which the justice can render upon demurrer. He cannot give a final judgment in the cause at this stage, for the party may choose to amend his pleadings and try the case on the facts. If, however, the party refuse to amend the defective pleading, the justice will disregard the same, and proceed to render final judgment, as follows:

"The plaintiff (or defendant) having refused to amend his complaint (or his answer) demurred to, it is adjudged that the defendant go without day and recover of the plaintiff the sum of ....... dollars, costs of this action (or that the plaintiff recover of the defendant the sum of ....... dollars, damages, and the further sum of ....... dollars, costs of this action.)"

If the justice deem the objection, raised by the demurrer, not well founded, he will enter in his docket as follows: "Demurrer to the complaint (or to the answer) filed, heard and overruled," and he will then proceed to the evidence in the cause.

Entry in Docket

NOTE.—The following is offered as a general precedent of the manner in which the justice will make the entries in his docket:

(Title as in No 1)

........., 19 ....... Summons issued; returnable on the ....... instant at my office.

........., 19 ....... Summons returned, served on defendant by O. P. M., constable, on the ....... instant, both parties appear, the plaintiff in person, the defendant by R. H. R., Esq., attorney.

The plaintiff complains on a promissory note executed by the defendant to him, dated ....... , payable one day after date, for $.......

The defendant answers and denies each and every allegation in the complaint, and claims a setoff of $....... for wood sold and delivered to the plaintiff, and also for goods sold and delivered to the defendant, and claims damages for $ .......

The defendant answers and denies each and every allegation in the complaint, and claims a setoff of $....... for work and labor performed for the plaintiff.

On joining issue of fact as above, the action is, by consent of parties, adjourned to the ....... instant, at my office.

A venire is also issued at the plaintiff's (or defendant's) demand, returnable at the time and place last mentioned.

........., 19 ....... The parties appear and proceed to the trial of the case. The following jurors are returned as summoned upon the venire by O. P. M., constable. (Insert the names of all jurors summoned.) The following jurors, who are returned as summoned, do not appear. (Insert their names.) The following jurors appear according to the summons. (Insert their names.) The following jurors are sworn to try the action. (Insert their names.)
§ 7-184

H. P. and J. M., witnesses for the plaintiff, and W. F., a witness for the defendant, are sworn and testify; J. S., a witness on the part of the defendant, is offered, but objected to by the plaintiff on the ground (state the ground), and rejected.

Having heard the evidence (and the arguments of a counsel, if any), the cause is submitted to the jury, who retire, under charge of O. P. M., a constable duly sworn for that purpose, and afterwards return in open court and publicly deliver their verdict, by which they find in favor of the plaintiff for $........ damages; whereupon, I adjudged that the plaintiff do recover of the defendant—

Damages, - - - - - $........

Costs, - - - - - ...........

........., 19 .... Execution issued for above judgment to O. P. M., constable.

........., 19 .... Notice of appeal served on me by defendant; my fee paid and return to the appeal made by me.

N. B.—If the action is tried by the justice without a jury, all that relates to the venire and the verdict in the above form must be left out, and the judgment will be entered as follows:

After hearing the proofs and allegations of the respective parties, I do adjudge that the plaintiff recover, etc. (as above).

[No. 39]

Form of Notice of Appeal to the Superior Court, Where a New Trial of the Whole Matter is to be Had

>Title as in No. 1

To G. W. H., Esq., a justice of the peace for said county.

Take notice, that the defendant in the above action appeals to the Superior Court from the judgment rendered therein by you on the ...... day of ........, 19......, in favor of the plaintiff for the sum of sixty-five dollars damages and the further sum of three dollars and seventy-five cents costs, and that this appeal is founded upon the ground that the said judgment is contrary to law and evidence.

Dated this ...... day of ........, 19......

W. W. ........

Attorney for Appellant.

[No. 40]

Return to Notice of Appeal

A....... B....... against 

C....... D....... 

County of ........

To the Superior Court of ........ County:

An appeal having been taken in this action by the defendant, I, G. W. H., the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, do hereby certify and return that the following proceedings were had by and before me in said action:

On the first of February, one thousand eight hundred and sixty-nine, at the request of the plaintiff, I issued a summons in his favor and against the defendant, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place the parties personally appeared.

The plaintiff complained for goods sold and delivered to defendant to the amount of $75. The defendant denied the right of the plaintiff to recover that amount for the goods, on the ground that he had paid, at or shortly after the purchase of said goods, $......... dollars thereon; and he also claimed to have a setoff against the plaintiff to the amount of $85 for board and lodging furnished to plaintiff and work and labor done for him; and he claimed to be entitled to judgment against the plaintiff for $........

Both parties introduced evidence upon the claims so made by them, and after hearing their proofs and allegations, I rendered judgment in favor of the plaintiff and against the defendant, on the tenth of February, eighteen hundred and sixty-nine, for $65 damages, and for the further sum of $3.75, costs of the action.

I also certify that on the eleventh of February, eighteen hundred and sixty-nine, the defendant served the annexed notice of appeal on me, and at the same time paid me my fee of $1 for making my return.

All of which I send, together with the process, pleadings, and other papers in the cause. Dated this 15th day of February, 1904.

G. W. H........

Justice of the Peace.

N. B.—If the cause was tried by a jury, state the fact and set forth the verdict, with the judgment thereon. It is not necessary to set out in the return a copy of any process, pleading, affidavit or other paper. It is sufficient to refer to such a paper as filed and as herewith sent.

[No. 41]

Where the Sum Demanded Exceeds Two Hundred Dollars

It appearing that the sum demanded by the plaintiff in this action exceeds two hundred dollars, it is ordered that the action be dismissed, and judgment is rendered against A. B., plaintiff, for the sum of $......... dollars, costs.

(Date and sign.)

[No. 42]

Where the Title to Real Estate is in Question

N. B.—The defendant, if he wishes to make answer to title, must file a written answer to the complaint, setting forth the facts.

Answer of Title

>Title as in No. 1

The defendant answers to the complaint:

1. That no allegation thereof is true.
2. That the plaintiff ought not to have or maintain his action against the defendant, because the premises mentioned and described in the complaint, at the time when the rent and render, for which said action is brought, is alleged to be due, was and is now the land and freehold of one J. D., and not that of the plaintiff; nor was the plaintiff then, nor is he now, entitled to the possession thereof; and the defendant further answers that the title to said premises was, at the time aforesaid, and is now, in said J. D., and will come in question on the trial of this action.

Dated this ...... day of ........, 19......

C. D.......,

Defendant
It appearing from the answer and proof of the defendant that the title to real estate is in controversy in this action, it is ordered that the action be dismissed, and judgment is rendered against the plaintiff for $50 dollars, costs.

[No. 43]

Tender of Judgment

(Title as in No. 1)

To C. D.:

Take notice, that the defendant hereby offers to allow judgment to be taken against him by the plaintiff in the above action for the sum of fifty dollars, with costs.

Dated this day of , 19 .

C. D., Defendant.

[No. 44]

Acceptance of Tender of Judgment

(Title as in No. 1)

To A. B.:

Take notice, that the plaintiff hereby accepts the offer to allow the plaintiff to take judgment in the above action for the sum of fifty dollars, with costs, and the justice will enter up judgment accordingly.

Dated this day of , 19 .

A. B., Plaintiff.

[No. 45]

Form of Judgment on Tender

(Title as in No. 1)

N. B.—The justice will state all the proceedings in the action from the issuing of the summons down to the appearance of the parties and the complaint of the plaintiff, and then proceed as follows:

Whereupon, the said defendant, before answering said complaint, made and served an offer, in writing, to allow the plaintiff to take judgment against him for the sum of fifty dollars with costs;* and the said plaintiff thereupon accepted such offer, and gave notice thereof to the defendant in writing; said offer and acceptance thereof being filed;

Now, therefore, judgment is accordingly rendered in favor of the plaintiff and against the defendant for the sum of fifty dollars damages, and the further sum of one dollar, costs.

If notice of acceptance is not given, the entry will be as follows:

(Follow the foregoing form down to the asterisk (*) and then add):

And the said plaintiff having refused to accept such offer, the defendant answered the complaint by denying, etc. (state the defense of the defendant down to the judgment, which, in case the plaintiff fails to recover more than the sum mentioned in the offer, will be entered thus):

After hearing the proof and allegations of the respective parties, I adjudge that the plaintiff do recover the sum of fifty dollars damages, and the further sum of one dollar, costs.

I further adjudge that the defendant do recover the plaintiff the sum of two dollars and seventy-five cents, costs accruing in the action subsequent to the offer of the defendant referred to.

[No. 46]

General Form—Execution

(Title as in No. 1)

State of North Carolina, to any constable or other lawful officer of . . . . county—Greeting:

Whereas, judgment has been rendered by G. W. H., Esq., a justice of the peace for said county, against the defendant, for the sum of . . . . dollars damages, and the further sum of . . . . dollars costs, on the . . . . day of . . . . 19 . . . ;

You are therefore commanded forthwith to levy of the goods and chattels of the said defendant (excepting such goods and chattels as are by law exempt from execution) the amount of such judgment, with interest from the date thereof until the money is recovered.

And make due return, according to law, in sixty days from the date hereof.

Dated this . . . . day of . . . . 19 . . .

G. W. H. . . .

Justice of the Peace.

[No. 47]

Execution in Attachment

(Title as in No. 1)

State of North Carolina, to any constable or other lawful officer of . . . . county—Greeting:

Whereas, judgment was rendered in said action, on the . . . . day of . . . . 19 . . . , issued by G. W. H., Esq., a justice of the peace for said county, in an action wherein A. B. was plaintiff and C. D. defendant, the following property of said defendant was, on the . . . . day of . . . . 19 . . ., duly levied on and attached:

(Here insert a list of property)

And whereas, judgment was rendered in said action, on the . . . . day of . . . . 19 . . . , in favor of said plaintiff, and against the said defendant in the sum of . . . . dollars:

Therefore, we command you that you satisfy the said judgment out of the property so attached as aforesaid, by the sale of the same or so much thereof as shall be sufficient to satisfy the said judgment; and if a sufficient sum be not realized therefrom, then you satisfy the said judgment out of any other goods and chattels of the said judgment debtor within your county.

And make due return thereof according to law within sixty days from the date hereof.

Witness, our said justice, this . . . . day of . . . . 19 . . .

G. W. H. . . .

Justice of the Peace.

[No. 48]

Record of Conviction of a Contempt

The justice will make an entry in his docket stating the particular circumstances of the contempt, of which the following is offered as an example:

Whereas, on the . . . . day of . . . . 19 . . . , while engaged in the trial of an action (or other judicial act, as the case may be) in which A. B. was plaintiff and C. D. was defendant, at my office in . . . . county, M. B. did willfully and contemptuously interrupt me, and did then and there conduct himself so disorderly and insolently to-
wards me, and by making a loud noise did disturb the proceedings on said trial (or other judicial act) and impair the respect due to the authority of the law; and on being ordered by me to cease making such noise and disturbance, the said M. B. refused so to do, but on the contrary did publicly declare and with loud voice (state whatever offensive words were used); and whereas, when immediately called upon by me to answer for the said contempt said M. B. did not make any defence thereto, nor excuse himself therefrom; the said M. B. is therefore convicted of the contempt aforesaid, and is adjudged to pay a fine of five dollars and be imprisoned in the county jail for the term of two days, and until he pays the said fine or is duly discharged from imprisonment according to law.

G. W. H.
Justice of the Peace

[No. 49]
Warrant of Commitment for a Contempt
(Title as in No. 1)

State of North Carolina, to the keeper of the common jail of ______ County—Greeting:

Whereas, etc. (recite the record of conviction so as to show the entire matter of contempt, together with the judgment therefor, and then proceed as follows):

Therefore, you are hereby commanded to receive the said M. B. into your custody in the said jail, and him there safely keep during the said term of two days, and until he pays the said fine or is duly discharged according to law.

Herein fail not.

Dated this ______ day of ______, 19__.

G. W. H.
Justice of the Peace.

(Rev. s. 1496; Code, s. 909; C. S. 1535.)

SUBCHAPTER VI. RECORDERS' COURTS.


§ 7-185. In what cities and towns established; court of record.—In each city and town in the state, which has acquired a population of one thousand or over by the last federal census, a recorder's court for such municipality may be established, which shall be a court of record and recorder's court for such municipality may be established, which shall be a court of record and shall be maintained pursuant to the provisions of this subchapter. (1919, c. 277, ss. 1, 2; 1925, c. 32, s. 1; C. S. 1536.)

Local Modification.—Richmond: 1941, c. 60, s. 1.

Cross References.—As to abolishing municipal recorder's court, see § 7-212. See also, note to § 7-278.

Constitutionality.—Where the question of the constitutionality of this section establishing recorder’s courts by a general act is the subject of the action, and pending the appeal the Legislature has withdrawn the effect or operation of the statute from a certain county (Caldwell) wherein the establishment of the court was the subject of injunctive restraint, the cause of action abates and the appeal will be dismissed at the cost of each party, and the order restraining the establishment of the particular court will continue to be effective. Coffey v. Rader, 182 N. C. 689, 110 S. E. 786 (1921).


§ 7-186. Recorder's election and qualification; term of office and salary.—The court shall be presided over by a recorder, who may be a licensed attorney at law, and who shall be of good moral character and, at the time of his appointment or election, a qualified elector of the municipality. The first recorder, upon the establishment of such court, shall be elected by the governing body of the municipality, either at the time of the establishment of the court or within thirty days thereafter, and he shall hold office until the next municipal election and until his successor is duly elected and qualified. If a vacancy occurs in the office at any time, the same shall be filled by the election of a successor for the unexpired term by the governing body of the municipality, at the regular or special meeting called for that purpose. After the first elected recorder each succeeding recorder shall be nominated and elected in the municipality in the same manner and at the same time as is now provided by law for the elective officers of the municipality, and in the general election for such officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office, as is now provided by law for a justice of the peace, and shall file the same with the clerk of the board of the city or town. The salary of the recorder shall be determined and fixed in advance by the governing body of the city or town, and shall not be increased or decreased during the term of his office, and shall be paid out of the funds of the municipality: Provided, that the governing body of such city or town is hereby authorized to provide a schedule of fees to be charged by said recorder. (1919, c. 277, s. 2; 1925, c. 32, s. 2; 1943, c. 543; C. S. 1537.)

Cross References.—As to forms of oath required of justice of peace, see § 11-11. As to oaths required of public officials generally, see §§ 11-6, 11-7, Const., Art. VI, s. 7. As to penalty for failure to take oaths, see § 128-5.

Editor's Note.—The act of 1925 added two provisions to the section. The 1943 amendment struck out the second provision making the recorder eligible to hold the office of mayor. Mandamus to Compel Appointment.—When it appears on appeal to the Supreme Court from admitted facts that a board of aldermen of an incorporated town are acting in violation of a command of the statute that they elect a recorder in the manner specified therein, a mandamus will issue to enjoin the public officers involved. Battle v. Rocky Mount, 156 N. C. 329, 72 S. E. 354.

Constitutional Provisions.—It is held in State v. Bate- man, 122 N. C. 157, 77 S. E. 768, that a former requirement that the recorder must be "a licensed attorney at law" is unconstitutional, on the ground that it does not lie within the power of the legislature to add to the constitutional disqualifications to hold office.

§ 7-187. Time and place of holding court.—The court shall be opened for the trial of criminal cases at least one day of each week, to be fixed by the governing body of the municipality, and shall continue its session from day to day until all business is legally disposed of. The court shall be held in the city or town hall, or other place provided therefor, and other sessions of the court may be held by the recorder, as necessity may require. (1919, c. 277, s. 3; C. S. 1538.)

§ 7-188. No subsequent change of judgment.—When a case has been finally disposed of and judgment pronounced therein, it shall not thereafter be reopened or the judgment or sentence rendered therein be modified, changed or stricken out by the recorder after the adjournment of the regular weekly term or after the adjournment of any special term called by the recorder. (1919, c. 277, s. 3; C. S. 1539.)
§ 7-189. Procedure in the court.—The recorder shall preside over the court and try and determine all criminal actions coming before him, the jurisdiction of which is conferred by this article, and the proceedings of the court shall be the same as are now prescribed for courts of justices of the peace and for the superior court so far as the same may reasonably apply. (1919, c. 277, s. 9; C. S. 1540.)

§ 7-190. Criminal jurisdiction.—The court shall have the following jurisdiction within the following named territory:
1. Original, exclusive, and concurrent jurisdiction, as the case may be, of all offenses committed within the corporate limits of the municipality which are now or may hereafter be given to justices of the peace under the constitution and general laws of the state, including all offenses of which the mayor or other municipal court now has jurisdiction.
2. Original and concurrent jurisdiction with justices of the peace of all offenses committed outside the corporate limits of the municipality and within a radius of five miles thereof, which is now or may hereafter be given to justices of the peace under the constitution and general laws of the state.
3. Exclusive, original jurisdiction of all other criminal offenses committed within the corporate limits of such municipality and outside, but within a radius of five miles thereof, which are below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors.
4. Concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime committed within the territory above mentioned, of which the recorder’s court is not herein given final jurisdiction.
5. All jurisdiction given by the general laws of the state to justices of the peace, or to the superior court, to punish for contempt, to issue writs ad testificandum, and other process to require the attendance of witnesses and to enforce the orders and judgments of the court. (1919, c. 277, s. 4; 1925, c. 32, s. 3; C. S. 1541.)

Cross References.—For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64; for statutory definition of felony, see § 14-1.

Editor’s Note.—In the second and third provisions of this section, the five mile radius is new with the acts of 1925; heretofore the jurisdictional limits herein mentioned was confined to a radius of two miles of the corporate limits of the municipality.

Conflicting Jurisdiction of Magistrate and City Courts.—The legislature may constitutionally grant a city court exclusive jurisdiction of offenses occurring within the city limits and embraced within the jurisdiction of a justice of the peace. State v. Baskerville, 141 N. C. 407, 412, 191 S. E. 18.

§ 7-191. Jurisdiction to recover penalties.—The recorder’s court shall also have jurisdiction to try all actions for the recovery of penalties imposed by law, or by any ordinance of the municipality in which the court is located, for any offense committed within the corporate limits of the municipality or outside thereof within five miles of the corporate limits, and all such penalties shall be recovered in the name of the municipality. (1919, c. 277, s. 10; 1925, c. 32, s. 4; C. S. 1542.)

Editor’s Note.—The acts of 1925 extended the radius to five miles of the corporate limits, while under the statute as it formerly stood, the radius was two miles of the corporate limits.

§ 7-192. Disposition of cases when jurisdiction not final.—In all cases heard by the recorder against any person for any offense whereof the court has not final jurisdiction and in which probable cause of guilt is found, such person shall be bound in a bond or recognizance with sufficient surety to appear at the next succeeding term of the superior court of the county for the trial of criminal cases, and in default of such bond or recognizance he shall be committed to the common jail of the county to await trial; but in all capital cases such person shall be committed to the common jail of the county without bail. (1919, c. 5; C. S. 1543.)

§ 7-193. Disposition of cases when jurisdiction final.—All persons pleading guilty or convicted in the court of any offense of which the court has final jurisdiction shall be fined or imprisoned, according to law, and any person entering a plea of guilty, or who may be convicted of any such offense, shall also pay the costs of the prosecution. (1919, c. 277, s. 7; C. S. 1544.)

§ 7-194. Sentences to be imposed.—When any person is convicted, or pleads guilty, of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which the court is held, and assign him to work on the public roads of the county as provided by law; or when such person is a woman or an infant of immature years, the recorder may sentence him to her to the city or county workhouse or state reformatory, or other penal institution provided by law for such purposes. If there is no chain-gang in the county in which the court is held, the recorder may sentence the person to work upon the public roads of any other county provided with a chain-gang for the working of public roads, as authorized by the general laws of the state. (1919, c. 277, s. 8; C. S. 1545.)

Cross References.—As to sentencing prisoners for work under the supervision of the State Highway and Public Works Commission, see §§ 148-30 and 148-32. See also §§ 7-94-4.

§ 7-195. Appeal to superior court.—Any person convicted of any offense of which the recorder has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the recorder, in the same manner as is now provided for appeals from courts of justices of the peace. Upon such appeal the defendant shall be required to give bond or recognizance with sufficient surety for his appearance at the next term of the superior court; and in default thereof the recorder shall commit him to the county jail of the county until he shall give bond or be otherwise discharged by law. (1919, c. 277, ss. 5, 9; C. S. 1546.)

Local Modification.—Pitt: 1937, c. 134.
§ 7-196. Costs paid to the municipality.—All costs incurred in issuing warrants and serving the same in cases where the recorder has not final jurisdiction, and for the service of process arising in such cases when the process is served by the officer of the municipality, except as hereinafter provided, shall be paid to the municipality; and officers serving process issued from said court shall be allowed the same fees as are now allowed sheriffs in like cases, the same, when collected, to be paid over as herein provided. Where such officer is not an officer of a municipality such costs shall be dealt with as is now provided by law. (1919, c. 277, s. 6; C. S. 1547.)

§ 7-197. Seal of court.—The recorder's court shall have a seal with the impression, "The Recorder's Court of the City of ————," which seal shall be used in the attestation of writs, warrants, or other process, acts, judgments, or decrees of the court, in the same manner and to the same effect as the seal of other courts in the state; but no process issued from said court to be executed within the county in which court is held, shall require attestation by seal, (1919, c. 277, s. 11; C. S. 1548.)

§ 7-198. Issuance and service of process.—The recorder may issue process to the chief of police of the municipality in which the court is held, or to the sheriff, constable, or other lawful officer of the county in which the municipality is located, or to any other county in the state; and such process, when attested by the seal of the court, shall run anywhere in the state, and shall be executed by all public officers authorized to execute process, and be returned by them according to law.

The summons, warrant of arrest, and every other writ, process, or precept issuing from a recorder's court or other court inferior to the superior court, except justices of the peace, may be signed by the recorder, vice recorder, or presiding justice of the court, or by the clerk of the court or deputy clerk, where the court has a clerk or deputy. (1919, c. 157, 277, s. 12; C. S. 1549.)

Proper Proceeding.—Under the proceedings established in "recorder's courts," the complaint and warrant—which, if necessary, must be construed together—have been established as the proper proceeding, just as has come down from the common law as to crimes the punishment of which is held, shall require attestation by seal, (1919, c. 277, s. 15, 18; 1925, c. 33, s. 5; C. S. 1551.)

Editor's Note.—The last provision of this section is new with the Acts of 1925.


§ 7-199. Vice recorder; election and duties.—The governing body of the municipality shall, at the same time and in the same manner as is provided in this article for the election of the first recorder, elect a vice recorder, who shall have the jurisdiction and authority conferred upon the recorder when the recorder shall be prevented from attending to his duties on account of sickness or other temporary disability or by reason of his temporary absence. The vice recorder shall receive the compensation allowed to the recorder for such services for the time that he may render such service, the compensation of the vice recorder to be deducted from the salary of the recorder, and the vice recorder shall be thereafter elected by the governing body of the municipality for the same term as the recorder is elected, and any vacancy occurring in the office of vice recorder shall be filled in the same manner as is provided for the filling of vacancies in the office of recorder. (1919, c. 277, s. 13; C. S. 1550.)

§ 7-200. Clerk of court; election and duties; removal; fees.—The clerk of the recorder's court shall be elected by the governing body of the city or town at the same time and for the same term as the vice recorder, and all vacancies in the office of the clerk of the court shall be filled in the manner provided for filling vacancies in the office of vice recorder. Before entering upon the duties of his office, the clerk shall enter into a bond, with sufficient surety, in a sum to be fixed by the governing body of the municipality, not to exceed five thousand dollars, payable to the state, conditioned upon the true and faithful performance of his duties as such clerk and for the faithful accounting for and paying over of all money which may come into his hands by virtue of his office. The bond shall be approved by the governing body and shall be filed with the clerk of the superior court of the county. The clerk shall make monthly settlements with the county and city treasurers for all money which has come into his hands belonging to either. The clerk of the governing body of the municipality shall ex officio discharge the duties of the clerk of the court, unless the governing body shall elect some other person to discharge the duties. The governing body of the municipality shall have the right to remove the clerk of the court, either for incapacity or for neglect of the duties of his office; and in case of a vacancy for any cause the office shall be filled in the manner hereinafore provided. Provided, that the governing body of the municipality is hereby authorized to provide a schedule of fees to be charged by the clerk of said court. (1919, c. 277, ss. 15, 18; 1925, c. 33, s. 5; C. S. 1551.)

§ 7-201. Clerk to keep records.—It shall be the duty of the clerk of the court to keep an accurate and true record of all costs, fines, penalties, forfeitures, and punishments by the court imposed, and the record shall show the name and residence of the offender, the nature of the offense, the date of the hearing of the trial, and the punishment imposed, which record shall at all times be open to inspection by any of the city authorities, or other person having business relating to the court. The clerk shall keep a permanent docket for recording all processes issued by the court, which shall conform to the dockets kept by the clerk of the superior court. He shall also keep in proper files, to be provided by the city, a record of all cases which shall be disposed of in the court and the disposition made thereof. (1919, c. 377, s. 17; C. S. 1552.)

§ 7-202. Clerk to issue process.—The clerk of the court shall have all the power and authority now conferred upon justices of the peace to issue warrants for the arrest of all persons charged with the commission of offenses within the territory fixed in this article which warrants, however, shall be made returnable before the recorder of said court at the next sitting thereof, and shall be issued only upon affidavit made as now re-

Page dimension: 467.8x716.4

[515]
required by law to support warrants issued by justices of the peace. The clerk shall also have all power and authority of justices of the peace or clerk of the superior court to issue subpoenas or other process, to run anywhere within the state; and when such subpoenas or other process shall run beyond the county in which the court is located the same shall be attested by the seal of the court, and shall also be signed by the recorder. (1919, c. 277, s. 18; C. S. 1553.)

§ 7-203. Prosecuting attorney; duties and salary.—There shall be a prosecuting attorney in the court who shall appear for the prosecution in all cases therein and, when specially requested by the governing body of the municipality and the recorder, shall assist in the prosecution of all cases which may be bound over or appealed from the court to the superior court; for his services he shall be paid such amount per annum as may be fixed by the governing body, at the same time and in the same manner as is provided for fixing the salary of the recorder. The prosecuting attorney may, or may not, perform the duties of city attorney, in the discretion of the governing body of the municipality: Provided, that the governing body of any such municipality is hereby authorized to provide a schedule of fees to be charged by said prosecuting attorney. (1919, c. 277, s. 16; 1925, c. 32, s. 6; C. S. 1554.)

Editor's Note.—The last provision of this section is new with the Acts of 1925.

§ 7-204. Jury trial, as in justice's court.—In all trials in the court, upon demand for a jury by the defendant or the prosecuting attorney representing the state, the recorder shall try the same as is now provided in actions before justices of the peace wherein a jury is demanded, and the same procedure as is now provided by law for jury trials before justices of the peace shall apply: Provided, however, that the compensation allowed jurors in all cases wherein the superior court has heretofore had final jurisdiction shall be the same as is allowed jurors in the superior court of the county in which the recorder's court is established. (1919, c. 277, s. 24; C. S. 1555.)

Local Modification.—Burke: 1931, c. 335; Craven: 1929, c. 115, s. 1; Hoke: Pub. Laws 1937, c. 408; Pitt: 1937, c. 134.

§ 7-205. Continuances, recognizances, and transcripts.—The recorder's court shall have the same authority to grant continuances, take bonds and recognizances, and render judgments on forfeited bonds and recognizances, as is now vested in the law in the superior courts, and the procedure regulating the issuing and service of notices against defendants and their sureties upon bonds and recognizances, and all other proceedings in taking and enforcing judgments in such cases, shall be the same as in the superior court in like cases. Transcripts of any judgments rendered may be docketed in the superior court of the county in which such court is held, in the same manner and with the same effect as judgments of other courts docketed as provided by law. (1919, c. 277, s. 21; C. S. 1556.)

§ 7-206. Officers' fees; fines and penalties paid.—In each case disposed of by the recorder where the defendant is convicted or pleads guilty, there shall, in addition to other lawful costs, be allowed the following fees, to be taxed as a part of the costs against the defendant, viz: For recorder, one dollar in each case involving the breach of a municipal ordinance and any crime or offense of which a justice of the peace has final jurisdiction, and a fee of two dollars in all other cases; for the prosecuting attorney, one dollar in all cases of violation of municipal ordinances and of any crime or offense of which a justice of the peace has final jurisdiction, and in all other cases a fee as now provided by law for solicitors prosecuting in the superior court; and for the clerk of such court the same fees as are now allowed to clerks of the superior court in similar cases; but in all cases of the breach of municipal ordinances and cases of which a justice of the peace has final jurisdiction and in which the defendant pleads guilty, the fee herein allowed a prosecuting attorney may be remitted by the recorder in his discretion. All costs recovered and collected in the court, except as herein otherwise provided, shall belong to the municipality and be paid into the treasury thereof. All fines and penalties collected shall be paid by the clerk of the court to the county treasurer as provided by law, and all fees allowed by law for an arrest or serving other process in a criminal action, when the same shall have been made by the chief of police or other officer who shall be on a salary, shall be paid over to the treasurer of the municipality for the use of the same, and to reimburse it for the expense of maintaining and supporting the court. (1919, c. 277, s. 14; C. S. 1557.)

Local Modification.—Cabarrus: 1937, c. 279; Harnett: 1933, c. 75, s. 16(c).

Cross Reference.—For sections authorizing the governing bodies of municipalities to fix certain fees, see §§ 7-166, 7-200, 7-203.

§ 7-207. County to pay for offenders' work on roads.—Whenever, under any judgment of the court, any defendant is sentenced to work upon the public roads or other public work in the county, or to pay a fine and the costs of the prosecution, or costs only, and the defendant shall in fact work out the sentence or fine and costs, or either, upon the public roads or other public works, as aforesaid, then the county shall be liable for and shall pay to the treasurer of the municipality one-half of such costs. (1919, c. 277, s. 19; C. S. 1558.)

§ 7-208. Prosecutor may be taxed with costs.—The recorder shall have full power, in any case in which he shall adjudge that the prosecution was not required by the public interests, to tax the prosecutor with the costs of such action; and in the event the recorder shall adjudge that prosecution is frivolous or malicious, he may imprison the prosecutor for the nonpayment of such costs, as provided by law for similar cases in other courts. When the costs are paid, they shall belong to the city. (1919, c. 277, s. 20; C. S. 1559.)

§ 7-209. Justice of the peace to bind defendants to recorder's court; procedure thereon.—In case any justice of the peace residing within the territory above mentioned shall bind any person over for any offense committed within said terri—
tory, of which the justice has committing, but not final, jurisdiction, but of which the recorder's court has final jurisdiction, then such justice shall have the peace, instead of binding the defendant over to the superior court of the county, shall bind him to appear at the recorder's court on the day succeeding the trial before the justice, at ten o'clock a. m. The justice of the peace shall at once turn over the case to the clerk of said court, and the clerk shall, upon receipt of the same, enter the case upon the docket of the court, and the recorder shall try such person either upon the original warrant under which he was bound over or upon a new warrant to be issued by him for such offense. In all cases the recorder shall have the right to amend any warrant issued by him or by the clerk of the court, or sent up by any justice of the peace as hereinbefore provided, in the same manner and to the same extent as justices of the peace are now authorized by law to make amendments to warrants in justices' courts.

(1919, c. 277, s. 22; C. S. 1560.)

§ 7-210. Transfer of certain cases to recorder's court.—All cases which shall be pending in any recorder's, police, mayor's, or other municipal court in the counties where such courts provided for in this article shall be established shall, after the election and qualification of the recorder and other officers authorized and required by this article, be transferred to the recorder's courts of the respective municipalities, to be tried in the manner and in accordance with the procedure provided; but no case pending in the superior court of any county at the time this article takes effect shall be transferred to the recorder's court, except by order of the presiding judge thereof. No cause shall be removed from the recorder's court as is now provided for the removal of cases from one justice of the peace to another. (1919, c. 277, s. 23; C. S. 1561.)

§ 7-211. Jurisdiction of justice of the peace after three months delay.—If any criminal offense committed within the jurisdiction of any recorder's court, of which said court is given original, exclusive and final jurisdiction, is not prosecuted to a final termination within three months after the commission of the offense, any justice of the peace within the territory shall acquire jurisdiction to issue his warrant, apprehend the offender, and dispose of such warrant as is now provided by law. (1919, c. 277, s. 23; C. S. 1562.)

§ 7-212. How municipal recorders' courts may be abolished.—The governing body of any municipality shall have the same power, to be exercised in the same manner, subject to the same limitations, to abolish municipal recorders' courts as is given the board of commissioners of any county to discontinue a county recorder's court, under the provisions of § 7-213. (1919, c. 277, s. 35; C. S. 1562.)

§ 7-213. Extension of jurisdiction. — In any city or town within the state of North Carolina, having a population of five thousand inhabitants or more, where there is now maintained a recorder's court under and by virtue of the law, or in which a recorder's court may be hereafter established and maintained, it shall be lawful for the governing body of any such city or town, and the board of county commissioners of the county in which such city or town shall be located, to extend the jurisdiction of the recorder's court in such city or town to the township in which such city or town is located, in the manner described in the following sections. (1921, c. 216, s. 1; C. S. 1562(a).)

§ 7-214. Meeting of town and county authorities; election.—Whenever the governing body of any city or town, as described in § 7-213, and the board of county commissioners of the county in which the same shall be located, shall desire to extend the jurisdiction of the recorder's court in such city or town to include the whole township, as set forth in § 7-213, the mayor of such city or town and the chairman of such board of county commissioners shall call a joint meeting of the two boards, to be held at any place within such township as they may agree upon, and if a majority of each of such boards, at such meeting, shall by a joint resolution vote in favor of the extension of the jurisdiction of the recorder's court as herein described, then at such joint meeting the governing body of the town or city, and the board of county commissioners of the county, shall pass a joint resolution calling an election, submitting to the voters of the entire township the question of the extension of said municipal court, and that election shall be conducted by the county commissioners in the same manner as is prescribed for the conduct of elections for the establishment of municipal recorders' courts by the governing bodies of cities and towns, in so far as said procedure is applicable; the result of the election shall be recorded in the minutes of the county commissioners and certified to and recorded in the minutes of the governing body of the town or city; the form of the ballot shall be as prescribed in § 163-155, subsec. (e), and if by such election such resolution is adopted it shall have the effect of conferring upon the recorder's court in such city or town the same powers, authority, and jurisdiction as to offenses committed within the township in which such city or town is located as such court would have had if the same had been committed in such city or town: Provided, however, that the extension of the jurisdiction of such recorder's court as herein described shall not have the effect of in any way extending or affecting in any manner whatsoever any ordinance or other law pertaining exclusively to such city or town. (1921, c. 216, s. 2; C. S. 1562(b).)

§ 7-215. Police powers. — Whenever the jurisdiction of any recorder's court shall have been extended as described in §§ 7-213 to 7-216, such action shall thereupon confer upon the police officers of such city or town the same powers and authority in making arrests for crimes and offenses committed anywhere within the township in which such city or town shall be located, as is now or may hereafter be conferred upon sheriffs or their deputies within their respective counties. (1921, c. 216, s. 3; C. S. 1565(c).)

§ 7-216. Resolution for extension filed with each board as records.—Whenever the governing board of any city or town and the county commissioners of the county shall have adopted the
§ 7-217. Jurisdiction not to extend to other municipalities.—No court hereafter established by the governing body of any city or town shall have jurisdiction over the territory within the corporate limits of any other incorporated city or town, or outside the county in which the city or town establishing such court is located. (1925, c. 216, s. 4; C. S. 1562(d).)

Local Modification.—Craven, Edgecombe, Nash, Robeson: 1925, c. 280.

Art. 25. County Recorders' Courts.

§ 7-218. Established by county commissioners.—In any county in which a municipal recorder's court may not be established under the provisions of this subchapter, or in which such court has in fact not been established in the county-seat, the board of commissioners may, in their discretion, establish a recorder's court for the entire county, which shall be a court of record and shall be held at the county seat, or other place within the county provided by the board of commissioners. (1919, c. 277, s. 25; 1921, c. 110, s. 1; 1943, c. 543; C. S. 1565.)

Local Modification.—Caldwell: Pub. Loc. 1931, c. 138; Henderson: 1927, c. 103; 1937, c. 97; 1939, c. 238; Richmond: 1941, c. 60; Swain: Pub. Loc. 1939, c. 499.

Editor's Note.—The 1943 amendment added at the end of this section the following words "or other place within the county provided by the board of commissioners."


§ 7-219. Recorder's election, qualification, and term of office.—The court shall be presided over by a recorder, who shall have the same qualifications as provided for recorders of municipalities. The first recorder shall be elected by the board of commissioners of the county, either at the time of the establishment of the court or within thirty days thereafter, and shall hold the office until the next regular election wherein county officers are elected, and until his successor shall be duly elected and qualified; and should a vacancy occur in said office at any time, the same shall be filled by the election of a successor with the qualifications herein provided, for the unexpired term, by the board of county commissioners at a regular or special meeting called for that purpose. The successor of the first recorder herein provided for and each succeeding recorder shall be nominated and elected in the county in the same manner and at the same time as is now provided by law for the nomination and election of the elective officers of the county and in the general election for such elective officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office as is now provided by law for justices of the peace, and shall file the same with the clerk of the superior court of the county, who shall duly record the same in a book kept for that purpose. The recorder's salary shall be paid out of the county funds upon vouchers, and shall not be increased or decreased during his term. (1919, c. 277, s. 25; C. S. 1564.)

Local Modification.—Henderson: 1939, c. 238; Mecklenburg: 1937, c. 253; Perquimans: 1943, c. 742; Scotland: 1925, c. 171.

Cross References.—As to forms of oaths required of justices of the peace, see §§ 11-6, 11-7, 11-11; Const., Art. VI, § 7. As to penalty for failure to take oaths, see § 128-5.

§ 7-220. Time and place for holding court.—The court shall be open for the trial of all criminal causes of which it has jurisdiction at least one day of each week, to be fixed by the board of county commissioners, and shall continue its session from day to day until all business is transacted by trial, continuance, or otherwise. The session of the court shall be held in the county courthouse or other place within the county provided by the board of commissioners for that purpose. Special sessions of the court may be called by the recorder as the necessities may require. (1919, c. 277, s. 26; C. S. 1565.)

§ 7-221. No subsequent change of judgment.—When any case has been finally disposed of by the recorder and judgment pronounced therein, the case shall not thereafter be reopened or the judgment or sentence rendered therein changed, modified or stricken out by the recorder after the adjournment of the regular weekly term of court or after the adjournment of any special term of court by the recorder. (1919, c. 277, s. 26; C. S. 1565.)

§ 7-222. Criminal jurisdiction.—The court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and, in addition to the jurisdiction conferred on municipal courts as hereinafter set forth, shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors: Provided, however, that where a special court or recorder's court shall legally exist within such county by virtue of a special act of the legislature passed before the amendment to the constitution in reference thereto, then the county recorder's court, as established in this article, shall not have jurisdiction of criminal cases within the territory of such existing recorder's court, so as to interfere with or conflict with the existing recorder's court, but shall have concurrent jurisdiction where the jurisdiction of the two courts covers the same causes or the same subject-matter. The article and the establishment of any court hereunder shall not be construed to repeal, modify or in anywise affect any existing special court or recorder's court by virtue of such former special acts herein referred to. (1919, c. 277, s. 27; C. S. 1567.)

Local Modification.—Franklin: 1943, c. 359.

Cross Reference.—For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

§ 7-223. Jurisdiction and powers as in municipal court.—The recorders of county courts provided for in this article shall be vested with all the jurisdiction and authority conferred upon recorders of municipal courts, in like manner and to the same extent as if such jurisdiction and authority had been specifically in this section set forth, in so far as such jurisdiction and authority are applicable
§ 7-224. Removal of cases from justices' courts.

When, upon written request made before entering on the trial of any cause before any justice of the peace, it shall appear proper for the cause to be removed for trial to some other justice, as is now provided by law, the cause may be removed for trial to the recorder's court of the county. (1919, c. 277, s. 28; 1921, c. 110, s. 3; C. S. 1569.)

Local Modification.—Bertie: 1943, c. 772; Nash: c. 768.

§ 7-225. Defendants bound by justice to recorder's court.

In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the recorder's court as provided in this article, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance or surety to appear at the next succeeding session of the recorder's court of the county, for trial; and in default of such surety such person shall be committed to the common jail of the county to await a trial: Provided, that in the event any justice of the peace or other committing magistrate shall bind over to the superior court any person accused of a crime within the jurisdiction of the county recorder's court, the clerk of the superior court shall, upon his own motion, transfer the papers in any case to the said recorder's court as provided in this article, and in case said notice is not served on the accused person and his surety at least five days before the beginning of the next succeeding term of the recorder's court, the case shall not be tried without the consent of the accused person until the following term of the recorder's court. (1921, c. 110, s. 5; C. S. 1570(a).)

§ 7-226. Notice to accused of transfer; trial; obligation of bond.

Whenever the clerk of the superior court shall transfer the papers in any case from the superior court to a county recorder's court, he shall at the same time issue a notice to the accused person and his surety, informing them that the cause has been so transferred and requiring the accused person to appear at the next succeeding term of said recorder's court for trial, and, upon the service of said notice upon the accused person and his surety, at least five days before the beginning of the next succeeding term of the recorder's court, the case shall stand for trial at said term and the bond given by the accused person for his appearance at the next term of the superior court shall in all respects be valid and binding to compel the appearance of the accused person at the said next succeeding term of said recorder's court, and in case said notice is not served on the accused person and his surety at least five days before the beginning of the next succeeding term of the recorder's court, then the case shall not be tried without the consent of the accused person until the following term of the recorder's court. (1921, c. 110, s. 5; C. S. 1570(a).)

Local Modification.—Cleveland, Lenoir: 1933, c. 277; 1939, c. 61; Mecklenburg: 1933, c. 277; 1937, c. 386.

Editor's Note.—Prior to Public Laws of 1921 this section read "upon affidavit, etc." instead of "upon written request, etc.," as it now stands.

§ 7-227. Trials upon warrants; by whom warrants issued.

All trials of criminal causes in said court shall be upon warrant issued by the clerk of the superior court or deputy clerk provided for in this article, or by the recorder or by any justice of the peace of the county. In either event such warrant shall be issued upon affidavit duly made and subscribed, setting forth the complaint against the defendant: Provided, the recorder shall have authority to amend the warrant and to allow amendment of the affidavit at any time before judgment. (1919, c. 277, s. 30; 1921, c. 110, s. 6; C. S. 1571.)


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

In all trials in county recorders' courts, upon demand for a jury by the defendant or the prosecuting attorney representing the state, a jury shall be had in the same manner and under the same provisions as are set forth in this subchapter in reference to municipal courts, so far as the same may be practically applicable to a county court. (1919, c. 277, s. 40; C. S. 1572.)

Local Modification.—Burke: 1931, c. 335; Cabarrus: 1939, c. 347; Craven: 1929, c. 115; Henderson: 1933, c. 316; Hoke: Pub. Loc. 1937, c. 408; Pasquotank: 1941, c. 213; Perquimans: 1929, c. 35; Tyrrell: 1943, c. 177.

§ 7-229. Sentence imposed; fines and costs paid.

Whenever any person shall be convicted or pleading guilty of any offense of which the court has final jurisdiction the recorder may sentence him to the common jail of the county in which the court shall be held, and assign him to work on the public roads of the county where provision has been made therefor; but if no provision has been made for working convicts upon the public roads in the county, then the recorder may sentence such person to be worked upon the public roads of any other county within the judicial district or any county within any adjoining judicial district which has made such provision: Provided, that in case the person so convicted or pleading guilty shall be an infant of immature years, then the recorder may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the state. All fines imposed by the court shall be collected by the clerk of such court or the
deputy clerk thereof in the same manner as the clerk of the superior court collects fines imposed by the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as is allowed by law in similar cases before the superior court. (1919, c. 277, s. 32; 1925, c. 308; C. S. 1573.)

Cross Reference.—As to sentencing prisoners for work under the supervision of the State Highway and Public Works Commission, see §§ 148-30 and 148-32.

§ 7-230. Appeals to superior court.—Any person convicted of any offense of which the county recorder has final jurisdiction may appeal to the superior court from any judgment or sentence of the court in the same manner as is now provided for appeals from the courts of justices of the peace; and any person tried before the recorder for any offense of which the court has not final jurisdiction shall, upon the recorder’s finding probable cause of guilt, be bound over to the superior court in the same manner as is provided by law in similar cases before justices of the peace. (1919, c. 277, s. 33; C. S. 1574.)

Derivative Jurisdiction.—When the Superior Court sits upon an appeal from a judgment of a justice of the peace in a criminal action, or a judgment of the court under this section, it is sometimes said to be acting under the derivative jurisdiction of the court from which appeal is taken; the trial is had upon the warrant issued by the court which had jurisdiction and which is required to be transmitted to the court with the return to the appeal. State v. Boykin, 211 N. C. 407, 412, 191 S. E. 18.

Where the case is beyond the jurisdiction of the inferior court, it does not reach the Superior Court under this section by appeal, but by the process of "binding over," and in such case only is an indictment necessary. Id.

§ 7-231. Clerk of superior court ex officio clerk of county recorder’s court.—The clerk of the superior court of any county in which a county recorder’s court shall be established shall be ex officio clerk of such court. He shall keep separate criminal dockets in his office for such court in the same manner as he keeps criminal dockets in the superior court; he shall otherwise possess all the powers and functions conferred upon, and discharge all the duties required of, clerks of the superior court under the general law; and he shall be liable on his official bond to the same extent that he would have been liable if he had done the act himself. The preceding sentence shall not apply to recorder’s courts in Bladen, Brunswick, Camden, Gates, Halifax, Martin, Moore, Orange, Perquimans, Forsyth and Vance Counties. (1919, c. 277, s. 36; 1935, c. 346; C. S. 1576.)

Editor’s Note.—The amendment of 1935 changed this section in such a manner that a comparison is necessary in order to determine its effect.

§ 7-232. Deputy clerk may be appointed.—In stead of having the clerk of the Superior Court to act ex-officio as clerk of the Recorder’s Court or General County Court, the board of commissioners of any county wherein a county Recorder’s Court or General County Court may be established may, at the time of the establishment of said court or at the time of fixing the county budget for any succeeding year, call upon the clerk of the Superior Court to appoint a special deputy to act as clerk of the Recorder’s Court or General County Court, and the clerk of the Superior Court shall within sixty days thereafter appoint a special deputy to act as clerk of the Recorder’s Court or General County Court, unless the time for good cause shall be extended by the Board of County Commissioners. Said special deputy shall assist the clerk of the Superior Court with the duties of his office and shall have all the power and authority in reference to the county Recorder’s Court or General County Court conferred upon the clerk of the Superior Court by the preceding section, and he shall do all things in reference to said Recorder’s Court or General County Court under the direction of the clerk of the Superior Court of the county as fully as the clerk of the Superior Court would otherwise be authorized to do. The Board of Commissioners may require and fix the official bond of said special deputy clerk for the faithful performance of his duties and fix his salary, which shall be fixed before he enters upon his duties and shall not be lowered during his term of office. His term of office shall be for the same time as the term of the recorder of said court, unless he shall be sooner removed by the clerk of the Superior Court for cause, and shall cease at any time that the court itself shall cease to exist. This section shall not apply to Bladen, Brunswick, Camden, Gates, Guilford, Halifax, Lee, Martin, Moore, Orange, Perquimans, Forsyth and Vance Counties. (1919, c. 277, s. 36; 1935, c. 346; C. S. 1576.)

Editor’s Note.—The last two sentences in above section were added by Public Laws 1935, chapter 345.


§ 7-233. Compensation of clerk when no deputy appointed.—When no deputy clerk is appointed or elected by the board of commissioners, they are authorized to pay annually to the clerk of superior court an amount fixed by the board, which shall be in addition to any salary or fees theretofore allowed by law to the clerk of superior court, and which shall be in compensation for the services rendered by him as clerk of the county recorder’s court. Such compensation shall be paid to the clerk of superior court so long as he shall perform the duties of clerk ex officio of the county recorder’s court. (1919, c. 277, s. 36; C. S. 1577.)

§ 7-234. Deputy clerk to take oath of office.—If any deputy clerk shall be appointed as provided in this article he shall take the oath required of deputy clerks under the general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of him under this article, both of which oaths shall be recorded in the office of the clerk of the superior court, and such deputy clerk shall be further authorized to perform all duties of deputy clerk under the general law in addition to
the duties set forth in this article. (1919, c. 277, s. 37; C. S. 1528.)

Cross Reference.—As to oath's required, see §§ 2-13, 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-235. Prosecuting attorney may be elected.—The board of commissioners of any county availing itself of the provisions of this article may elect, at the same time, in the same manner, and for the same term as herein provided for the election of a deputy clerk, a prosecuting attorney for said court, and fix his compensation in such amount as they may deem suitable for the services to be rendered: Provided, that the board may require the county attorney to discharge the duties of prosecuting attorney in said court, and fix his compensation accordingly. (1919, c. 277, s. 38; C. S. 1529.)

Local Modification.—Montgomery: 1929, c. 112; Washington: 1941, c. 164.

§ 7-236. Fees for issuing and serving process.—All justices of the peace, constables and sheriffs issuing or serving warrants or other process returnable to the recorder's court shall have the same fees as are now prescribed by law, which fees shall be collected and paid out in the same manner and by the same officers as collect and distribute such fees in the superior court. (1919, c. 277, s. 41; C. S. 1530.)

§ 7-237. Costs and fees taxed as in municipal court.—Except as provided in § 7-238, there shall be taxed in the county recorder's court the same costs and fees for the benefit of the officers thereof as provided for municipal recorder's court. Such costs and fees shall be collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners. (1919, c. 277, s. 39; C. S. 1581.)

Cross Reference.—See § 7-206.

§ 7-238. Fees taxed when county officer on salary; recorder's court fund.—In cases in which the recorder or judge and the solicitor of the county recorder's courts shall be paid salaries, in lieu of fees for such recorder or judge or solicitor, the clerk of the recorder's court shall tax against the defendant who is convicted, or who confesses his guilt, or upon whom judgment is suspended in said court in cases originally within the jurisdiction of the justice of the peace a tax fee of three dollars in each case, and in all other cases within the jurisdiction of the said recorder's court a tax fee of six dollars, and these several sums when collected shall be paid over by said clerk to the treasurer or financial agent of the county, to be kept by him as a separate and distinct fund to be known as the recorder's court fund. This fund shall be used only in paying the salary of the recorder and prosecuting attorney of said court, and the other expenses of the court. (1921, c. 110, s. 13; C. S. 1588(a).)

§ 7-239. Courts may be discontinued after two years.—The board of commissioners of any county which has established a county recorder's court under the provisions of this article are authorized, after two years trial of the court, to discontinue the same at any time thereafter if in their judgment the public interest shall require it. If any such court shall be so discontinued, the action or resolution must be taken or adopted at least six months prior to the next general election, and shall not go into effect until the term of office of the recorder shall expire. (1919, c. 277, s. 35; C. S. 1582.)


§ 7-240. Established for entire county.—The governing body of any municipality possessing a population of two thousand or over, according to the last federal census, in which the county courthouse is located, and the board of commissioners of the county, shall have the power, at a joint meeting of the two bodies, by joint resolution, in the manner hereinafter provided, to establish a recorder's court so as to include the entire county, outside of other municipalities therein possessing a population of two thousand or over. After the adoption of such joint resolution such municipal recorder's court shall possess all the powers and functions and exercise all the territorial jurisdiction in this subchapter conferred upon both municipal and county recorder's court under the procedure herein provided for, and subject to the provisions herein in reference to concurrent jurisdiction where a special or recorder's court exists under prior special acts in any portion of the county. (1919, c. 277, s. 41; C. S. 1583.)

Local Modification.—Richmond: 1941, c. 60.

§ 7-241. Election of recorder.—If the territorial jurisdiction of such municipal recorder's court is extended to the entire county, as set forth in the proceeding section, then the first recorder shall be selected for the term and in the manner hereinafter set forth, by a joint meeting of the governing body of such municipality and the board of commissioners of the county, and such recorder shall be thereafter nominated and elected as is provided for herein for the nomination and election of a county recorder. Such recorder shall be a resident of the municipality, and in all other respects the court shall be conducted under the proceedings herein provided for municipal courts. (1919, c. 277, s. 42; C. S. 1584.)

Local Modification.—Lenoir, Onslow, Sampson: 1925, c. 213; 1927, c. 170.

§ 7-242. Mayor's jurisdiction continued, when.—In case the jurisdiction of the recorder's court of any municipality in any county shall not be extended in the manner authorized in this article, and no county recorder's court shall be established therein, then the mayor of the various cities and towns in such county shall continue to have all the powers and functions and exercise all the jurisdiction now conveyed upon such officials by the general law for municipal corporations. (1919, c. 277, s. 43; C. S. 1595.)

Art. 27. Provisions Applicable to All Recorders' Courts.

§ 7-243. Appeals from justices of the peace.—In all cases where there is an appeal from a justice of the peace, such appeal shall be first heard in the recorder's court, in the manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the recorder's court. (1919, c. 277, s. 54 1/2; C. S. 1597.)

Object.—One of the objects of this and related sections
was to relieve the congested dockets of the Superior Court. State v. Baldwin, 205 N. C. 174, 175, 170 S. E. 645.

Under the general provisions of this section, an appeal from a conviction of simple assault in a justice's court must first be taken to the recorder's court and not the Superior Court in the counties affected by the act. Id.

§ 7-244. Offenders may be sentenced to city chain-gang. — In case any municipality possessing a population of two thousand or over, as provided for herein, in which a recorder's court shall be established pursuant to the provisions of this subchapter, shall now or hereafter establish and maintain a city chain-gang, or workhouse or other penal institutions for the imprisonment and working of city prisoners, any recorder may sentence any person convicted of any offense committed within said municipality and punishable by imprisonment, to be imprisoned and worked on such city chain-gang, or in such workhouse or other penal institutions, for such time as the recorder may in his discretion determine in accordance with the law. (1919, c. 277, s. 44; C. S. 1586.)

Local Modification.—Richmond: 1941, c. 60.
Cross Reference.—See § 7-194 and notes.

§ 7-245. Recorders' courts substituted for other special courts. — Wherever there has been established in any county, city, or town a recorder's court or other special court, which, under the provisions of this subchapter, might have been established hereunder, whether it shall possess exactly the same jurisdiction and functions or not, the board of commissioners of the county or the governing body of such city or town, or the governing body of such city or town and the board of commissioners of the county acting jointly, may abolish such existing court and adopt any one of the courts herein provided for by appropriate resolution of such boards. (1919, c. 277, s. 45; C. S. 1587.)

Art. 28. Civil Jurisdiction of Recorders' Courts.

§ 7-246. Civil jurisdiction may be conferred. — The board of county commissioners of any county in which there is a city or town with a population of not less than ten thousand inhabitants, in which city or town there has been established a municipal recorder's court, under the provisions of this subchapter, or in which there is a municipal recorder's court established by law, may confer upon such recorder's court jurisdiction to try and determine civil actions, as hereinafter provided, wherein the party plaintiff or defendant is a resident of such county, or is doing business in the county. Such jurisdiction may be conferred by resolution of the board of county commissioners of any county, entered upon their minutes, and the board of county commissioners of the county may likewise confer civil jurisdiction on the county recorder's court to try and determine civil actions as hereinafter provided, wherein one or more of the parties, plaintiff or defendant, is a resident of said county or is doing business therein. (1919, c. 277, s. 47; 1921, c. 110, s. 7; 1933, c. 166; C. S. 1589.)

Local Modification.—Carteret: 1933, c. 379; Richmond: 1941, c. 60; Surry: Pub. Loc. 1927, c. 133, s. 1.
Editor's Note.—Prior to the amendment of 1933, Public Laws 1933, c. 166, this section applied in cities or towns of not less than 10,000 "nor more than 25,000" inhabitants. The quoted clause was omitted by the amendment.

Constitutionality.—A similar statute authorizing the board of commissioners of a county having a recorder's court to allot stated civil jurisdiction to said court by the adoption of an ordinance to that effect was held to be unconstitutional as an unlawful delegation of legislative powers. Durham Provision Co. v. Daves, 190 N. C. 7, 128 S. E. 593.

§ 7-247. Extent of jurisdiction. — The jurisdiction of such municipal and county recorders' courts in civil actions shall be as follows: (a) Jurisdiction concurrent with that of the justices of the peace within the county; (b) jurisdiction concurrent with the superior court in all actions founded on contract, wherein the amount involved exclusive of interest and costs does not exceed one thousand dollars; (c) jurisdiction concurrent with the superior court in actions not founded upon contract wherein the amount involved exclusive of interest and costs does not exceed the sum of five hundred dollars. (1919, c. 277, s. 48; 1921, c. 110, s. 8; C. S. 1590.)

Local Modification.—Carteret: 1933, c. 379; Mecklenburg: 1923, c. 174.

§ 7-248. Procedure in civil actions. — The rules of practice, issuing and serving process, and filing pleadings shall conform, as near as may be, to the practice in the superior court: Provided, it shall not be necessary to file written pleadings in any action of which justices of the peace now have jurisdiction. The process shall be returnable directly to the court; and no civil process shall be issued by any recorder's court to any county other than that in which the court is located. (1919, c. 277, s. 56; 1921, c. 110, s. 9; C. S. 1591.)

Local Modification.—Carteret: 1933, c. 379.
Cross Reference.—As to uniform practice in inferior courts where summons issued to run outside county, see §§ 1-92, 1-93, 1-94.

Editor's Note.—Prior to the amendment in 1921, it was necessary to file written pleadings in an action of which the justice of the peace had jurisdiction.

§ 7-249. Trial by jury in civil actions. — In all civil actions the parties shall be deemed to have waived a trial by jury unless demand for such trial is made before the trial begins. The demand shall be in writing and signed by the party making it, or his attorney, and accompanied by a deposit of five dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it. (1919, c. 277, s. 49; 1921, c. 110, s. 10; C. S. 1592.)

Local Modification.—Carteret: 1939, c. 115, s. 1; Hoke: Pub. Loc. 1937, c. 493.
Editor's Note.—The amendment in 1921 changed the amount of the deposit from three to five dollars.

§ 7-250. Jurors drawn and summoned. — If a trial by jury is demanded, the recorder shall continue the cause until a day is set for demand for such trial is made before the trial begins. The demand shall be in writing and signed by the party making it, or his attorney, and accompanied by a deposit of five dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it. (1919, c. 277, s. 49; 1921, c. 110, s. 10; C. S. 1592.)

Local Modification.—Carteret: 1939, c. 115, s. 1; Hoke: Pub. Loc. 1937, c. 493.

§ 7-251. Talesmen and challenges. — The recorder shall have the right to call in bystanders according to the practice in the superior court [522]
as nearly as the same is applicable, and each party shall have the same causes of challenge as in the superior court. (1919, c. 277, s. 51; C. S. 1594.)

Local Modification.—Craven: 1929, c. 115, s. 1; Hoke: Pub. Loc. 1937, c. 408.

§ 7-252. Jury as in superior court.—The jury shall be a jury of twelve, and the trial shall be conducted as nearly as possible as in the superior court. (1919, c. 277, s. 52; C. S. 1595.)

Local Modification.—Craven: 1929, c. 115, s. 1; Hoke: Pub. Loc. 1937, c. 408; Surry: Pub. Loc. 1927, c. 133, s. 2.

§ 7-253. Appeals to superior court.—Appeals may be taken from the recorder’s court to the superior court of the said county in time, for errors assigned in matters of law, in the same manner as now provided for appeals from the superior court to the supreme court, with the exception that the record may be typewritten instead of printed, and only one copy thereof shall be required. The time for taking and perfecting appeals shall be counted from the end of the term. Upon such appeal the superior court may either affirm or modify the judgment of the recorder’s court, or render the cause for a new trial. From the judgment of the superior court, an appeal may be taken to the supreme court. Provided, that appeals from a county recorder’s court to the superior court of the said county shall be tried de novo in the superior court. (1919, c. 277, ss. 53, 54; 1921, c. 110, s. 11; C. S. 1596.)

Editor’s Note.—The last provision contained in this section is new with the Acts of 1921.

§ 7-254. Enforcement of judgments.—Orders to stay execution shall be the same as in appeals from the superior court to the supreme court. Judgments of the recorder’s court may be enforced by executions issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court, as now provided for judgments of justices of the peace; and the judgment, when docketed, shall in all respects be a judgment of the superior court as if rendered by such court, and shall be subject to the same statute of limitations and the statutes relating to revival of executions. Provided, that a judgment of the recorder’s court shall not be a lien upon real estate until docketed in the superior court. (1919, c. 277, s. 55; 1921, c. 110, s. 12; C. S. 1598.)

Editor’s Note.—The last provision, herein contained, providing docketing in the superior court before the judgment shall be a lien upon real estate, is new with the Acts of 1921.

§ 7-255. Costs in civil actions.—In all civil actions the clerk shall tax against the losing party the sum of three dollars in cases originally within the jurisdiction of the justice of the peace, and the sum of six dollars in all other cases, and all sums so collected shall be disposed of as provided for tax fees in criminal actions in § 7-236. (1921, c. 110, s. 13; C. S. 1598(a.).)

Cross Reference.—See also §§ 7-206 and 7-237.

Art. 23. Elections to Establish Recorders’ Courts.

§ 7-256. Election required.—The courts provided for in this subchapter shall be established upon elections held as set forth in this article, except county recorders’ courts which may be established by the county commissioners of any county without a popular vote. (1919, c. 277, s. 58; 1921, c. 110, s. 14; C. S. 1599.)

Editor’s Note.—The excepting clause in this section was placed herein by the Acts of 1921.

§ 7-257. Municipal recorder’s court.—The governing body of any city or town which may, under the terms of this subchapter, establish a court, prior to its establishment shall pass a resolution, if in their judgment such court should be established, reciting such fact and calling an election at a date to be fixed, which shall be not less than thirty days nor more than two years from the passage of the resolution, at which election there shall be submitted to the qualified voters of the city the question of establishing such court. The form of the ballot shall be as prescribed in § 163-153, subsec. (e). (1919, c. 277, s. 55; 1921, c. 201; C. S. 1600.)

Editor’s Note.—The 1919 amendment substituted “two years” for “sixty days” formerly appearing in the eighth line of this section.

§ 7-258. Notice of election.—Notice of such election shall be given, signed by the clerk of the city or town or the mayor thereof, containing in substance the resolution, the date of the election, and a reference to this subchapter, which notice shall be published once a week for four successive weeks prior to said election in some newspaper published in the city or town. (1919, c. 277, s. 59; C. S. 1601.)

§ 7-259. New registration may be ordered.—The governing body of such city or town may in its discretion order a new registration of the voters for any election authorized hereunder. (1919, c. 277, s. 60; C. S. 1602.)

§ 7-260. Manner of holding election.—The election shall be held, reported, and recorded in the city or town, under the laws governing general elections as near as may be applicable to the city or town. The result of the election shall be reported to, canvassed and declared by the governing body of the city or town, and recorded upon the minutes thereof. If the majority of the votes cast is declared in favor of such court, it shall be established, and not otherwise. (1919, c. 277, s. 61; C. S. 1603.)

Cross Reference.—As to general election laws, see § 163-146 et seq.

§ 7-261. Another election after two years.—If the majority of the votes cast at such election is against the court, another election for the same purpose may thereafter be called, but not within less than two years from the first or any succeeding election in reference thereto. (1919, c. 277, s. 62; C. S. 1604.)

§ 7-262. Municipal courts with jurisdiction over the entire county.—The courts provided for in article twenty-six of this subchapter shall be established in the following manner: The governing body of the city and the board of county commissioners of the county, at a joint meeting, shall pass a joint resolution calling an election submitting to the voters of the entire county the question of the establishment of said court. The election shall be conducted by the county com-
municipal recorders' courts by the governing bodies of cities and towns, in so far as said procedure is applicable; the result of the election shall be recorded in the minutes of the county commissioners and certified to and recorded in the minutes of the governing body of the city. The form of the ballot shall be as prescribed in § 163-155, subsec. (e). (1919, c. 277, s. 62; C. S. 1927, c. 74; S. 1606.)

§ 7-263. Expense of elections paid.—The expense of conducting the elections for "municipal courts" and "municipal-county courts" shall be borne by the city or municipality concerned. (1919, c. 277, s. 63; C. S. 1927, c. 74.)

§ 7-264. Certain districts and counties not included.—This subchapter shall not apply to the following judicial districts: the tenth, except as to Granville and Orange counties; the eleventh, except as to Wake and Durham counties; the seventeenth, except as to Randolph and Transylvania counties; the nineteenth; and the twentieth, except as to Cherokee, Jackson, Haywood and Swain counties; nor shall it apply to the counties of Chatham, Columbus, Johnston, New Hanover, and Robeson. (1919, c. 277, s. 64; 1921, c. 110, s. 16; Ex. Sess. 1921, cc. 59, 80; 1923, cc. 19, 40; 1925, c. 162; Pub. Loc. 1927, cc. 214, 545; 1929, cc. 17, 111, 114, 130, 340; 1931, cc. 3, 19; 1933, c. 142; 1935, c. 356; 1938, c. 204; 1941, c. 338; C. S. 1927, c. 246.)

Local Modification.—Alexander: 1939, c. 204; Halifax: 1931, c. 3; Hyde: 1935, c. 396; 1941, c. 134.

SUBCHAPTER VII. GENERAL COUNTY COURTS.

Art. 30. Establishment, Organization and Jurisdiction.

§ 7-265. Establishment authorized; official entitlement; jurisdiction.—In each county of this state, there may be established a court of civil and criminal jurisdiction, which shall be a court of record and which shall be maintained pursuant to this subchapter and which court shall be called the general county court and shall have jurisdiction over the entire county in which said court may be established. In any county in the state in which there is situated a city which has or may have in the future a population, according to any enumeration by the United States census bureau, of more than twenty thousand inhabitants, the commissioners of such county or counties are authorized hereby to establish general county courts as hereinafter provided without first submitting the question of establishing such court to a vote of the people: Provided, that the said enumeration need not be made at a regular decennial census. In the event that the second sentence of this section is acted upon by the commissioners of any county in establishing a general county court, as is herein provided, the said commissioners may make such provisions for holding such courts in such city. (1923, c. 216, s. 1; 1925, c. 245; 1927, c. 74; C. S. 1608(f).)

Local Modification.—Caswell: 1931, c. 17; 1931, c. 405; 1937, c. 54; Cherokee: Pub. Loc. 1927, c. 87; Henderson: 1927, c. 103; Richmond: 1941, c. 60, s. 1; Transylvania: 1931, c. 1; Wilson: 1931, c. 61; 1935, cc. 29, 149, s. 1.

Editor's Note.—See note to § 7-278.

In General.—Under this section the Legislature may create courts inferior to Superior Court if provision is made for appeal to the Superior Court. Jones v. Standard Oil Co., 202 N. C. 328, 163 S. E. 741.

The establishment of a General County Court by the board of commissioners of a county under the provisions of this subchapter shall be valid if: (a) the said court is authorized by the Legislature and the board of commissioners being clothed merely with the power to find the facts in regard to the necessity and expediency of such court, and their acts in establishing such courts having been ratified by the Legislature. State ex rel. Meador v. Thomas, 205 N. C. 142, 170 S. E. 110.

Enactment of Acts of Commissioners in Creating Courts. —The acts of the county commissioners in the organization of general county courts, heretofore organized, as provided by ch. 216 of the Public Laws of 1923 and ch. 85 of the Public Laws, extra session 1924, and all amendments thereto, were ratified and declared to be the acts of the General Assembly of North Carolina by the Acts 1927, ch. 232, sec. 1.

§ 7-266. Creation by board of commissioners without election.—If in the opinion of the board of commissioners of any county, the public interests will be best promoted by so doing, they may establish a general county court under this article, by resolution which shall, in brief, recite the reasons for the establishment thereof, and further recite that, in the opinion of the board of commissioners, it is not necessary that an election be called upon the establishment of such court as herein provided for, and upon the adoption of such resolution the board of commissioners may establish said court without holding such election. (Ex. Sess. 1924, c. 85, s. 1.)

Local Modification.—Henderson: 1927, c. 103; Person: 1929, c. 246.

Cited in Ex parte Com'r, 219 N. C. 96, 12 S. E. (2d) 889.

§ 7-267. Abolishing the court.—Whenever in the opinion of the board of commissioners of any county in which a court has been established under this article, the conditions prevailing in such county are such as to no longer require the said court, such board of county commissioners may, by proper resolution reciting in brief the reasons therefor, abolish said court: Provided, no such court shall be abolished except at the end of the terms of office of the judge and solicitor, unless such judge and solicitor shall voluntarily tender their resignations, setting forth, in brief, that in their opinion the existence of the said court is no longer necessary, in which event the board of commissioners may forthwith abolish the same. (Ex. Sess. 1924, c. 85, s. 2.)

Cited in Ex parte Board of Com'rs, 219 N. C. 96, 12 S. E. (2d) 889.

§ 7-268. Transfer of criminal cases.—Upon the establishment of the general county court, as in this article authorized, the clerk of the superior court shall immediately transfer from the superior court to such general county court all criminal actions pending in the superior court of which the general county court has jurisdiction, as in this article conferred, and the general county court shall immediately proceed to try and dispose of such criminal actions. (Ex. Sess. 1924, c. 85, s. 2.)

This and related sections modify § 15-177. See State v. Baldwin, 205 N. C. 174, 170 S. E. 645.

§ 7-269. Transfer of civil cases.—Transfers may be made in term of any civil action in the superior court.
§ 7-270. Costs.—Cost in both criminal and civil actions shall be taxed and collected as now provided by law. (Ex. Sess. 1924, c. 85, s. 2.)

§ 7-271. Judge; election, term of office, vacancy in office, qualification, salary, office.—The court shall be presided over by the judge, who may be a licensed attorney at law, and at the time of his election he shall be a qualified elector in the county. The first judge of the court upon the establishment of said court shall be elected by the board of county commissioners within thirty days after the establishment of said court, and he shall hold his office until January first following his election, and until his successor is elected and qualified. If a vacancy occurs in the office of judge of said court, the same shall be filled by the election of a successor for the unexpired term by the board of county commissioners. After the first elected judge by the board of county commissioners, each succeeding judge shall be elected by a vote of the qualified electors of the county at the next general election before the expiration of the term of office and when other county officers are elected, and shall hold his office for a term of four years beginning January first following his election, and until his successor is elected and qualified. Before entering upon the duties of his office, the judge shall take and subscribe an oath of office, as is now provided by law for justices of the peace, and he shall file the same with the clerk of the superior court of the county. The salary of said judge shall be fixed by the board of commissioners of the county, and shall not be decreased during the term of office, and it shall be paid monthly out of the funds of the county. The judge shall reside in the county and shall be provided by the county commissioners with an office at the county-seat. The terms of said court shall be held in the courthouse, except as otherwise provided in § 7-265, but they shall at no time inconvenience or discommode the superior court of the county while the superior court in term is using the courthouse. If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such judge, fixing his term of office, in which event the judge so appointed shall hold office pursuant to such appointment, and shall not be elected by a vote as herein provided for. (1923, c. 216, s. 2; Ex. Sess. 1924, c. 85, s. 1; C. S. 1608(g).)

Local Modification.—Duplin: 1943, c. 264; Scotland: 1925, c. 172.

Cross References.—As to forms of oaths required of justices of peace, see § 11-11. As to oaths required of public officials generally, see §§ 11-6, 11-7; Const., Art. VI, s. 7.

Editor's Note.—This section was amended in 1924 by striking out a provision fixing the salary at not less than $500 not to be increased; by striking out the provision denying the judge the power to practice law in other courts, and by adding the last sentence.

Election of Judges by the Board of Commissioners Constitutional.—Under the Const., Art. IV, § 30, the legislature may provide for the election of officers of inferior courts, and the word "election" does not necessarily import a popular election for the office of presiding judge of the court, because the law authorizing the board of county commissioners to authorize the election of judges is not an unlawful delegation of legislative powers. State ex rel. Meador v. Thomas, 205 N. C. 142, 170 S. E. 110.

§ 7-272. Terms of court.—The court shall open for the transaction of business and trial of causes the first Monday of each month and continue until all matters before the court are disposed of. (1923, c. 216, s. 2; C. S. 1608(h).)

§ 7-273. Prosecuting officer; duties, election, salary, etc.—There shall be a prosecuting attorney of the general county court, to be known officially as the prosecutor, who shall appear for the state and prosecute in all criminal cases being tried in said court, and for his services he shall be paid such salary as may be fixed by the board of county commissioners. He shall be elected by the board of county commissioners for the first term as herein provided for the election of the judge, and thereafter by the qualified electors of the county in the same manner as is provided herein for the election of the judge; and vacancies in the office of the prosecutor shall be filled by the board of county commissioners as they are herein authorized to fill vacancies in the office of judge. If requested to do so by the judge, the prosecutor shall represent the county in prosecution of criminal appeals from this court in the superior court. The salary of the prosecutor shall be paid monthly out of the county funds. If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such solicitor, fixing his term of office, in which event the solicitor so appointed shall hold office pursuant to such appointment, and shall not be elected by a vote as herein provided for. (1923, c. 216, s. 3; Ex. Sess. 1924, c. 85, s. 1; 1925, c. 250, s. 1; C. S. 1608(i).)

Local Modification.—Duplin: 1943, c. 264; Henderson: 1927, c. 103.

Editor's Note.—This section was amended in 1924 by striking out a provision limiting the salary to a minimum of $1,000. The last sentence was also added by that amendment.

The 1925 amendment struck out the word "judge" in the last sentence and substituted the word "solicitor."

§ 7-274. Superior court clerk as clerk ex officio; salary, bond, etc.—The clerk of the superior court of the county shall be ex officio clerk of the general county court, herein provided for, and in addition to the salary and fees paid him as clerk of the superior court, he shall be paid such additional compensation as the county commissioners of the county may fix, to be paid monthly out of the county funds. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him to the same extent as he is bound as clerk of the superior court. The
Clerk of said Court or any deputy thereof, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants in said Court and make the same returnable to the Clerk of said Court or any deputy thereof, upon proper authority to issue any criminal warrant or warrants in said Court in the same manner and with the same powers and authority as he does and has in attendance upon the superior courts of the county. The county commissioners of the county are authorized to make said sheriff such additional allowances as they may fix for such services in addition to his salary and fees fixed by law.

§ 7-276. Fees of clerk and sheriff.—In those counties in which the clerk of the superior court and sheriff are paid fees, and not salaries, such clerk and sheriff shall receive the same fees for services rendered in the general county court as they would have received had such services been rendered in the superior court. (Ex. Sess. 1924, c. 85, s. 5/.)

Local Modification.—Scotland: 1925, c. 172.

§ 7-277. Separate records to be kept by clerk; blanks, books and stationery.—The clerk of the said general county court shall keep separate records, criminal and civil, for the use of said court, to be furnished by the county commissioners, and they shall also provide all such necessary blanks, forms, books and stationery as may be needed by said court. And the said clerk shall keep the same in his office of clerk of the superior court. (1923, c. 216, s. 6; C. S. 1908(l).)

§ 7-278. Criminal jurisdiction, extent.—The general county court, herein provided for, shall have the following jurisdiction in criminal actions within the county:

1. Original, exclusive and concurrent jurisdiction, as the case may be, of all offenses within said county which are now or may hereafter be given to justices of the peace under the constitution and general laws of the state, including all offenses of which mayors of towns or other municipal courts now have jurisdiction.

2. Original and concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime within the territory of the general county court, and of which said court is not herein given exclusive jurisdiction.

3. To punish for contempt to the same extent and in the manner allowed by law to the superior courts of this state; to issue writs ad testificandum and other process to compel the attendance of witnesses and to enforce the orders and judgments of the court in the same manner allowed by law to the superior courts of this state.

4. The general county court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and in addition thereto shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors. In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the general county court, as herein provided for, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance, or surety, to appear at the next first Monday of the month next succeeding before the general county court for trial, and in default of surety such person shall be committed to the county jail to await trial.

5. In counties in which there is a special court or courts for cities and towns, the jurisdiction of the general county court in criminal actions shall be concurrent with the jurisdiction conferred upon such special courts. (1923, c. 216, s. 13; 1924, c. 85, s. 1; C. S. 1908(m).)

Cross Reference.—For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note.—The fifth paragraph was added by the 1924 amendment.

In General.—This section as enacted was one of many general provisions applicable to the several courts provided by the act. The last clause has reference to the jurisdiction exercised by the statutory courts in all criminal matters arising in the county which are given to justices of the peace. State v. Baldwin, 235 N. C. 174, 175, 170 S. E. 645. When the amendment of 1924 is construed in pari materia with both §§ 7-265 et seq., and § 7-135 et seq., it has a prospective purpose and means that when general county courts exist or are created in counties where special courts for cities and towns shall be, or shall have been created, or are now contemporaneous existence, their jurisdiction shall be as defined in the amendment, that is, concurrent with the jurisdiction conferred upon such special courts. In re Barnes, 212 N. C. 735, 738, 194 S. E. 499.

Warrant on Appeal.—Upon conviction in a county court of a misdemeanor within the final jurisdiction of such court, upon a warrant sworn out before a justice of the peace, on appeal the superior court has derivative jurisdiction to try defendant upon the same warrant without a bill of indictment found by the grand jury. State v. Shine, 222 N. C. 237, 22 S. E. (2d) 447.

§ 7-279. Civil jurisdiction, extent.—The jurisdiction of the general county court in civil actions shall be as follows:

1. Jurisdiction concurrent with that of the justices of the peace of the county.

2. Jurisdiction concurrent with the superior court in all actions founded on contract.

3. Jurisdiction concurrent with the superior court in all actions not founded upon contract.

4. Jurisdiction concurrent with the superior court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof.

5. Jurisdiction concurrent with the superior court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions.
§ 7-280

6. Jurisdiction concurrent with the superior court of all actions and proceedings for divorce and alimony, or either;

7. Jurisdiction concurrent with the superior court in all matters pending in said court for the appointment of receivers, as provided in §§ 1-501, et seq.;

8. Jurisdiction concurrent with the superior court to appoint receivers. (1923, c. 216, s. 14; 1935, c. 171; 1937, c. 58; C. S. 1608(n).)

Local Modification.—Berrie: 1935, c. 179.

Editor's Note.—The 1935 amendment added subsection 6 to the section, and the 1927 amendment added subsections 7 and 8. See 12 N. C. Law Rev., 39.

§ 7-280. Election, requirement of.—The general county court, more especially provided for, shall be established upon elections as set forth in this article, except as otherwise provided in §§ 7-265 and 7-266. (1923, c. 216, s. 20; C. S. 1608(o).)

Cross Reference.—As to when court may be established without election, see §§ 7-265 and 7-266.


§ 7-281. Resolution by county commissioners; time for election; ballots.—The board of commissioners of the county shall pass a resolution, if in their judgment such court should be established, reciting such fact and calling an election at a date to be fixed, which shall not be less than thirty days nor more than sixty days from the passage of the resolution, at which election there shall be submitted to the qualified voters of the county the question of establishing such court. The form of the ballot shall be as provided in § 163-155, subsec. (e). (1923, c. 216, s. 21; C. S. 1608(p).)

§ 7-282. Notice of election; publication.—Notice of such election shall be given at least thirty days prior to the day of election, signed by the chairman of the board of county commissioners and containing in substance the resolution passed by the board, the date of the election and a reference to the act creating the court, and which notice shall be published once a week in the newspapers published in the county and a copy thereof shall be posted at the courthouse door. (1923, c. 216, s. 22; C. S. 1608(q).)

§ 7-283. Law governing elections; election officers; registration.—Any election held under the provisions of this law shall be conducted in the same manner as is now or may hereafter be prescribed by law for holding elections for the members of the general assembly, except as herein otherwise stated. The board of county commissioners shall appoint the registrars and judges of election and any other election officers necessary for holding said election, and registration and challenge of voters shall be conducted in the same manner as is now or may hereafter be provided for election of the members of the general assembly, except as herein set forth. The said board of county commissioners may or may not, in their discretion, order a new registration for any election held under this law. In case no new registration is ordered the registration books of each voting precinct shall be kept open for twenty days prior to the election for the purpose of allowing electors to register who have not theretofore registered in the township or voting precinct, of their residence, and who are entitled to register for said election; and the registration books shall close on Saturday next preceding the election and the registrar shall transcribe the names of all persons who have registered for former elections in their township, or voting precincts, and are otherwise qualified electors at said election upon a new registration book. The registrars are authorized and directed to register any person legally qualified and entitled to vote in their respective townships or voting precincts who apply for such purpose, in the same manner and under the same rules and regulations as now or hereafter may be provided for registering electors for the general election in said county. (1923, c. 216, s. 23; C. S. 1608(r).)

Cross Reference.—As to general election laws, see § 163-146 et seq.

§ 7-284. Count and return of votes; canvass of returns; effect; expense.—The vote cast at said election shall be counted at the close of the polls by the election officers and returned to the clerk of the said board of county commissioners of said county by a member of said election officers on the second day next succeeding the day of said election; and the said board of county commissioners at their next regular meeting, or any called meeting, shall tabulate and declare the result of the election, all of which shall be recorded in the minutes of said board of county commissioners, and no other recording and declaring of the result of said election shall be necessary. If a majority of the votes cast at said election is declared in favor of such court, it shall be established, and not otherwise. The expenses of said election shall be paid by the county commissioners out of the county fund. (1923, c. 216, s. 24; C. S. 1608(s).)

§ 7-285. Application of article.—This article shall not apply to any county in which there has been established a court, inferior to the superior court, by whatever name called, by a special act, nor shall this article apply to the following counties: Granville, Henderson, Iredell, New Hanover, Pasquotank, Randolph and Wake; nor shall it apply to the counties in the seventeenth (17th) and nineteenth (19th) judicial districts, except Buncombe county. (Ex. Sess. 1924, c. 85, s. 2; 1925, c. 9; 1927, c. 103, ss. 1, 2; 1929, c. 159, s. 1; 1931, c. 19; 1937, c. 439.)

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

Editor's Note.—The county of Randolph was added to the list of counties to which this article does not apply by the 1925 amendment. The 1927 amendment made an exception in the case of Henderson County. The act of 1931 struck out the exception as to counties in the sixteenth judicial district.

Art. 31. Practice and Procedure.

§ 7-286. Procedure; issuance and return of process.—The rules of procedure, issuing process and filing pleadings shall conform as nearly as may be to the practice in the superior courts. The process shall be returnable directly to the court, and may issue out of the court to any county in the state: Provided, That civil process in cases in which the jurisdiction may be exercised by justices of the peace shall not run outside of or beyond the county in which such court sits.

Motions for the change of venue or removal
of cases from the general county courts to the superior courts of counties other than the one in which the said court sits may be made and acted upon, and the causes for removal shall be the same as prescribed by law for similar motions in the superior courts.

The provision of the chapters on civil procedure and criminal procedure, and all amendments thereof, shall apply as nearly as may be to the general county courts, and the judges and the clerks of said courts, in all cases pending in said courts, shall have rights, privileges, powers and immunities similar in all respects to those conferred by law on the judges and clerks of the superior courts of the state, and shall be subject to similar duties and liabilities: Provided, that this section shall not extend the jurisdiction of said judges and clerks, nor infringe in any manner upon the jurisdiction of the superior courts, except as provided in articles thirty and thirty-one of this chapter.

All motions and petitions for removal of actions from the general county court to the district court of the United States shall be presented to, be heard, and determined by the judge of the general county court with the right of appeal from any order or ruling of said judge to the superior court. (1923, c. 216, s. 7; 1925, c. 242, s. 2; 1925, c. 250, s. 2; 1933, c. 128, s. 1; C. S. 1608(1).)

Local Modification.—Richmond: 1941, c. 60.

Editor's Note.—The first 1925 amendment made several changes in this section and the second 1925 amendment added the proviso at the end of the third paragraph. The 1931 amendment added the last paragraph.

§ 7-287. Trial by jury; waiver; deposit for jury fee.—In all civil actions the parties shall be deemed to have waived a jury trial unless demand shall be made therefor in the pleadings of the parties to the action when same are filed. The demand shall be in writing and signed by the party making it, or by his attorney, and accompanied by a deposit of three dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it. Any defendant in a criminal action may demand a trial by jury, in which event such defendant shall not be required to deposit the sum of three dollars. Such jury shall be drawn as herein otherwise provided for. (1923, c. 216, s. 8; Ex. Sess. 1924, c. 85, s. 1; 1937, c. 56; C. S. 1608(u).)

Local Modification.—Duplin: 1917, c. 85.

Editor's Note.—The last two sentences of this section were added by the 1924 amendment.

Prior to the 1937 amendment demand for jury trial was required to be made "before the trial begins."


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

§ 7-289. Talesmen; challenges.—The judge shall have the right to call in talesmen to serve as jurors according to the practice of the superior court as nearly as the same is applicable, and to direct the sheriff to summon a sufficient number of talesmen to serve during any one week for the proper dispatch of the business of the court. (1923, c. 216, s. 10; C. S. 1608(w).)

§ 7-290. Process; authentication; service; return.—All civil summons in actions begun in the general county court shall be served at least ten days before the return day named therein, and shall be returnable on the first Monday of the month next succeeding the issue thereof, unless the same be issued within less than ten days before the first Monday of the month next succeeding its issuing, in which event it shall be made returnable on the first Monday of the second succeeding month next after the date of the issue thereof; and when the summons be issued more than ten days before the first Monday of the month next succeeding its issuing, and shall be executed by the proper officer within less than ten days of the return day named therein, it shall be returned as if executed in proper time, and the case placed on the summons docket and continued to the first Monday of the month next succeeding the return day thereof, at which time it shall be treated in all respects as if that had been the return day named therein. The summons shall be in the name of the state, signed by the clerk of the court in which the action is brought, and shall be directed to the sheriff or other proper officer of the county. (1923, c. 216, s. 11; C. S. 1608(x).)

§ 7-291. Pleadings; time of filing.—The complaint shall be filed by the return day named in the summons and the answer, demurrer or other pleadings on the part of the defendant shall be filed within twenty (20) days thereafter: Provided, if a copy of the complaint be served on the defendant at the time of the service of the summons, then the defendant shall have only twenty (20) days from
the date of such service to file an answer, demurrer or otherwise plead. If the answer contains a counterclaim against the plaintiff or plaintiffs or any of them, such answer shall be served upon the plaintiff or plaintiffs against whom such counterclaim is pleaded or against the attorney or attorneys of record of such plaintiff or plaintiffs; the plaintiff or plaintiffs against whom such counterclaim shall be pleaded shall have twenty (20) days after the service thereof within which to answer or reply to such counterclaim. If a counterclaim is pleaded against any of the plaintiffs and no copy of the answer containing such counterclaim shall be served as herein provided for, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same. All other replies, if any, shall be served within twenty (20) days from the filing of the answer. For good cause shown and found by the judge, the judge may extend the time for the filing of any of the pleadings provided for in this article on the part of the plaintiff or on the part of the defendant. (1923, c. 216, s. 12; 1925, c. 250, s. 3; C. S. 1608(y).)

Editor's Note.—This section was amended in 1925 to make it conform to other sections now appearing as sections 1-125 and 1-140.

§ 7-292. Criminal appeals to superior court; cases bound over to superior court.—Any person convicted of any offense of which the general county court has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the court in the same manner as is now provided for appeals from justices of the peace; and any person tried before the general county court for any offense of which said court has not final jurisdiction shall, if probable cause be found, be bound over to the superior court in the same manner as is provided by law in similar cases before a justice of the peace. The judge may, upon proper affidavit, issue criminal warrants returnable before him in or out of term. All persons convicted in said court may be sentenced to the roads, or county farms, or jail, as the judge may determine. (1923, c. 216, s. 15; C. S. 1608(z).)

§ 7-293. Amendments in pleadings and warrants.—The judge shall have power in his discretion to allow amendments in pleadings and warrants, to the same extent as is allowed in the superior courts of the state. (1923, c. 216, s. 16; C. S. 1608(aa).)

§ 7-294. Jury trials, conduct of.—The jury in the general county court shall be a jury of twelve and the trial shall be conducted as nearly as possible as in the superior court. (1923, c. 216, s. 17; C. S. 1608(bb).)

§ 7-295. Appeals to superior court in civil actions; time; record; judgment; appeal to supreme court.—Appeals in civil actions may be taken from the general county court to the superior court of the county in term time for errors assigned in matters of law in the same manner as is now provided for appeals from the superior court to the supreme court except that appellant shall file in duplicate statement of appeal, as settled, containing the exceptions and assignments of error, which, together with the original record, shall be transmitted by the clerk of the general county court to the superior court, as the complete record on appeal in said court; that briefs shall not be required to be filed on said appeal, by either party, unless requested by the judge of the superior court; the record on appeal to the superior court shall be docketed before the next term of the superior court ensuing after the case on appeal shall have been settled by the agreement of the parties or by order of the court, and the case shall stand for argument at the next term of the superior court ensuing after the record on appeal shall have been docketed; ten days, unless otherwise ordered by the court. The time for taking and perfecting appeals shall be counted from the end of the term of the general county court at which such trial is had. Upon such appeal the superior court may either affirm or modify the judgment of the general county court, or remand the cause for a new trial. From the judgment of the superior court an appeal may be taken to the supreme court as is now provided by law. (1923, c. 216, s. 18; 1933, c. 109; 1937, c. 84; C. S. 1608(cc).)

Editor's Note.—Prior to Public Laws 1933, c. 109, the exception at the end of the first sentence of this section merely provided that the record might be typewritten and that only two copies should be required. This was omitted and the present exception inserted in lieu thereof. The 1923 amendment inserted that part of the first sentence after the semi-colon and further provides as follows: "This act shall apply to all cases tried before the ratification of this act in which an appeal has been entered and time for service of case on appeal and counterclaim or exceptions has been extended by order of court with consent of counsel for parties. If any section of this act should be held to be invalid, such invalidity shall not affect the validity of any other section.

Assignment of Error.—In the absence of assignments of error appearing in the transcript on appeal to the Supreme Court, the appeal will ordinarily be dismissed. It must, however, be presented to the court by assignments of error based on exceptions to specific rulings of the judge of the Superior Court, on the assignments of error appearing in the case on appeal filed in the Superior Court. Id.

Sending Record Up.—Where an appeal is taken from appeal in a county court under this section it is not desirable that the entire record in the Superior Court be sent up, but only such parts as may be necessary to determine the appeal to be reviewed with only material exceptions, properly stated, grouped and concisely compiled to enable the court to understand them without searching through the record. Baker v. Clayton, 202 N. C. 741, 164 S. E. 23.

See 11 N. C. Law Rev., 217, where it is pointed out that the 1933 amendment changes this section, so that instead of following the practice in appeals from the Superior Court to the Supreme Court, the appellant may file in duplicate the statement of the case on appeal, and this with the original records in the case shall be transmitted to the clerk of the Supreme Court and become the court record on appeal. Briefs are not required to be filed by either party, unless requested by the judge of the Superior Court.

Superior Court Sits as an Appellate Court.—In hearing civil cases on appeal from the general county court, the Superior Court sits as an appellate court, subject to review by the Supreme Court. Jenkins v. Castello, 208 N. C. 498, 198 S. E. 266, citing Cecil v. Snow Lbr. Co., 174 N. C. 392, 164 S. E. 75.

The jurisdiction of the superior court on an appeal from a general county court is an appellate jurisdiction limited to questions of law only which are properly presented by errors assigned, and the superior court may either affirm or modify the judgment of the general county court or remand the cause for a new trial. Robinson v. McAlhaney, 216 N. C. 6, 198 S. E. 117.

In Granting a New Trial It Is Essential That the Superior Court Specifically State the Rulings upon Exceptions.—Where an appeal is taken from the general county court to the Superior Court for errors assigned in matters
of law, as authorized by this section, and a new trial is granted by the Superior Court, it is essential that the rulings upon exceptions granting the new trial be specifically stated, so that in case of appeal to the Supreme Court, they may be considered in the superior court for an order of rehearing in accordance with Rule 19(3) of the Rules of Practice in the Supreme Court, and properly considered on appeal. Jenkins v. Castelboc, 298 N. C. 576, 184 S. E. 85, decided prior to the 1937 amendment.

Where the record is not docketed in the Superior Court within the time prescribed, the appeal is properly dismissed, it being formerly provided that appeals from the general county court are governed by the rules governing appeals from the Superior Courts to the Superior Court, and dismissal in such circumstances is mandatory under Rule of Practice in the Supreme Court No. 5. Groovy v. Graybeal, 299 N. C. 575, 184 S. E. 85, decided prior to the 1937 amendment.

The superior court has discretionary authority to reinstate an appeal from a general county court upon motion made at the same term the appeal is dismissed for failure of appellant to comply with the statutory requirements governing such appeals. This section provides that such appeal shall be heard by the court or an order of rehearing in such a manner, and upon such conditions as the court may direct. Jenkins v. Castelboc, supra.

§ 7-296. Enforcement of judgments; stay of execution, etc.—Orders to stay execution on judgments entered in the general county court shall be the same as in appeals from the superior court to the supreme court. Judgments of the general county court may be enforced by execution issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court as now provided for judgments of justices of the peace, and the judgment when docketed shall in all respects be a judgment of the superior court in the same manner and to the same extent as if rendered by the superior court, and shall be subject to the same statutes and rules relating to the revival of judgments in the superior court and issuing executions thereon. (1923, c. 216, s. 19; C. S. 1608(dd).)

When the judgment of a general county court is docketed in the Superior Court of the county it becomes a judgment of the Superior Court in like manner as transcribed judgments of justices of the peace under § 7-166, and the general county court has no further jurisdiction of the case, and may not thereafter hear a motion for the appointment of a receiver for the judgment debtor. Essex Inv. Co. v. Woolworth Co., 214 N. C. 214, 198 S. E. 659.

§ 7-297. May be established in two or more contiguous counties in same judicial district; jurisdiction.—In any two or more contiguous and adjoining counties of any judicial district of this State there may be established, under the general powers and authority contained in articles thirty and thirty-one, of this chapter, except as herein otherwise provided, a court of civil and criminal jurisdiction, maintained pursuant to this sub-chapter and the said articles thirty and thirty-one, not inconsistent herewith, a court of record, to be known as and designated a district county court, and containing all the authority, jurisdiction, rights, powers and duties, compensations and fees, as provided in the articles aforesaid, except as herein otherwise provided. (1931, c. 70.)

Local Modification.—Richmond: 1941, c. 65.

§ 7-298. Judge of court; election; term of office; oath of office and salary.—The court shall be presided over by a judge, who may be a licensed attorney at law, and at the time of his election he shall be a qualified elector in one of the counties composing the said district county court.

The first judge of said court, upon its establishment as hereinafter provided, shall be elected by the several boards of commissioners of the counties establishing the said district courts, each board being entitled to one vote to be cast in accordance with the majority vote of each board, at any joint meeting of said boards of commissioners, as hereinafter provided, within sixty days after the establishment, and he shall hold his office until January first, following the next general election of county officials, and until his successor is elected and qualified. Any vacancy arising in the office of judge of said court shall be filled by the several boards of commissioners of the counties establishing the said district court, in joint meeting assembled, which shall be called by the chairman of the board of commissioners of the county in which such judge resided at the time of his death or removal, or resignation.

At the joint meeting of said boards of commissioners when an election of the judge of said court is made, the said commissioners shall also fix the salary of said judge, which salary together with the salary of the prosecuting attorney hereinafter provided for shall be paid from the costs taxed and collected in the trial of all actions in said court to which costs provided for there shall be added a trial fee of five dollars and if there be a deficiency in the payment of said salaries from said costs as herein provided for, the said deficiency shall be proportionately paid by the several counties composing the said district county court, in proportion as the population of each county shall bear to the whole of the counties creating said court, on the basis of the most recent federal decennial census.

The judge shall reside in one of the counties of said district; he shall take the oath of office prescribed in section 7-271; hold his terms of court in the county courthouse in each county of his district, and shall not be permitted to practice law during his tenure of office in any of the courts of the State.

His successor shall be nominated and elected by a vote of the qualified electors of the several counties embraced within the jurisdiction of said district at the next general election before the expiration of the term of office and when other county officers are elected, in the same manner,
§ 7-299. Present county courts may be changed to district courts. — In any county where a county court has been heretofore created and now exists under and by virtue of article thirty, of this chapter, where it is desired to change said court from a county court to a district county court, under the provisions of this article, its board of commissioners may, by proper resolution, reciting in brief the reasons therefor, abolish the said county court and establish for said county, in the manner provided in this article, a district county court; and in such event, the judge and solicitor of the said county court shall thereupon be named and elected as judge and solicitor of said district county court until the expiration of the time for which they were elected as officers of the said county court, and until their successors are duly elected and qualified. (1931, c. 70.)

§ 7-300. When court to be held. — The court shall be open for the transaction of business and trial of cases at least once a week in each county in each month in districts composed of four counties, or less, and at least once in every eight weeks in districts composed of more than four counties, which week or the time of holding said court for each of said counties shall be determined and declared by said joint meeting of said commissioners upon recommendation of the bars of the several counties composing said district, or majority of the resident lawyers of said counties, and certified by said commissioners to each superior court clerk of the several counties within the district. (1931, c. 70.)

§ 7-301. Prosecuting attorneys. — There shall be a prosecuting attorney of the said district court, known officially as the prosecuting attorney, and he shall appear for the State and prosecute all criminal actions in said county courts of his district; and for his services he shall be paid such salary as may be fixed by the boards of county commissioners of the several counties composing the district.

The said prosecuting attorney shall be elected by the respective boards of commissioners in the same manner as hereinbefore provided for the election of a judge thereof. He shall hold his office until January first next following the general election for county officers, and at the said first general election following his election by the said boards of commissioners, and thereafter at each subsequent general election for county officers, he shall be nominated and elected by the duly qualified electors of the counties composing said district, under the general laws governing the nomination and election of district officers, or solicitors of the several judicial districts.

Any vacancy arising in the said office of prosecuting attorney shall be filled by the board of commissioners of the counties composing the district, in the same manner, and, as hereinbefore provided for the election of the judge thereof; and the compensation or salary of the said prosecuting attorney shall be paid by the several counties composing the district in the same proportion, or basis provided for payment of the salary of the judge, and shall be payable monthly out of the funds of the counties composing said district court. If requested to do so by the judge, the prosecuting attorney shall represent the county in prosecuting any appeal of a criminal action from said district court in the Superior Court. (1931, c. 70.)

§ 7-302. Clerks; duties and compensation. — The several clerks of the superior court in the several counties of said district court shall ex-officio be clerk of said district court of each and all terms held within the respective counties of each, and subject to all the rights, duties and liabilities provided for in sections 7-274 and 7-277. The clerk of said court or any deputy thereof, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants in said court and make the same returnable before the judge thereof, at any time or times designated for the trial of criminal cases. The last sentence shall not apply to the following counties: New Hanover, Caldwell, Henderson, Ashe, Hoke, Lincoln, Wayne, Wilkes, Nash, Edgecombe, Alexander, Rockingham, Duplin, Union, Alleghany, Halifax, Alamance, Clay, Vance, Dare, Wake, Hertford, Jackson, Mecklenburg, Craven, Vance, Person, Robeson, Johnston, Yadkin, Davidson, Haywood, Pitt, Tyrrell, Hyde, Watauga, Durham, Scotland, Forsyth and Camden. (1931, c. 70, s. 1; c. 233.)

§ 7-303. Sheriffs; duties and compensation. — The several sheriffs of the several counties of said district court, or their duly constituted deputies, shall attend upon each term of this court within their respective counties, and be subject to and possess the same power and authority and additional compensation as authorized under § 7-275. (1931, c. 70.)

§ 7-304. Jurisdiction. — The said county district courts shall have the same criminal and civil jurisdiction as that of the general county court, and as fixed and defined in §§ 7-278 and 7-279. (1931, c. 70.)

§ 7-305. Procedure to establish. — Upon a petition signed by a majority of the resident licensed attorneys at law, of not less than two counties of the State within any one judicial district, and duly verified to that effect, addressed to and filed with the Governor, praying the establishment of a general county district court for any two or more of the counties named in the petition, the Governor shall transmit a copy of the petition to each of the respective boards of county commissioners, and at the same time he shall issue an order to each of said boards directing a joint meeting of the same at the courthouse
§ 7-306. Practice and procedure.—The practice and procedure of the said county district courts shall be the same as that of the general county court, and as prescribed in §§ 7-286 to 7-289. (1931, c. 70.)

§ 7-307. Abolishing the court.—Whenever in the opinion of the board of commissioners of any county in which a court has been established under the provisions of this article, the conditions prevailing in such county are such as to no longer require the said court, such board of county commissioners may, by proper resolution, reciting in brief the reasons therefor, duly certify the same to the chairman of the board of commissioners of each other county composing, forming and creating the said district court; whereupon the respective boards of commissioners of the several counties embraced in said district court, shall meet at the courthouse of the county in which the judge resides on the third Monday of the month next following the receipt of the certified copy of the resolution aforesaid, or the subsequent and next following Monday first and abolish the said county court for the county having adopted the resolution aforesaid, which shall go into effect as to the county abolishing said court at the end of the term to which the judge has been elected. If, upon the abolition of the said county court, as to the county adopting the resolution aforesaid, as many as two other counties forming, composing and making up the said district court, desire the same continued in full force and effect within their respective counties the said commissioners shall readjust the salary and compensation of the judge and prosecuting attorney of said court on the basis hereinafter provided to take effect at the end of the term to which the said judge has been elected, and the said county court shall continue in full force and effect within the other counties remaining, forming and composing the same, with no impairment of the rights, powers, duties, and authorities conferred by this article. But said court may, at any time, at a meeting held pursuant to a resolution, certified as aforesaid, subject to the provisions hereinafter recited, abolish the said court in each, all or any of the counties in the districts; and in such event the Clerk of Court shall transfer all cases pending therein to the Superior Court of his respective county. (1931, c. 70.)

SUBCHAPTER VIII. CIVIL COUNTY COURTS.

Art. 33. With Jurisdiction Not to Exceed $3000.

§ 7-308. Establishment.—An inferior court with civil jurisdiction only as hereinafter provided may be established by the board of county commissioners of any county in this state upon the petition of a majority of the resident practicing attorneys within the county. (1925, c. 135, s. 1.)

§ 7-309. Jurisdiction.—The said court shall have exclusive original jurisdiction in all civil actions, matters, and proceedings, including all proceedings whatever ancillary, provisional and remedial to civil actions founded on contract or tort, wherein the superior court now has exclusive original jurisdiction: Provided, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars ($3,000).

The said court shall have jurisdiction with the Superior Court in all actions pending in said court to issue and grant temporary restraining orders and injunctions: Provided, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars ($3,000).

The said court shall have jurisdiction with the Superior Court in all actions pending in said court to issue and grant temporary restraining orders and injunctions: Provided, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars ($3,000).

The said court shall have jurisdiction with the Superior Court in all actions pending in said court to issue and grant temporary restraining orders and injunctions: Provided, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars ($3,000).

The said court shall have jurisdiction with the Superior Court in all actions pending in said court to issue and grant temporary restraining orders and injunctions: Provided, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars ($3,000).

§ 7-310. Juries in such court; drawing jury; challenges.—In the trial of civil actions in said court either the plaintiff at the time of filing the complaint or the defendant at the time of filing the answer may in his pleadings demand and have a jury trial as provided in the trial of causes in the Superior Court; failure to demand a jury trial at the time herein provided shall be deemed a waiver of the right to a trial by jury. The judge of said court, when in his opinion the ends of justice would be best served by submitting the issues to the jury, may have a jury called of his own motion and submit to it such issues as he may deem material.

Jurors shall receive the same compensation as is now provided by law for jurors serving in the Superior Court, to be paid out of the treasury of said county on presentation of a ticket duly issued by the clerk of said court; the clerk of said court shall tax the sum of three dollars as cost of jury in all jury cases and the same shall be collected by said clerks and paid into the county treasury of said county.

The commissioners of said county at their regular meeting on the first Monday of April, in the year nineteen hundred and twenty-five,
§ 7-311. Terms; docket.—The judge and clerk of said county court are hereby authorized to fix the terms of said court and to make up the docket of said court upon consulting with the bar association of said county. (1925, c. 135, s. 3.)

§ 7-312. Witnesses; how summoned. — Witnesses shall be summoned by subpoena issued by the clerk of said court as now provided for the summoning of witnesses for the trial of causes in the superior court and shall be allowed the same compensation to be taxed as cost by the clerk of this court. (1925, c. 135, s. 5.)

§ 7-313. Appeals.—Appeals may be taken by either the plaintiff or the defendant from the said county court to the Superior Court of said county in term time for errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court, with the exception that the record may be typewritten instead of printed and only one copy thereof shall be required. The time for taking and perfecting the appeals shall be counted from the end of the term. Upon appeals from said county court the Superior Court may either affirm, modify and affirm the judgment of said county court or remand the cause to the county court for a new trial.

The bonds to stay execution shall be the same as now required for appeals from the Superior Court to the Supreme Court. The judgment of the Superior Court shall be certified to said county court; final judgment may be rendered unless there is an appeal to the Supreme Court. In case of appeal to the Supreme Court upon filing of the certificate from the Supreme Court to the Superior Court said certificate shall be transmitted by the clerk thereof to the clerk of this court. (1925, c. 135, s. 6.)

An appeal to the Superior Court from the granting or refusal of a restraining order by the county court may be taken to the next term of the Superior Court without the necessity of serving statement of case on appeal, counter-case or exceptions, etc., the case having been heard on the pleadings and the record in the Superior Court consisting of the summons, complaint, answer, orders, judgment and assignment of errors. Thomason v. Swenson, 234 N. C. 759, 169 S. E. 620.

§ 7-314. How actions commenced.—All actions shall be commenced in said court by summons running in the name of the State and issued by the clerk of said county court and shall be returnable as is provided for by law for summons in the Superior Court. The plaintiff shall file and retain complaint on or before the return day of such summons; the defendant shall file a written answer or a认er and shall make his motions in writing during the term in which the summons is returnable and the case shall stand for trial at the next succeeding term. (1925, c. 135, s. 7.)

§ 7-315. Judgments.—The judgments of said court may be enforced by execution issued by the clerk of this court as now provided for executions and transcripts of judgments from the courts of justices of the peace. (1925, c. 135, s. 8.)

Cross Reference.—As to docketing judgments of courts of justices of the peace in superior court, see § 7-166.

§ 7-316. Process of the court.—The process of said court while exercising the jurisdiction of a justice of the peace shall not run outside of said county. In all other cases these processes shall run as processes issue out of the Superior Court. (1925, c. 135, s. 9.)

§ 7-317. Removal of cause before justice.—When, upon affidavit made before entering upon the trial of any cause before any justice of the peace in said county, it shall appear proper for said cause to be removed for trial to some other justice of the peace, as is now provided by law, said cause may be removed for trial to the said county court. (1925, c. 135, s. 10.)

Local Modification.—Mecklenburg: 1933, c. 279.

§ 7-318. Rules of practice.—The rules of practice as provided for in said county court shall have the same effect as the rules of practice as now provided for in the superior court for the trial of all causes shall apply in this court, supplemented, however, by such rules and regulations as may be prescribed by the judge of this court relating to causes pending therein. (1925, c. 135, s. 11.)

§ 7-319. Bonds for costs; duties of clerk.—The statutes about bonds for costs and about [533]
suits without bonds for costs that now apply to the Superior Court shall also apply to this court. Wherever the law otherwise provides for a thing to be done by the clerk of the Superior Court or by the judge of the Superior Court or by either, the same thing shall be performed by the clerk of said county court or by the judge of said county court in causes in said county court; this provision shall apply especially to all provisional remedies as now provided by statute except special proceedings. (1925, c. 135, s. 12.)

§ 7-320. Costs.—In all causes removed to or brought into the said county court the costs shall be the same as in the Superior Court. All cost shall be paid to or collected by the clerk of said county court in the same manner as in the Superior Court and paid by the said clerk of said county court into the treasury of said county: Provided, that for the service of process the fees shall be paid to the officer serving the process. The officers shall perform all the duties in said county court as provided in the Superior Court and receive therefor the same fees as allowed for the same service performed in the Superior Court. (1925, c. 135, s. 13.)

§ 7-321. Appointment and compensation of judge; substitute; vacancies.—After the ratification of this article and the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the Governor who shall appoint a judge to preside over such court, and each fourth year thereafter it shall be the duty of the Governor to appoint the judge of each such county court who shall preside over said court, who shall be learned in the law, of good moral character, and who shall at the time of his appointment and qualification be an elector in and for said county; that the said judge shall hold office for a term of four years and until his successor is appointed and qualified. And before entering upon the duties of his office the said judge shall take and subscribe an oath of office as is now provided by law for the judges of the Superior Court and file the same with the clerk of the Superior Court of said county; and the said clerk shall record the same. Said judge shall receive a salary of one hundred dollars ($100) a week for each week that he is engaged in holding court, payable in equal weekly installments out of the treasury of said county.

The said judge shall not by reason of his office be prohibited from practicing the profession of attorney at law in other courts of this State except as to matters pending in connection with or growing out of said county court.

When the said judge is unable to preside over said court on account of sickness or absence for other cause he shall appoint some other person learned in the law who shall take the same oath and possess the same qualifications as provided for the judge, to act as a substitute judge with all the powers and duties of the judge, and the compensation of said substitute judge shall be paid by the said judge.

Any vacancy occurring in the office of judge shall be filled by the Governor of the State. (1925, c. 135, s. 14.)

Cross References.—As to forms of oath required of superior court judges, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-322. Compensation of clerk; vacancy; files, books, stationery, etc.—The clerk of the superior court of said county by himself or his deputies shall ex officio perform the duties of clerk of said county court and shall be paid a sum not less than one thousand dollars ($1,000) annually, the amount to be determined by the board of commissioners of said county and paid out of the treasury of said county as full compensation for his duties as clerk of said county court. Upon the failure of the clerk of the Superior Court of said county to qualify under this article or in case of any vacancy in the office of clerk of the said county court such vacancy shall be filled by the board of commissioners of said county. The necessary files, books, stationery and other material of that nature shall be furnished to the clerk of said county court by said county. (1925, c. 135, s. 15.)

§ 7-323. Stenographer; fees.—There shall be an official stenographer of this court whose duty shall be the same as the official stenographer of the Superior Court of said county. Said stenographer's fees shall be the same in amount as the fees of the official stenographer of the superior court of said county and shall be taxed as costs. (1925, c. 135, s. 16.)

§ 7-324. Procedure.—The procedure of said county court, except that hereinafter provided, shall follow the rules and principles laid down in the chapter on civil procedure and amendments thereto in so far as the same may be adapted to the needs and requirements of the said county court. (1925, c. 135, s. 17.)

§ 7-325. Records.—There shall be docket files, and records kept of all proceedings in the said county court, conforming as nearly as possible to the records of the superior court. (1925, c. 135, s. 18.)

§ 7-326. To be court of record.—The said county court shall be a court of record and the clerk thereof shall be provided with a seal of said court. (1925, c. 135, s. 19.)

§ 7-327. Pending cases.—All cases pending in the superior court of said county and in the courts of the justices of the peace of said county on the date the court is established shall be tried in the courts wherein they are pending. (1925, c. 135, s. 20.)

§ 7-328. First session.—The presiding judge of said county court shall hold the first session of said county court within thirty days after his appointment by the Governor, and other sessions shall be held as provided in this article. (1925, c. 135, s. 21.)

§ 7-329. Discontinuance of court.—The board of commissioners of any county may discontinue such court on written petition signed by the majority of the practicing attorneys of such county. (1925, c. 135, s. 22.)

§ 7-330. Existing laws not repealed.—This article shall not be construed to repeal chapter seven, nor shall it repeal or affect any act establishing any inferior court now existing or
that may hereafter be created under the existing law but shall be construed to be supplemental to the existing law and a method by which county courts may be established. (1925, c. 135, s. 23.)

§ 7-331. Article not applicable to certain counties.—The provisions of this article shall not apply to the following counties: Burke, Hyde, Avery, Alexander, Clay, Catawba, Mitchell, Madison, Graham, Swain, Henderson, Duplin, Jackson, Davie, Cherokee, Stokes, Lincoln, Wilkes, Johnson, Person, Pamlico, Watauga, Haywood, Vance, Robeson, Craven, Hoke, Vance, Anson, Pender, Macon, Onslow, Bladen, Alleghany and Scotland: Provided, this article shall not apply to any of the counties of the present Sixteenth and Seventeenth Judicial Districts. (1925, c. 135, s. 24.)

Art. 34. With Jurisdiction Not to Exceed $5000.

§ 7-332. Establishment.—In addition to the plan for a general county court provided for in articles 30 and 31, of this chapter, there may be established by the board of county commissioners in any county, a court of civil jurisdiction, which shall be a court of record and which shall be maintained pursuant to this article, and which court shall be called the county civil court, and shall have civil jurisdiction as provided in this article. (1925, c. 167, s. 1.)

Cross References.—As to forms of oaths required of superior court judges, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-333. Qualification, election, and term of judge; office.—The county civil court shall be presided over by a judge, who may be an attorney at law, and shall reside and be a qualified elector in the county during his term of office, and shall be permitted to practice law during his term of office. The first judge of the county civil court shall be elected by the board of county commissioners at the time of the establishment of said court, and he shall hold his office until January first, following the next general election of county officers within said county, and until his successor is elected and qualified, and if a vacancy occurs in the office of judge, it shall be filled by the election of a successor for the unexpired term by the board of county commissioners. Each succeeding judge shall be elected by a vote of the qualified electors of the county at the next general election before the expiration of the term of office in the same manner as other county officers are nominated and elected, and shall hold office for a term of four years, beginning January first, following his election and until his successor is elected and qualified, unless said court is abolished. The judge shall qualify by taking and subscribing an oath of office as is now provided by law for a judge of the Superior Court, which shall be filed with the clerk. The salary of said judge shall be fixed by the board of commissioners of the county, which shall not be decreased during the term of office; to be paid in monthly installments by the county. The judge shall be provided by the county board of commissioners with an office and a suitable and convenient room for holding court at the county seat. (1925, c. 167, s. 2.)

§ 7-334. Substitute judge.—When the judge of said county civil court is unable to hold court on account of sickness, absence, disqualification, or other cause, he shall appoint some other person learned in the law, who shall take the same oath and possess the same qualifications as provided for a judge, to act as substitute judge, who shall be invested with all the powers and duties of the judge, and his compensation during his appointment shall be paid by the said judge. (1925, c. 167, s. 3.)

§ 7-335. Terms of court; calendar.—The court shall open for the transaction of business and trial of cases on the first Monday of each month and continue until the matters of the court are disposed of, and it shall be the duty of the judge to prepare a calendar of cases for trial, on which jury cases shall have precedence. (1925, c. 167, s. 4.)

§ 7-336. Clerk of court.—The clerk of the superior court of the county shall be ex officio clerk of the court, and in addition to the salary or fees paid him as clerk of the Superior Court, he shall be paid such additional compensation as the county commissioners of the county may fix to be paid monthly out of the county funds, and the board of county commissioners may authorize and empower to provide for salary or fees for such additional deputies as he may need. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk, to the same extent as he is bound as clerk of the Superior Court. (1925, c. 167, s. 5.)

§ 7-337. Sheriff.—The sheriff of the county, or his deputies, appointed, shall attend upon the terms of this court in the same manner and with the same power and authority as he does and has in attendance upon the superior court of the county. The county commissioners of the county are authorized to make said sheriff such additional allowances as they may fix for such services, in addition to his salary or fees fixed by law. (1925, c. 167, s. 6.)

§ 7-338. Records; blanks, forms, books, stationery.—The clerk of the court shall keep separate records for the use of the said court to be furnished by the county commissioners, and they shall also provide such necessary blanks, forms, books, and stationery as may be needed by the court, and the clerk shall keep the same in the office of the clerk of the Superior Court. (1925, c. 167, s. 7.)

§ 7-339. Juries.—The jury in said court shall be a jury of twelve and the trial shall be conducted as nearly as possible as in the Superior Court. In all actions the parties shall be deemed to have waived a jury trial, unless demand shall be made therefor, as hereinafter provided, in writing. The plaintiff in filing the complaint, or the defendant at the time of filing an answer, may in the pleadings demand a jury trial, or in cases transferred from the Superior Court to the said court, either party may demand jury trial, in writing, signed by the party making it or his attorney, which must be made at the time of said transfer. Any demand for a jury trial shall be accompanied by a deposit of five dollars ($5.00), to insure the payment of the jury tax, except in cases brought in forma pauperis, provided such
demand shall not be used to the prejudice of the party making it. (1925, c. 167, s. 8.)

§ 7-340. Jury list; summons.—It shall be the duty of the board of county commissioners, upon the establishment of a court as herein provided, and every two years thereafter, to prepare a list of jurors, identical with the list prepared for the Superior Court and subject to the same rules and regulations, and mark said jury box as the county civil court box, from which the jury shall be drawn. The judge of the court shall issue the proper writ to the sheriff of the county to summon the jurors for the court in the same manner as juries are ordered and drawn in the Superior Court. (1925, c. 167, s. 9.)

§ 7-341. Talesmen.—The judge shall have the right to call in talesmen to serve as jurors, according to the practice of the superior court, and to direct the sheriff to summon a sufficient number of talesmen to serve during any one week for the proper dispatch of the business of the court. (1925, c. 167, s. 10.)

§ 7-342. Procedure, process, pleadings, etc.—The procedure, practice, processes, pleadings and procuring evidence and judgments shall conform as near as may be to the courts having concurrent jurisdiction with this court. (1925, c. 167, s. 11.)

§ 7-343. Appeals.—Appeals in all actions may be taken from the court to the Superior Court of the county in term time for errors assigned in matters of law in the same manner as is now provided for appeals from the Superior Court to the Supreme Court, with the exception that the record may be typewritten instead of printed, and only two copies shall be required; one for the court and the other for the opposing counsel. The time for taking and prosecuting appeals shall be counted from the end of the calendar month of the court at which such trial is had. It shall be the duty of any judge of the Superior Court holding the courts in any county, where a court is established under the provisions of this article, to allot sufficient and adequate time during each regular term of the Superior Court held in such county for the hearing of appeals from the county civil court of such county. Upon such appeal the Superior Court may either affirm or modify and affirm the judgment of the county civil court or remand the cause for a new trial. From the judgment of the Superior Court an appeal may be taken to the Supreme Court, as is now provided by law. Orders to stay execution on judgments entered in the court shall be the same as in appeals from the Superior Court to the Supreme Court, and judgments of said court may be enforced by execution by the clerk thereof, returnable within twenty days, and transcripts of such judgments may be docketed in the superior court as now provided for judgments of justices of the peace, and when docketed shall, in all respects, be judgments in the superior court as if rendered by the superior court. (1925, c. 167, s. 12.)

§ 7-344. Jurisdiction.—The county civil court shall have jurisdiction only in civil matters, and as follows:

(1) Jurisdiction concurrent with that of the justices of the peace of the county;
(2) Jurisdiction concurrent with the Superior Court in all actions founded on contract wherein the amount demanded shall not exceed the sum of five thousand dollars ($5,000), exclusive of interest and cost;
(3) Jurisdiction concurrent with the Superior Court in all actions not founded upon contract; wherein the amount demanded shall not exceed the sum of five thousand dollars ($5,000), exclusive of interest and cost;
(4) Jurisdiction concurrent with the Superior Court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof;
(5) Jurisdiction concurrent with the Superior Court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions. (1925, c. 167, s. 13.)

§ 7-345. Stenographer; fees.—There shall be an official stenographer of the court whose duties and fees shall be the same and taxed as those of the official stenographer of the superior court. (1925, c. 167, s. 14.)

§ 7-346. Disqualification of judge.—Where the judge is disqualified to try any case, it shall be removed for trial to the superior court of the county, in which the court is located or one tenus to the substitute judge. (1925, c. 167, s. 15.)

§ 7-347. Pending cases, transfer.—By consent of plaintiff and defendant any case, within the jurisdiction of the court, pending in the superior court may be transferred to the docket of the county civil court, and there tried. (1925, c. 167, s. 16.)

§ 7-348. Abolishing court.—This court may be abolished by resolution of the board of county commissioners of any county for such county by giving written notice of such intention six months prior to the end of the term of any presiding judge thereof, to become effective at the end of such term of office; and, in case of the abolition of the court, cases then pending shall be transferred to the Superior Court. (1925, c. 167, s. 17.)

§ 7-349. Existing laws not repealed.—This article shall not be construed to repeal any existing laws by which a county court may be created or to effect or repeal any court now or hereafter created under existing laws and shall only be construed to be an additional method by which a county court may be established. (1925, c. 167, s. 18.)

§ 7-350. Article inapplicable to certain counties. —This article shall not apply to the counties of Bladen, Jones, Bertie, Caldwell, Craven, Columbus, Gaston, Henderson, Mitchell, Vance. (1925, c. 167, s. 19.)

Art. 35. With Jurisdiction Not to Exceed $1500. § 7-351. Establishment.—In addition to the plans now provided by law for the establishment of courts inferior to the superior court, there may be established by resolution of a majority of the members of the board of county commissioners of any county in the state a court of civil jurisdiction, which shall be a court of record, shall be
§ 7-352. Qualification of judge.—The county civil court shall be presided over by a judge, who may be an attorney at law, who shall at the time of appointment and qualification be an elector in and for said county, and he shall not by reason of his term of office be prohibited from practicing the profession of attorney at law in other courts except as to matters pending in connection with or growing out of said county civil court.

§ 7-333. Appointment of judge; vacancies; substitute judge.—After the ratification of this article and the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the governor of the state, who shall appoint a judge to preside over such court, and each second year thereafter it shall be the duty of the governor of the state to appoint the judge of each such county civil court, who shall preside over said court; the said judge shall hold office for a term of two years and until his successor is appointed and qualified. Any vacancy occurring in the office of judge shall be filled by the governor of the state.

When the judge of said county civil court is unable to hold court on account of sickness, absence, disqualification or other cause, the governor of the state shall appoint some other person, who shall take an oath and possess the same qualifications as provided for a judge, to act as substitute judge, who shall be invested with all the powers and duties of the judge. At the time of fixing the salary for the judge, the board of county commissioners shall fix a per diem compensation for the substitute judge which shall be paid out of the salary fixed for the judge.

§ 7-354. Oath of judge.—Before entering upon the duties of his office, the said judge shall take and subscribe an oath of office as is now provided by law for the judges of the superior court, and file the same with the clerk of the superior court of said county; and said clerk shall record the same. (1937, c. 437, s. 3.)

Cross References.—As to forms of oaths required of superior court judges, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-355. Salary of judge.—The salary of said judge shall be fixed by the board of commissioners of the county, shall not be decreased during the term of office, and shall be paid in monthly installments out of the funds of the county. The judge shall be provided by the county board of commissioners with a suitable and convenient room for holding court at the county-seat. (1937, c. 437, s. 3.)

Cross References.—As to forms of oaths required of superior court judges, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-356. Disqualification of judge.—Where the judge is disqualified by reason of interest in any case, it shall be removed for trial to the superior court of the county. (1937, c. 437, s. 6.)

§ 7-357. Clerk of court.—The clerk of the superior court shall be ex officio clerk of the county civil court established under the provisions of this article, and he shall have as nearly as possible the same duties, powers and responsibilities with reference to the county civil court as he has in his capacity as clerk of the superior court. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk of the county civil court to the same extent as he is bound as clerk of the superior court. In addition to the salary or fees paid him as clerk of superior court, the clerk of the county civil court shall be paid such additional reasonable compensation as the board of county commissioners may fix; and the board of county commissioners are hereby authorized and empowered to provide the salary of such additional deputy or deputies as he may need. (1937, c. 437, s. 7.)

§ 7-358. Oath of clerks.—The clerks of the county civil court, before entering on the duties of their office, shall take and subscribe, before some officer authorized by law to administer an oath, the oath required under general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of them under this article and file such oaths with the register of deeds for the county. (1937, c. 437, s. 8.)

Cross References.—As to forms of oaths required of clerk of the superior court, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-359. Appointment and removal of deputies.—Each clerk of the county civil court shall have the authority to appoint deputy clerks and the authority to revoke such appointments at will. He shall make a record of each appointment and furnish a transcript of such record to the register of deeds, who shall record the same in the record of deeds and make a cross-index thereof. When the appointment of any deputy clerk is revoked, the clerk shall write on the margin of the records of such appointment the word "revoked" and the date of revocation, and sign his name thereto. (1937, c. 437, s. 9.)

§ 7-360. Oath and power of deputies.—If any deputy clerk shall be appointed as provided in this article, he shall take and subscribe to the oaths prescribed for clerks. Each deputy clerk appointed as herein provided shall have as nearly as possible the same powers and duties, with reference to the county civil court, as a deputy clerk of the superior court has with reference to the superior court. (1937, c. 437, s. 10.)

§ 7-361. Sheriff.—The sheriff of the county, or his deputies appointed, shall attend upon this court in the same manner and with the same power and authority as he does and has in attendance upon the superior court of the county. The board of county commissioners of the county are authorized to make said sheriff such additional allowances as they may deem necessary and proper for such services, in addition to his salary or fees now fixed by law. (1937, c. 437, s. 11.)

§ 7-362. Stenographer.—The board of county commissioners shall appoint an official stenographer of the court, whose duties shall be the same as those of the official stenographer of the superior court, and the compensation shall be fixed and paid by the board of county commissioners. (1937, c. 437, s. 12.)
§ 7-363. Jury trial.—In the trial of actions in said court any party is entitled to the right of trial by jury as is provided in the trial of causes in the superior court, unless said right of trial by jury shall be waived as hereinafter provided. (1937, c. 437, s. 13.)

§ 7-364. Waiver of jury trial; jurisdiction concurrent with superior court.—In those cases in which written pleadings are required to be filed, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the filing of the complaint or petition the plaintiff, in writing, demands a jury trial; or, at the time of filing the answer or other pleading which raises an issue of fact, the defendant or other party filing such pleading demands, in writing, a jury trial. (1937, c. 437, s. 13(a).)

§ 7-365. Waiver of jury trial; jurisdiction concurrent with justice of peace.—In those cases in which no written pleadings are required, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the issuance of summons the plaintiff or petitioner, in writing, demands a jury trial; or the defendant, at any time before the commencement of the trial, in writing, demands a jury trial. (1937, c. 437, s. 13(b).)

§ 7-366. Jury trial in cases instituted in superior court or before magistrate.—In those cases which were or may hereafter be instituted before a justice of the peace and removed or appealed to this court, and in those cases which were or may hereafter be instituted in superior court and removed to this court, a jury trial will be conclusively presumed to have been expressly waived unless the party desiring a trial by jury shall make a demand therefor, in writing, at any time before the case is called for trial; in which event the number of the jury shall be as herein elsewhere provided. (1937, c. 437, s. 13(c).)

§ 7-367. Jury of six; demand and deposit for jury of twelve.—The jury of said court shall be a jury of six unless, at any time before the calling of the cause for trial, either party, who has not waived the right to trial by jury by failing to demand a jury trial in apt time as provided herein, or otherwise, demands a trial by a jury of twelve, in which event a jury of twelve shall be impaneled: Provided, that in those cases in which a jury of twelve is demanded the party shall, at the time of making the demand, pay to the clerk of said court a deposit of five dollars to insure the payment of the jury tax: Provided further, that where a party making such demand for a jury of twelve makes affidavit and satisfies the judge or clerk of said court that he is unable to make the deposit, such party shall not be required to make the same. The deposit for jury of twelve shall be returned to the party making it when the jury tax is paid by the losing party against whom the costs are taxed. (1937, c. 437, s. 13(d).)

§ 7-368. Judge may impanel jury on own motion.—The judge of said court, when in his opinion the ends of justice would be best served by submitting an issue or issues to the jury, may call a jury of his own motion and submit to it such issue or issues as he may deem material. (1937, c. 437, s. 13(e).)

§ 7-369. Drawing juries; summonses of jurors; pay of jurors.—The regular jurors shall be drawn from the superior court jury box; the drawing and summoning of said jurors shall be in the same manner as jurors are drawn and summoned for the superior court: Provided, however, only twelve jurors shall be drawn and summoned for any one week of court unless the judge specifies that a larger number shall be drawn. The judge of each county civil court, at least thirty days in advance, shall notify the chairman of the board of county commissioners when a jury will be needed.

Jurors shall receive the same compensation as is provided by law for jurors serving in the superior court, to be paid out of the treasury of said county on presentation of a ticket duly issued by the clerk of said court. (1937, c. 437, s. 14.)

§ 7-370. Talesmen.—The judge shall have the right to call in talesmen to serve as jurors, according to the practice of the superior court, and to direct the sheriff to summon a sufficient number of talesmen to serve during any one week or a portion thereof for the proper dispatch of the business of the court. (1937, c. 437, s. 15.)

§ 7-371. When court opens; terms of court.—The county civil courts shall be open for the transaction of business within their jurisdiction whenever matters before the court require attention, except for the trial of issues of fact requiring a jury and the trial of contested causes wherein the county civil court is exercising jurisdiction concurrent with that of the superior court, which shall be heard in term time.

The judge of the county civil court is hereby authorized to fix the terms of said court upon consulting with the clerk of the court and the members of the bar of the county. (1937, c. 437, s. 16.)

§ 7-372. Jurisdiction.—The county civil court shall have jurisdiction only in civil matters and as follows:
(1) Jurisdiction concurrent with that of the justices of the peace of the county;
(2) Jurisdiction concurrent with the superior court in all actions founded on contract wherein the amount demanded shall not exceed the sum of one thousand five hundred dollars, exclusive of interest and costs;
(3) Jurisdiction concurrent with the superior court in all actions not founded on contract wherein the amount demanded shall not exceed the sum of one thousand five hundred dollars, exclusive of interests and costs;
(4) Jurisdiction concurrent with the superior court in all actions to try title to lands, to prevent trespass thereon, and to restrain waste thereof wherein the value of the land does not exceed the sum of one thousand five hundred dollars;
(5) Jurisdiction concurrent with the superior court in all actions and proceedings for divorce and alimony, or either, and to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper. (1937, c. 437, s. 17.)

§ 7-373. Appeals from justice of the peace.—In all cases where there is an appeal from a jus-
tice of the peace of a county wherein a county civil court has been established under the provision of this article, such appeal shall be first heard de novo in the county civil court in the manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the said county civil court. Said appeals shall be docketed in the county civil court within the same time limit and in the same manner as such appeals are now required to be docketed in the superior court. (1937, c. 437, s. 18.)

§ 7-374. Removal of cause before justice of peace.—When, upon affidavit made before entering upon the trial of any cause before any justice of the peace of said county, it shall appear proper for said cause to be removed for trial to some other justice of the peace, as is now provided by law, said cause shall be removed for trial to the said county civil court. (1937, c. 437, s. 19.)

§ 7-375. Pending cases, transfer.—By written consent of plaintiff and defendant filed with the clerk of superior court, any case within the jurisdiction of the county civil court, now or hereafter pending in the superior court, may be transferred to the docket of the county civil court and there tried; if a jury trial is desired, it shall be expressed in the agreement to transfer the case; otherwise, the right to trial by jury shall be conclusively presumed to have been expressly waived. (1937, c. 437, s. 20.)

§ 7-376. Records; blanks, forms, books, stationery.—The clerk of the county civil court shall keep separate records for use of the said court to be furnished by the county commissioners, and they shall also provide such necessary blanks, forms, books, and stationery and office equipment as may be needed by the court; the clerk shall keep the same in the office of the clerk of such court. (1937, c. 437, s. 21.)

§ 7-377. Processes; pleadings; procedure, etc.—When the county civil court is exercising jurisdiction concurrent with that of the superior court, the rules of processes, pleadings, procedure, practice, and procuring evidence and judgment shall conform as nearly as possible to those of the superior court.

When the county civil court is exercising jurisdiction concurrent with that of justices of the peace, actions shall be commenced in the county civil court by summons issued and signed by the clerk or deputy; and orders to seize property in attachment and subpoena may be issued by the clerk or deputy and the other rules of processes, pleadings, procedure, practice, and procuring evidence and judgment shall conform as nearly as possible to those of the courts of the justices of the peace of the county. (1937, c. 437, s. 22.)

§ 7-378. Appeal to superior court; time for perfecting appeal; record on appeal; briefs; judgment; appeal to supreme court.—Appeals in actions may be taken from the county civil court within ten days from the date of rendition of judgment to the superior court of the county in term time, for errors assigned in matters of law or legal inference, in the same manner as is provided for appeals from the superior court to the supreme court, except as follows:

(1) The appellant shall cause a copy of the statement of case on appeal to be served on the respondent within thirty days from the entry of the appeal taken, and the respondent, within fifteen days after such service, shall return the copy with his approval or specific amendments endorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.

(2) The appellant shall file one typewritten copy of the statement of case on appeal, as settled, containing the exceptions and assignments of error, which, together with the original record, shall be transmitted by the clerk of the county civil court to the superior court as the complete record on appeal in said court.

(3) The record in the case on appeal to the superior court must be docketed in the superior court within ten days after the date of settling the case on appeal. If the appellant shall fail to perfect his appeal within the prescribed time, the appellee may file with the clerk of superior court a certificate of the clerk of court from which the appeal comes showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant and the date of the settling of case on appeal, if any has been settled, with his motion to docket and dismiss said appeal at appellant's cost, which motion shall be allowed at the first regular term or any succeeding regular term of the superior court.

(4) Appellant shall file one typewritten brief with the clerk of superior court, and shall immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If appellant's brief has not been filed with the clerk of superior court, and no copy has been delivered to appellee's counsel within three weeks from the date of settling the case on appeal, the appeal will be dismissed on motion of appellee at the next regular term or any succeeding regular term of the superior court, unless for good cause shown the court shall give appellant further time to file his brief.

(5) Appellee shall file one typewritten brief and a carbon copy thereof with the clerk of superior court within five weeks from the date of settling the case on appeal; the copy of same will be furnished counsel for appellant by the clerk of superior court, on application. On failure of the appellee to file his brief by the time required, the case will be heard and determined at the next regular term or any succeeding regular term of the superior court without argument from appellee, unless for good cause shown the court shall give appellee further time to file his brief.

(6) It shall be the duty of any judge of the superior court holding court in any county where a court is established under the provisions of this article, to allot sufficient and adequate time during each regular term of the superior court held in such county for the hearing of appeals from the county civil court of such county: Provided, no such appeal shall be heard until five days has ex-
be transferred to the superior court and there the abolition of the court, cases then pending shall at the end of such term of office; and in case of any presiding judge thereof, to become effective intention six months prior to the end of the term for such county by giving written notice of such clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the board of county commissioners of any county abolished by resolution of county commissioners. (1931, c. 89, s. 2.)

§ 7-388. Appointment of judge; associate judge. —The court shall be presided over by a judge, who may be licensed to practice law, and who, at the time of his election or appointment, shall be a qualified elector in the county. The board of commissioners of the county shall appoint such judge, whose term of office shall be two (2) years from the date of his appointment, and until his successor shall have been appointed and qualified, or until the court shall be abolished, as herein provided. In the event of a vacancy by death or resignation, appointment shall be for the unexpired term of the previous judge. The salary of said judge shall be fixed by the board of commissioners of the county, and the same shall be paid monthly out of the general county fund. In each county in which the court is established, under the provisions of this article, there shall be appointed by the board of commissioners of said county an associate judge, who shall preside as judge of the county court, and with like authority of the regular judge, in the event of sickness or absence from the county of the regular judge, or in the event that the regular judge should be disqualified by relationship to the parties in interest, or from other cause. The associate judge shall take the same oath of office required by the judge of the county court, and shall be paid such compensation for his services as may be provided by the board of commissioners. The compensation which shall be paid to the associate judge
§ 7-389. Appointment of prosecuting attorney.
There shall be a prosecuting attorney of said County Court, to be known as the prosecuting attorney, who shall appear for the State and prosecute all criminal cases being tried in said court, and for his services he shall be paid such salary as may be fixed by the board of commissioners, to be paid monthly from the general county fund. The board of commissioners shall appoint such prosecuting attorney, whose term of office shall be two (2) years from the date of his appointment, and until his successor shall have been appointed and qualified, or until the court shall be abolished, as herein provided, except in the event of a vacancy in the office of prosecuting attorney, either by death or resignation, the appointment to fill such vacancy shall be for the unexpired term of the previous prosecuting attorney. (1931, c. 89, s. 6.)

§ 7-390. Clerk of court; term of office; fees; bond; sheriff.
In those counties in which the clerk of the superior court and sheriff are paid fees and not salaries, such clerks and sheriffs shall receive the same fees for services rendered in a county court as they would have received had such services been rendered in the superior court. The Clerk of the Superior Court shall, ex-officio, be Clerk of the County Court, and in all counties in which the Clerk of the Superior Court is paid fees, the Clerk of the Superior Court shall have the right and privilege to resign as Clerk of the County Court, and in the event of such resignation the board of commissioners shall have the authority to appoint a Clerk of the County Court, whose term of office shall be two (2) years, and whose term of office shall expire at the time fixed for the termination of the office of the judge of said court, and the appointment of the Clerk of the County Court shall thereafter be made by the board of commissioners at the same time when the appointment of the judge of said court is made by said board of commissioners. He will receive the same fees for services rendered as clerks of the Superior Courts. In all counties in which the Clerks of the Superior Court are paid salaries the board of commissioners are authorized, in their discretion, to provide additional compensation to such clerks for their services rendered as Clerk of the County Court.
In the event that the Clerk of the Superior Court shall resign as Clerk of the County Court as herein provided, upon the appointment of a Clerk to the County Court, he shall be required to enter into a bond in such sum as may be fixed by the board of commissioners for the faithful performance of the duties of his office. (1931, c. 89, s. 7.)

Local Modification.—Lee: 1941, c. 330.

§ 7-391. Oath of judge; prosecuting attorney.
The judge of the county court, before entering upon the duties of his office, shall take the prescribed oath required of judges of the Superior Court, and such oath shall be recorded by the Clerk of the Superior Court of the county. The prosecuting attorney, before entering upon the duties of his office, shall take the prescribed oath required of solicitors of the Superior Court, and said oath shall be recorded by the Clerk of the Superior Court of the county. (1931, c. 89, s. 8.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11; Const. Art. VI, s. 7.

§ 7-392. Court seal. — The County Criminal Court shall have a seal with the impression "County Court of ..........County," which shall be used in attestation of all writs, warrants, or other processes, acts, or judgments of said court whenever required, and in the same manner and in the same effect as the seal of other courts of record in the State of North Carolina. (1931, c. 89, s. 9.)

§ 7-393. Jurisdiction; appeal; judgment docket.
The jurisdiction of the County Court shall be as follows:
(a) Said court shall have final exclusive and original jurisdiction of all criminal offenses committed in the county below the grade of a felony, as now defined by law, except as to offenses over which justices of the peace have final jurisdiction, and all such offenses whereof said court is given jurisdiction are hereby declared to be petty misdemeanors.
(b) To punish for contempt to the same extent and in the same manner allowed by law to the Superior Court of this State; to issue writs ad testificandum and other processes to compel the attendance of witnesses and to enforce the orders and judgments of the court in the same manner allowed by law to the Superior Court of this State.
(c) The judge of the County Court shall have all the power and jurisdiction and authority now conferred by law upon the Superior Court to sentence any person who pleads guilty or who is convicted in said court of a misdemeanor for which the punishment prescribed by law is imprisonment, to be imprisoned in the common jail of the county and to be assigned to work on the public roads under the supervision of the state highway and public works commission and the clerk of said court shall issue commitments therefor in the same manner as now provided by law for the Clerks of the Superior Court.
(d) Any person convicted in said court shall have the right of appeal to the Superior Court of said county, and upon such appeal the trial in the Superior Court shall be de novo.
(e) The County Court shall have exclusive preliminary jurisdiction over all offenses whereof exclusive jurisdiction is not given to said court, and shall hear and determine all warrants charging such offenses, and in the event that the court finds probable cause, shall bind the defendant over to the Superior Court, requiring such bond as the court may fix for the appearance of the defendant at the next ensuing term of the Superior Court of said county for the trial of criminal causes; and all justices of the peace is-
§ 7-394. Jury trials.—In all cases coming before the said County Court a jury may be demanded by either the State or the defendant, or the court may, upon its own motion, order a jury trial in any case where, in the judgment of the court, the ends of justice would be better met by submitting the case to a jury. The board of commissioners of the county in which said County Court is established are hereby required to furnish the clerk of said County Court with a list of jurors of said county, and in any case where a jury trial is to be had a jury of twelve (12) shall be drawn from the said list of jurors so furnished by the board of commissioners. The names of the jurors shall be drawn from the box as now provided in cases in the Superior Court in drawing a special venire: Provided, however, the defendant may waive a jury drawn from the box, in which event the court shall direct the sheriff to summons bystanders or tales jurors to serve as jurors in said cases, and the judge of the County Court shall have like authority as is now existing by the judge of the Superior Court to order the summons of tales jurors to serve in said court where the jurors drawn from the box shall be legally challenged or shall be otherwise disqualified to serve as such jurors. The causes of challenge of jurors in the County Court shall be the same as now provided for challenges of jurors in the Superior Court. The fees of jurors shall be the same as now paid jurors in the Superior Court, and shall be paid from the general county fund, and a jury tax of fifteen ($15.00) dollars in such cases shall be taxed in the bill of costs. (1931, c. 89, s. 11.)

Local Modification.—Lee: 1929, c. 213; Onslow: 1941, c. 303.

§ 7-395. Process.—The warrants, subpoenas, and other processes of law issued by said court shall be directed to the sheriff or other lawful officer of the county to which said process is directed, and service thereof shall be lawfully made when made by the sheriff, deputy sheriff, of the county, or any other constable of said county, or by any rural policeman of said county, or municipal officer, and all warrants and subpoenas and other processes issued by the clerk of said county, when attested by the seal of said county, shall run anywhere in the State of North Carolina, and shall be executed by all officers in the same manner and way as processes now issued by the Superior Court. (1931, c. 89, s. 12.)

§ 7-396. Duties of judge; bond on appeal or on being bound over.—The judge of the County Court shall preside over said court and shall direct and determine all actions coming before him, the jurisdiction of which is conferred by this article, and in all cases where the defendant or defendants shall crave an appeal to the superior court, and in cases where the court has preliminary jurisdiction, and probable cause is found, the defendant shall be required to give bond, with sufficient surety, to be fixed by the court, conditioned upon the defendant’s appearance at the next ensuing term of the Superior Court of said county for the trial of criminal causes, and in default thereof the court shall commit the defendant to the common jail of said county until said defendant shall have given bond or shall have been otherwise discharged according to law, except in capital cases, when the court shall find probable cause, he shall bind the defendant over to the superior court without bond. (1931, c. 89, s. 13.)

§ 7-397. When prosecuting attorney’s fee taxed in bill of costs.—In all cases where the defendant shall plead guilty, or shall be convicted, there shall be taxed in the bill of costs a fee of eight dollars ($8.00) in lieu of prosecuting attorney’s fee, which shall be paid by the defendant, and shall be paid into the general county fund. In the event the defendant is confined to jail or confined to jail and assigned to work on the public roads such fee shall not be taxed as a part of the cost. (1931, c. 89, s. 14.)

§ 7-398. Complete record to be kept by clerk; docket.—It shall be the duty of the clerk of said court to keep an accurate account and true record of all costs, fines, penalties, forfeitures, and punishments of said court imposed under the provisions of this article, and said record shall show the name of each offender, the name of the offense, the date of the hearing of the trial, and the punishment imposed, and the board of commissioners shall provide dockets for recording all of the processes issued by said court, which shall conform to the docket kept by the clerk of the Superior Court, and shall also provide proper files to properly keep a record of all cases which shall be disposed of in said court, and the disposition that has been made of the same. (1931, c. 89, s. 15.)

§ 7-399. Warrants returnable to court.—All warrants for crimes whereof the County Court shall have jurisdiction may be issued by any Justice of the Peace of said county, or mayor of any incorporated town, as provided by law, and shall be made returnable before the County Court at the next ensuing term thereof. (1931, c. 89, s. 16.)

§ 7-400. Service fees to officers except where they are on salary.—The cost of issuing and serving warrants, subpoenas, and other processes of law by said court shall be payable to the officers issuing or serving them, and shall be payable to the clerk of said court as is now done in cases
§ 7-401. Regular and special terms; place of sessions.—There shall be held a regular term of the County Court established under the provisions of this article on the second Tuesday in each month: Provided, however, special terms may be held at any time by order of the judge of said court for the purpose of disposing of cases where pleas of guilty shall be entered and for the trial of cases where the defendants are confined to prison. At all regular terms the court shall continue in session until all cases are tried, continued, or otherwise disposed of according to law: Provided, however, the board of county commissioners in any county in which a County Court is established under the provisions of this article by proper resolution duly entered upon the minutes of said board, may, in the exercise of their discretion, fix other days than the days provided in this article on which regular terms of said court may be held: Provided, further, when a regular term of the County Court to be held under the terms fixed by this article shall conflict with a term of the Superior Court in said county, the regular term of the County Court shall be held on the first Tuesday following the termination of said term of the Superior Court, as fixed by law. All sessions of said County Court shall be held in the court house of the county in which said county is established. (1931, c. 89, s. 18.)

§ 7-402. Judge and prosecuting attorney may practice law in other courts.—In the event of the appointment of a licensed lawyer as judge or prosecuting attorney of said County Court, nothing in this article shall prevent the said judge or the prosecuting attorney appointed under the provisions of this article from practicing law in matters in which he is in no way connected by reason of his said office, or in courts in the State in matters which have not been heard or will not be heard in the County Court of which he is an officer. (1931, c. 89, s. 19.)

§ 7-403. Other County Court Acts not affected.—Nothing in this article shall be construed to repeal, alter, or amend any law heretofore enacted authorizing the establishment of county courts in the several counties of the State, but this article shall be construed to be in addition to and supplemental to such acts, and any court established under the provisions of this article shall be restricted and limited to all the provisions herein contained. (1931, c. 89, s. 20.)

§ 7-404. Certain counties excepted from provisions of article.—This article shall not apply to the counties of Alexander, Alleghany, Ashe, Beaufort, Bertie, Bladen, Brunswick, Buncombe, Camden, Caswell, Catawba, Chowan, Clay, Cleveland, Craven, Cumberland, Currituck, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Franklin, Greene, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Jackson, Johnston, Lincoln, Macon, Madison, Montgomery, New Hanover, Northampton, Orange, Pamlico, Pasquotank, Perquimans, Pitt, Randolph, Robeson, Rockingham, Rowan, Sampson, Scotland, Stanly, Surry, Swain, Transylvania, Vance, Wake, Warren, Watauga, Wayne, Wilkes, Yancey and Richmond. (1931, c. 89, s. 21, c. 270; 1935, c. 8; 1939, c. 41.)

Editor's Note.—Cabarrus county was omitted by the amendment of 1931.

The 1939 amendment omitted Yadkin county.

SUBCHAPTER X. SPECIAL COUNTY COURTS.

Art. 37. Special County Courts.

§ 7-405. Establishment upon resolution of county commissioners.—In addition to the plans now provided for the establishment of courts inferior to the superior court, there may be established by resolution of all of the members of the board of county commissioners of any county in the state a court of criminal and civil jurisdiction, which shall be a court of record and shall be called a special county court and shall have criminal and civil jurisdiction as herein provided: Provided, that the board of county commissioners may by proper resolution, establish a special county court having only criminal jurisdiction or only civil jurisdiction or having both criminal and civil jurisdiction as herein provided. (1939, c. 357, s. 1.)

§ 7-406. Qualifications of judge and solicitor.—The judge of said special county court shall be an elector in and for said county at the time of appointment and qualification, and shall be a man of good moral character. The solicitor of the county shall be an elector in and for said county, shall be a man of good moral character and a licensed attorney at law. (1939, c. 357, s. 2.)

§ 7-407. Appointment of judge.—After the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the governor of the state, who shall appoint a judge to preside over such court, and each second year thereafter it shall be the duty of the governor of the state to appoint the judge of each such county court who shall preside over said court, and the said judge shall hold office for a term of two years, and until his successor is appointed and qualified. Any vacancy occurring in the office of judge shall be filled by the governor of the state. (1939, c. 357, s. 3.)

Local Modification.—Richmond: 1941, c. 60, s. 2, repealed by 1943, c. 254, ss. 1, 3.

§ 7-408. Appointment of prosecuting attorney and clerk.—The board of commissioners of any county availing itself of the provisions of this article may elect or appoint and for the same term as herein provided for the appointment of the judge of this court, a prosecuting attorney and clerk for said court. (1939, c. 357, s. 4.)

Local Modification.—Richmond: 1941, c. 60, ss. 3, 4; 1943, c. 254, ss. 1, 4.

§ 7-409. Appointment of acting attorney or judge in absence of regular official.—Whenever,
for any reason, the prosecuting attorney is temporarily absent, the judge shall appoint some other practicing attorney in the county to act as prosecuting attorney, and in case of temporary absence of the judge, either on account of sickness or other cause, the judge of said county shall appoint a judge to hold court during the absence of the regular judge. 

(1939, c. 357, s. 5.)

§ 7-410. Compensation of judge and solicitor.

—The salary of the judge and solicitor and for any reason, the prosecuting attorney is temporarily absent, the judge shall appoint some prosecuting attorney, and in case of temporary absence of the judge, either on account of sickness or other cause, the judge of said county shall appoint a judge to hold court during the absence of the regular judge. 

(1939, c. 357, s. 6.)

Local Modification—Richmond: 1941, c. 60, s. 5.

§ 7-411. Oaths of judge and solicitor.—Before entering upon the duties of office, the judge and solicitor shall take and subscribe an oath as is now provided by law for the judges and solicitors of the superior court, and file the same with the clerk of the superior court of the county, and the clerk shall record the same. 

(1939, c. 357, s. 7.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11; Const., Art. VI, § 7.

§ 7-412. Appointment of temporary judge, etc.

—Where the judge is disqualified by reason of interest in any case, he may appoint a temporary judge to hear said case, or said case may be removed to the superior court for trial in the county. 

(1939, c. 357, s. 8.)

§ 7-413. Duties and liabilities of clerk.—The clerk of the special county court established under the provisions of this article shall have as nearly as possible the same duties, powers, and responsibilities with reference to the special county court as a clerk of the superior court. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk of the special county court to the same extent as a clerk of the superior court. 

(1939, c. 357, s. 9.)

§ 7-414. Oath of office of clerk.—The clerk of the special county court before entering on the duties of the office, shall take and subscribe, before some officer authorized by law to administer an oath, the oath required under general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of him under this article and file such oath with the register of deeds for the county. 

(1939, c. 357, s. 10.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11; Const., Art. VI, § 7.

§ 7-415. Attendance upon court by sheriff or deputies.—The sheriff of the county, or his deputies, shall attend upon this court in the same manner and with the same power and authority as he does and has in attendance upon the superior court of the county. 

(1939, c. 357, s. 11.)

§ 7-416. Appointment of court stenographer.

—In the trial of any case in the special county court where a stenographer is deemed necessary, the judge of said court shall appoint a stenographer, and the fees for such work shall be taxed as part of the court cost in said case. 

(1939, c. 357, s. 12.)

§ 7-417. Right of jury trial in civil actions.

—In the trial of civil actions in said court, any party is entitled to the right of trial by jury as is provided in the trial of causes in the superior court, unless said right of trial by jury shall be waived as hereinafter provided. 

(1939, c. 357, s. 13.)

§ 7-418. Jury trial where no written pleadings are filed.—In those cases in which no written pleadings are required, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the issuance of the summons, the plaintiff, or petitioner, in writing, demands a jury trial, or the defendant at any time before the commencement of the trial, in writing, demands a jury trial. 

(1939, c. 357, s. 14.)

§ 7-419. Jury trial where written pleadings are filed.—In those cases in which written pleadings are required to be filed, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the filing of the complaint or petition, the plaintiff, in writing, demands a jury trial, or unless at the time of the filing of the answer, or other pleading raising an issue of fact, the defendant or other party filing such pleading demands, in writing, a jury trial. 

(1939, c. 357, s. 15.)

§ 7-420. Jury trial where cases appealed or removed.—In those cases which were or may hereafter be instituted before a justice of the peace and removed or appealed to this court, and in those cases which were or may hereafter be instituted in superior court, and removed to this court, a jury trial shall be conclusively presumed to have been expressly waived unless the party desiring a trial by jury shall make a demand therefor, in writing, at any time before the case is called for trial, in which event the number of the jury shall be as herein elsewhere provided. 

(1939, c. 357, s. 16.)

§ 7-421. Number of jurors; deposit on demand for jury trial.—The jury of said court shall be a jury of six in all civil cases where a jury is demanded: Provided, that in those cases in which a jury is demanded the party shall at the time of making the demand pay to the clerk of the said court a deposit of six dollars ($6.00) to insure the payment of the jury tax: Provided, further, that where a party making such demand for a jury trial makes affidavit and satisfies the judge or clerk of the said court that he is unable to make the deposit, such party shall not be required to make the same. The deposit for a jury shall be returned to the party making it when the cost is paid by the losing party, against whom the cost is taxed. 

(1939, c. 357, s. 17.)

§ 7-422. Continuance of trial upon demand for jury; drawing and summoning of jury; compensation of jurors.—When a trial by jury is demanded in civil or criminal cases, the judge shall continue the cause until a day to be set, and the judge, together with the attorneys representing all parties, shall immediately proceed to the office of the register of deeds of the county and cause to be drawn a jury of twelve, observing as nearly as may be the rule for drawing a jury for the superior court. The judge shall issue the proper writ to the sheriff of the county, commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the ac-
tion. Such jurors shall receive the same compensation as is provided by law for jurors serving in the superior court, and are to be paid out of the treasury of said county on presentation of a ticket duly issued by the clerk of said court. (1939, c. 357, s. 18.)

§ 7-423. Jury trials in criminal actions.—In all criminal actions, upon demand of the defendant or the prosecuting attorney, a jury of six shall be summoned in the same manner as provided for summoning jurors in civil actions. (1939, c. 357, s. 19.)

§ 7-424. Talesmen may serve as jurors.—In all criminal and civil actions, the judge shall have the right to call in talesmen to serve as jurors, according to the practice of the superior court, and to direct the sheriff to call in a sufficient number of talesmen to serve during any one week or part of a week for the proper dispatch of the business of the court. (1939, c. 357, s. 20.)

§ 7-425. Sessions of court.—The special county court shall be open for the trial of all criminal cases of which it has jurisdiction at least one day each of week, and shall also be open at least once each month for the trial of all civil causes of which it has jurisdiction, said days to be fixed by the board of county commissioners, and shall continue its session from day to day until all business is transacted by trial, continuance or otherwise. The session of the court shall be held in the county court house or other place within the county provided by the board of county commissioners for that purpose. Special sessions of the court may be called by the judge as the necessities may require. (1939, c. 357, s. 21.)

§ 7-426. Civil jurisdiction of court.—The special county court shall have jurisdiction in civil matters as follows:
1. Jurisdiction concurrent with that of the justices of the peace of the county.
2. Jurisdiction concurrent with the superior court in all actions founded on contracts wherein the amount demanded shall not exceed the sum of fifteen hundred dollars ($1500.00), exclusive of interest and cost.
3. Jurisdiction concurrent with that of the superior court in all actions not founded on contract wherein the amount demanded shall not exceed the sum of one thousand dollars ($1000.00), exclusive of interest and cost.
4. Jurisdiction concurrent with the superior court in all attachment and claim and delivery proceedings wherein the value of the property demanded does not exceed the sum of one thousand dollars ($1000.00), exclusive of interest and cost. (1939, c. 357, s. 22.)

§ 7-427. Procedure for hearing of appeals from courts of justices of the peace.—In all cases where there is an appeal from a justice of the peace of a county wherein a special county court has been established under the provisions of this article, such appeal shall be first heard de novo in the special county court. All appeals from justices of the peace in civil cases shall be heard in the same manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the said special county court, and said appeals shall be docketed in the special county court within the same time limit and in the same manner as such appeals are now required to be docketed in the superior court. (1939, c. 357, s. 23.)

§ 7-428. Transfer of cases from superior court. —By written consent of a plaintiff and defendant filed with the clerk of the superior court, any civil case within the jurisdiction of the special county court, now or hereafter pending, in the superior court, may be transferred to the docket of the special county court, and there tried. If a jury trial is desired, it shall be expressed in the agreement to transfer the case; otherwise the right to trial by jury shall be conclusively presumed to have been expressly waived. (1939, c. 357, s. 24.)

§ 7-429. Separate records, equipment, etc., furnished by commissioners.—The clerk of the special county court shall keep separate records for use of said court to be furnished by the county commissioners, and they shall also provide necessary blanks, forms, books, and such stationery and office equipment as may be needed by the court. The clerk shall keep the same in the office of the clerk of such court. (1939, c. 357, s. 25.)

§ 7-430. Procedure in civil actions.—In civil cases when the special county court is exercising jurisdiction concurrent with that of the superior court, as now established, the rules of procedure, pleadings, practice, and admission of evidence, and judgment shall conform as nearly as possible to those of the superior court. In civil cases where the special county court is exercising jurisdiction concurrent with that of justices of the peace, actions shall be commenced in the special county court by summons issued and signed by the clerk or deputy, and orders to seize property in claim and delivery proceedings, warrants of attachment and subpoena may be issued by the clerk or deputy and the other rules of processes, pleadings, procedure, practice and procuring evidence and judgments shall conform as nearly as possible to those of the courts of the justices of the peace. (1939, c. 357, s. 26.)

§ 7-431. Orders to stay execution; judgments. —Orders to stay execution on judgments entered in the special county court shall be the same as in appeals from the superior court to the supreme court. Judgments of the county court shall be docketed in the judgment docket of the superior court, as is provided for judgments of the superior court, and the judgments when docketed shall in all respects be judgments of the superior court in the same manner and to the same extent as if rendered by the superior court, and shall be subject to the same statute of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon. (1939, c. 357, s. 27.)

§ 7-432. Seal of court.—The county court shall have a seal with the impression "County Special Court", which shall be used in attestation of all summons, other processes, etc., acts, or judgments of said court whenever required, and in the same manner and to the same effect as the seal of other courts of record in the state of North Carolina. (1939, c. 357, s. 28.)
§ 7-438. Criminal cases bound over by justices of the peace.—In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the special county court as provided in this article, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance or surety to appear at the next succeeding session of the special county court of the county, for trial; and in default of such surety such person shall be committed to the common jail of the county to await a trial: Provided, that in the event any justice of the peace or other committing magistrate shall bind over to the superior court any person accused of a crime within the jurisdiction of the special county court, the clerk of the superior court shall, upon his own motion, transfer all papers in the case to the special county court, and the case shall then stand for trial at the next succeeding term of said special county court, as if the defendant had been bound over to the said court in the first instance: Provided, further, that in the event any justice of the peace or other committing magistrate shall bind over to the special county court any person charged with an offense beyond the jurisdiction of said court, the said judge shall cause the accused person to enter into a new bond with sufficient surety for his appearance at the next succeeding term of the superior court of the county, and shall transmit all papers in the case to the said superior court, but this shall be done without additional cost to the accused person. (1939, c. 357, s. 34.)

§ 7-439. Notice to accused person and surety in cases transferred from superior court.—Whenever the clerk of the superior court shall transfer the papers in any case from the superior court to a special county court, he shall at the same time issue a notice to the accused person and his surety, informing them that the cause has been so transferred and requiring the accused person to appear at the next succeeding term of said special county court for trial, and, upon the service of said notice upon the accused person and his surety, at least five days before the beginning of the next succeeding term of the special county court, the case shall stand for trial at said term and the bond given by the accused person for his appearance at the next term of the superior court shall in all respects be valid and binding to compel the appearance of the accused person at the said next succeeding term of said special county court, and in case said notice is not served on the accused person and his surety at least five days before the beginning of the next succeeding term of the special county court, then the case shall not be tried without the consent of the accused person until the following term of the special county court. (1939, c. 357, s. 33.)

§ 7-440. Issuance of warrant in criminal causes.—All trials of criminal causes in said court...
Chapter 8. Evidence.

Sec.
8-9. Copies of grants certified by clerk of secretary of state validated.
8-10. Copies of grants in Burke.
8-13. Certain deed dated before 1835 evidence of due execution.
8-14. Certified copies of maps of Cherokee lands.
8-15. Certified copies of certain surveys and maps obtained from the state of Tennessee.

CHAPTER 8. EVIDENCE

§ 7-441. Punishment upon conviction.—Whenever any person shall be convicted or plead guilty of any offense of which the court has final jurisdiction the judge may sentence him to the common jail of the county in which the court shall be held, and assign him to work on the public roads, under the supervision of the state highway and public works commission: Provided, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the judge may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the state. All fines imposed by the court shall be collected by the clerk of such court or the deputy clerk thereof in the same manner as the clerk of the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as are allowed by law in similar cases before the superior court. (1939, c. 357, s. 37.)

§ 7-442. Appeals to superior court.—Any person convicted of any offense of which the county court has final jurisdiction may appeal to the superior court from any judgment or sentence of the court in the same manner as is now provided for appeals from the courts of justices of the peace; and any person tried before the judge for any offense of which the court has not final jurisdiction shall, upon the judge’s finding probable cause of guilt, be bound over to the superior court in the same manner as is provided by law in similar cases before justices of the peace. (1939, c. 357, s. 38.)

§ 7-443. Fees for issuance and service of warrants.—All justices of the peace, constables and sheriffs issuing or serving warrants or other process returnable to the special county court shall have the same fees as are now prescribed by law, which fees shall be collected and paid out in the same manner and by the same officers as collect and distribute such fees in the superior court. (1939, c. 357, s. 39.)

§ 7-444. Costs and fees as county funds.—There shall be taxed in the special county court the same costs and fees for the benefit of the officers thereof as provided for municipal recorder’s court. Such costs and fees shall be collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners. (1939, c. 357, s. 40.)

§ 7-445. Abolition of court by resolution of commissioners.—Any court established under this article may be abolished by resolution of a majority of the board of county commissioners for such county by giving written notice of such intention one month prior thereto; and in case of the abolition of the court, cases then pending shall be transferred to the superior court and there tried. (1939, c. 357, s. 41.)

§ 7-446. Counties exempt.—This article shall not apply to the counties of Alamance, Alexander, Anson, Ashe, Avery, Beaufort, Bertie, Bladen, Brunswick, Burke, Caldwell, Carteret, Catawba, Chatham, Chowan, Clay, Cleveland, Columbus, Craven, Dare, Duplin, Edgecombe, Franklin, Forsyth, Gaston, Gates, Granville, Greene, Halifax, Harnett, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenior, Lincoln, Madison, Mecklenburg, Mitchell, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Robeson, Rutherford, Sampson, Stanly, Surry, Union, Vance, Wake, Warren, Wayne, Washington and Wilson. (1939, c. 357, s. 42.)

§ 7-447. Construction of article.—This article shall not be construed to repeal or modify any existing laws by which a county court may be created or to affect or repeal any court now or hereafter created under existing laws, and shall only be construed to be an additional method by which a special county court may be established for criminal, civil, or criminal and civil jurisdictions. (1939, c. 357, s. 43.)

Art. 1. Statutes.
Sec.
8-1. Printed statutes and certified copies evidence.
8-3. Laws of other states or foreign countries.
8-4. Judicial notice of laws of United States, other States and foreign countries.
8-5. Town ordinances certified.

Art. 2. Grants, Deeds and Wills.
Sec.
8-6. Copies certified by secretary of state.
8-7. Certified copies of grants and abstracts.
8-8. Certified copies of grants and abstracts recorded.
§ 8-1. Printed statutes and certified copies evidence of title under McCulloch.

§ 8-17. Conveyances or certified copies evidence of title under McCulloch.

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


§ 8-20. Certified copies registered in another county and used in evidence.

§ 8-21. Deeds and records thereof lost, presumed to be in due form.


§ 8-23. Local: copies of records from Tyrrell.

§ 8-24. Local: records of partition in Duplin.

§ 8-25. Local: records of deeds and wills in Anson.


§ 8-27. Local: records of wills in Bladen.


§ 8-29. Copies of wills in secretary of state's office.

§ 8-30. Copies of wills recorded in wrong county.

§ 8-31. Copy of will proved and lost before recorded.

§ 8-32. Certified copies of deeds and wills from other states.

§ 8-33. Copies of lost records in Bladen.

Art. 3. Public Records.

§ 8-34. Copies of official writings.

§ 8-35. Authenticated copies of public records.

§ 8-36. Authenticated copy of record of administration.

§ 8-37. Certificate of commissioner of motor vehicles as to ownership of automobile.

Art. 4. Other Writings in Evidence.

§ 8-38. Proof by attesting witness not required.

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

§ 8-40. Proof of handwriting by comparison.


§ 8-42. Book accounts under sixty dollars.

§ 8-43. Book accounts proved by personal representative.


§ 8-45. Itemized and verified accounts.

Art. 5. Life Tables.

§ 8-46. Mortuary tables as evidence.

§ 8-47. Present worth of annuities.

Art. 6. Calendars.

§ 8-48. Clark's calendar; proof of dates.

Art. 7. Competency of Witnesses.

§ 8-49. Witness not excluded by interest or crime.

§ 8-50. Parties competent as witnesses.

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

§ 8-52. Communications between attorney and client.

§ 8-53. Communications between physician and patient.

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

Art. 1. Statutes.

§ 8-55. Testimony enforced in certain criminal investigations; immunity.

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

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

§ 8-58. Wife may testify in applications for peace warrants.

Art. 8. Attendance of Witness.

§ 8-59. Issue and service of subpoena.

§ 8-60. Attendance before referee or commissioners.

§ 8-61. Subpoenas duces tecum issued.

§ 8-62. Subpoenas and depositions upon removal of cause.

§ 8-63. Witnesses attend until discharged; effect of nonattendance.

§ 8-64. Witnesses exempt from civil arrest.

Art. 9. Attendance of Witnesses from without State.

§ 8-65. Definitions.

§ 8-66. Summoning witness in this state to testify in another state.

§ 8-67. Witness from another state summoned to testify in this state.

§ 8-68. Exemption from arrest and service of process.

§ 8-69. Uniformity of interpretation.

§ 8-70. Title of article.

Art. 10. Depositions.

§ 8-71. Manner of taking depositions in civil actions.

§ 8-72. Notice required for taking depositions.

§ 8-73. Publication of notice in case of nonresident.

§ 8-74. Depositions for defendant in criminal actions.

§ 8-75. Depositions in justices' courts.

§ 8-76. Depositions before municipal authorities.

§ 8-77. Depositions in quo warranto proceedings.

§ 8-78. Commissioner may subpoena witness and punish for contempt.

§ 8-79. Attendance before commissioner enforced.

§ 8-80. Remedies against defaulting witness before commissioner.

§ 8-81. Objection to deposition before trial.

§ 8-82. Deposition not quashed after trial begun.

§ 8-83. When deposition may be read on the trial.

§ 8-84. Depositions taken in the state to be used in another state.

Art. 11. Perpetuation of Testimony.

§ 8-85. Relief afforded by superior courts.

§ 8-86. How to obtain relief.

§ 8-87. Rules of procedure; admissibility of testimony taken.

§ 8-88. Taxing costs.

Art. 12. Inspection and Production of Writings.

§ 8-89. Inspection of writings.

§ 8-90. Production of writings.

§ 8-91. Admission of genuineness.

act of the general assembly certified by the secretary of state shall be received in evidence in every court. (Rev., ss. 1592, 1593; Code, ss. 1339, 1340; R. C., c. 44, ss. 4. 5; 1826, c. 7; C. S. 1747.)

Public Statute Admissible.—Where the public printer has
published a certain act with other public acts of the general assembly, it is made, presumptively at least, a part of the statute of the State and can be introduced in court by that original or an exemplification made therefrom by him which, when competent, is to be used in evidence." Id.

§ 8-2. Martin's collection of private acts.—Any private act published by Francis X. Martin in his collection of private acts, shall be received in evidence in every court. (Rev., s. 1594; Code, s. 1340; R. C., c. 44, s. 5; 1826, c. 7, s. 2; C. S. 1748.)

§ 8-3. Laws of other states or other countries.—A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, shall be evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases, adjudged in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof. And either party may also exhibit a copy of the laws of another state, or of a territory, or of a foreign country, on file in the state or supreme court library, or in the offices of the governor or secretary of state. (Rev., s. 1594; Code, s. 1340; R. C., c. 44, s. 5; 1826, c. 7, s. 2; C. S. 1748.)

Foreign Laws Must Be Proved.—The courts will not take judicial notice of the statutes and the laws in the different states which have changed the common law. Miller v. Atlantic, etc., R. Co., 154 N. C. 441, 70 S. E. 838.

Same.—Question of Fact.—What is the statute law of another state is a question of fact to be proved like any other fact. Couch v. Fauckett, 122 N. C. 270, 29 S. E. 365. See also Miller v. Atlantic, etc., R. Co., 154 N. C. 441, 70 S. E. 838.

Same.—Question for Jury.—Where the common law of another state is proved, the court must leave the evidence of the same to the jury without instructions. Hooper v. Moore, 50 N. C. 130.

Publication of Foreign Laws Admissible.—A book purporting to be a publication of the statute laws of another state, and to be published by the authority of such state, is admissible as evidence of such laws. Balk v. Harris, 122 N. C. 64, 30 S. E. 318; Copeland v. Collins, 122 N. C. 619, 52 S. E. 838.

Same.—Printed Copy Admissible.—By the terms of this section, a printed copy of the acts of the legislature of another state, or of a territory, or of a foreign country, is to be received in evidence as a printed copy of the statute law of a foreign state. Miller v. Urban, 141 N. C. 846, 54 S. E. 294.

Presumption as Regards Common Law.—In the absence of proof to the contrary, the common law will generally be presumed to be in force in a sister state, except in those cases where its jurisprudence is not founded on the common law. Miller v. Atlantic, etc., R. Co., 154 N. C. 441, 70 S. E. 838. See also the luminous treatment of the subject generally in Chamberlayne on Evidence, vol. I, sec. 584 et seq.

Same.—Question for Jury.—Where the common law of another state is proved, the court must leave the evidence of the same to the jury without instructions. State v. Railroad, 141 N. C. 846, 54 S. E. 294.

United States Agricultural Regulations Judicially Notice.—The regulations of the United States Agricultural Department, concerning the transportation of cattle, are not foreign laws within the meaning of this section, and the courts are required to take judicial notice of them. State v. Railroad, 141 N. C. 846, 54 S. E. 294.

Witnesses.—Any person who claims to know the provisions of the common or unwritten laws of a foreign country may, under this section, testify to and explain them before courts and juries. State v. Behrman, 114 N. C. 797, 92 S. E. 230.

An examination of the cases will show that an attempt to prevent the admission of the testimony of a party who claims to know the laws of a foreign state, or of a territory, or of another country, has quite frequently been made by the litigating parties. The basis of this attempt, and the reasons given in support thereof, has been different in a large number of the decided cases. One of the grounds, frequently relied on as a means for the exclusion of this evidence, is the fact that the particular witness has not been shown to be an expert. This point, however, has been of little avail to the party attempting to exclude the admissibility of the evidence, since the construction placed on this section has been that it is not the legislative intent that evidence be required in such a case. In reaching this conclusion much weight has been given to the wording that the common law of another state may be proved as a "fact."—Ed. Note.

A law of another state may be proved in transitory actions brought in the courts of this State by the provisions of our law, as learned in the law of such other State, and by its authorized statutes and reports of decisions of its courts of last resort, and when properly offered in evidence they must be interpreted by our courts as matters of law. Howard v. Howard, 200 N. C. 574, 158 S. E. 101.

A transcript of a statute, once duly certified by the Secretary of State, in the manner prescribed by our law, is admissible in evidence at all times of its being in force according to its terms unless a repeal is shown. State v. Cheek, 35 N. C. 179, 34 S. E. 176.

Same.—Applicable to Criminal and Civil Cases.—The certificate of the Secretary of State, in relation to the statutes of another state, given in pursuance of this section is evidence in both criminal and civil cases. State v. Patterson, 24 N. C. 346.

§ 8-4. Judicial notice of laws of United States, other States and foreign countries.—When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take judicial notice of such law in the same manner as if the question arose under the law of this State. (1931, c. 30.)

Cross Reference.—As to judicial notice of private statutes, see § 1-157. [549]
Editor’s Note.—The act from which this section was codified provided that it should not apply in the trial of any cause of action which accrued prior to its ratification on February 16, 1931.

Survival of Action under Law of Another State.—In an action to recover for the alleged tortious conversion of personal property by a nonresident, against his personal representative, the failure of the plaintiff to allege survival of the cause of action under the laws of the state in which it arose does not render the complaint demurrable. Suskin v. Hodges, 216 N. C. 333, 4 S. E. (2d) 891.

§ 8-5. Town ordinances certified.—In the trial of appeals from mayor’s courts, when the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, certified by the mayor, shall be prima facie evidence of the existence of such ordinance. (Rev., s. 1595; 1899, c. 277, s. 2; C. S. 1750.)

Cross References.—As to duty of mayor to certify ordinance on appeal, see § 160-16. As to how ordinances are pleaded and proved, see § 160-272.

When Certification Unnecessary.—The certification of a town ordinance as required by this section, is only prima facie evidence of its existence, and this is unnecessary when the ordinance has been proven by the production of the original record of the town by the proper officer, or if it shows its passage. State v. Razook, 179 N. C. 708, 103 S. E. 67.

Evidence Insufficient to Rebut Prima Facie Case.—When the defendant has certified that the ordinance alleged to have been violated is the ordinance certified by the mayor, it is not conclusive that the ordinance had not been passed at some other time, against the statutory certificate of the mayor that it was in existence at the time of the defendant’s conviction. State v. Gill, 195 N. C. 425, 142 S. E. 328.

Art. 2. Grants, Deeds and Wills.

§ 8-6. Copies certified by secretary of state.—Copies of the plats and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the secretary of state, certified by him as true copies, shall be as good evidence, in any court, as the original. (Rev., s. 1596; Code, s. 1341; R. C., c. 44, s. 6; 1822, c. 1154; C. S. 1751.)

In General.—This section does not make the copies better evidence than the original; and where there is a material discrepancy, it is for the jury to find as a fact which one is correct. Richards v. Ritter Lumber Co., 158 N. C. 34, 73 S. E. 485.

Certification by Clerk of Secretary of State.—See sec. 8-9.

Abstract Competent to Show Title.—Abstracts of grants in the usual form, duly certified as correct copies by the Secretary of State and recorded in the office of the register of deeds, are competent to show title out of the state. Marshall v. Corbett, 137 N. C. 285, 50 S. E. 210.

§ 8-7. Certified copies of grants and abstracts.—For the purpose of showing title from the state of North Carolina to the grantee or grantees therein named and for the lands therein described, duly certified copies of all grants and of all memoranda and abstracts of grants on record in the office of the secretary of state, given in abstract or in full, and with or without the signature of the governor and the great seal of the state appearing upon such record, shall be competent evidence in the courts of this state or of the United States or of any territory of the United States, and in the absence of the production of the original grant shall be conclusive evidence of a grant from the state to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 1; C. S. 1752.)

Section Constitutional.—This section is constitutional and valid. Howell v. Hurley, 170 N. C. 401, 87 S. E. 107.

Copy Conclusive as to Regularity of Original.—An abstract of a grant of the State’s land by the Secretary of State imports the regularity of its issuance, and that the constitutional mandate of affixing the seal of the original had been legally complied with, though the abstract gives no indication thereof, the regularity of the official conduct in granting the original being presumed; and the abstract may be introduced as competent evidence on the trial of an action involving the title to the lands described in the grant, by one claiming under it. Howell v. Hurley, 170 N. C. 401, 87 S. E. 107.

§ 8-8. Certified copies of grants and abstracts recorded.—Duly certified copies of such grants and of such memoranda and abstracts of grants may be recorded in the county where the lands therein described are situated, and the records thereof in such counties, or certified copies thereof, shall likewise be competent evidence for the purpose of showing title from the state of North Carolina to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 2; C. S. 1753.)

Cross Reference.—As to registration of certified copies of deeds or writings, and their use in evidence, see § 47-31.

§ 8-9. Copies of grants certified by clerk of secretary of state validated.—All copies of grants heretofore issued from the office of the secretary of state, duly certified under the great seal of the state, and to which the name of the secretary has been written or affixed by the clerk of the said secretary of state, are hereby ratified and approved and declared to be good and valid copies of the original grants and admissible in evidence in all courts of this state when duly registered in the counties in which the land lies; all such copies heretofore registered in said counties are hereby declared to be lawful and regular in all respects as if the same had been signed by the secretary of state in person and duly registered. (Rev., s. 1597; 1901, c. 613; C. S. 1754.)

Editor’s Note.—Prior to the enactment of this section it was consistently held that the clerk of the Secretary of State had no power to certify and affix the great seal of the state to copies of grants and other papers from the Secretary of State’s office. Beam v. Jennings, 96 N. C. 82, 2 S. E. 245, but such acts on the part of the clerk are now validated by the provisions of this section.

§ 8-10. Copies of grants in Burke.—Copies of grants issued by the state within the county of Burke prior to the destruction of the records of said county by General Stoneman in the year one thousand eight hundred and sixty-five, shall be admitted in evidence in all actions when the same are duly registered; and when the original grants are lost, destroyed or cannot be found after due search, it shall be presumed that the same were duly registered within the time prescribed by law, as provided upon the face of original grant. (Rev., s. 1610; 1901, c. 513; C. S. 1755.)

Cross Reference.—As to copies of destroyed record as evidence generally, see § 98-1 et seq.

§ 8-11. Copies of grants in Moore.—Copies of grants for land situated in Moore county and the counties of which Moore was a part, entered in a book, and the book being certified un-
under the seal of the secretary of state, shall have the force and effect of the originals and be evidence in all courts. (Rev., s. 1613; 1903, c. 214; C. S. 1758.)

§ 8-12. Copies of grants in Onslow.—The copies of grants made by the register of deeds of Onslow county under laws of 1907, chapter 434, of grants, abstracts of grants, and other documents pertaining to titles of land in Onslow county issued prior to the year one thousand eight hundred and eighty-eight, and contained in a book called Book of Transcribed Grants Issued Prior to One Thousand Eight Hundred, duly authenticated as prescribed in said chapter 434 of the laws of one thousand nine hundred and seven, shall be received as evidence in all courts of the state, and certified copies thereof shall be received as evidence. (1907, c. 434; C. S. 1757.)

§ 8-13. Certain deeds dated before 1835 evidence of due execution.—In all actions hereafter instituted in which the title or ownership of any lands situated in North Carolina is at issue or in dispute, any deed or release, or a duly certified copy thereof, in which the people of the state of North Carolina are grantees and bearing date prior to the year one thousand eight hundred and thirty-five and purporting to have been filed and recorded in the office of the secretary of state of North Carolina prior to said year and now on file and of record in said office, and executed or purporting to have been executed by any person or persons as the representatives or agents or for or on behalf of any society, tribe, nation or aggregation of persons, whether signed or executed individually or in their representative capacity, and any such deed or release having been authorized to be executed by an act of the general assembly of North Carolina by the properly authorized agents of such society, tribe, nation or aggregation of persons, shall be prima facie evidence that the person or persons signing or executing any such deed or release were the properly authorized agent or agents of such society, tribe, nation or aggregation of persons. Any recitals or statements of fact in any such deed or release shall be prima facie evidence of the truth thereof in any such actions. (1915, c. 75; C. S. 1758.)

§ 8-14. Certified copies of maps of Cherokee lands.—Certified copies by the secretary of state of the copies, or parts thereof, of the maps of the Cherokee lands and of the Cherokee Country, as provided for and described in chapter one hundred and seventy-five of the laws of one thousand nine hundred and thirteen, shall, when certified under the hand and seal of the secretary of state, be competent evidence in the trial of any action in the courts of the state. (1913, c. 102; C. S. 1760.)

§ 8-15. Certified copies of certain surveys and maps obtained from the state of Tennessee.—A certified copy of the report of the survey made by the North Carolina commissioners, McDowell, Vance and Matthews, of that portion of the state of Tennessee extending from a point on the Virginia line to a point on the Smoky Mountain west of the Pigeon River, as obtained and filed by the secretary of state under the provisions of chapter one hundred and sixty-two of the laws of one thousand nine hundred and thirteen, shall, when certified under the hand and seal of the secretary of state, be competent evidence in the trial of any action in the courts of the state. (1913, c. 102; C. S. 1760.)

§ 8-16. Evidence of title under H. E. McCulloch grants.—In all actions or suits, wherein it may be necessary for either party to prove title, by virtue of a grant or grants made by the king of Great Britain or Earl Granville to Henry McCulloch, or Henry Eustace McCulloch, it shall be sufficient for such party, in the usual manner, to give evidence of the grant or conveyance from the king of Great Britain or Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, and the mesne conveyances thereafter, without giving any evidence of the deed or deeds of release, relinquishment or confirmation of Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, or the power or powers of attorney by which the conveyances from the said Henry McCulloch, or Henry Eustace McCulloch, purport to have been made. (Rev., s. 1600; Code, s. 1336; R. C., c. 44, s. 1; 1819, c. 1021; C. S. 1761.)

§ 8-17. Conveyances or certified copies evidence of title under McCulloch.—In all trials where the title of either plaintiff or defendant shall be derived from Henry Eustace McCulloch, or Henry McCulloch, out of their tracts number one and three, it shall not be required of such party to produce, in support of his title, either the original grant from the crown to the proprietors, or a registered copy thereof; but in all such cases the grant or deed executed by such reputed proprietors, or by his or their lawful attorney, or a certified copy thereof, shall be deemed and held sufficient proof of the title of such proprietors, in the same manner as though the original grants were produced in evidence. (Rev., s. 1601; Code, s. 1337; Code, s. 1336; R. C., c. 44, s. 2; 1807, c. 724; C. S. 1762.)

§ 8-18. Certified copies of registered instruments evidence. —A copy of the record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of the county where the original or duly certified copy has been registered, may be given in evidence in any of the courts of the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (Rev., s. 1509; Code, s. 1251; 1893, c. 119, s. 2; R. C., c. 37, s. 16; 1846, c. 68, s. 1; C. S. 1763.)

Cross Reference.—As to recordation and use in evidence of certified copies generally, see § 47-31.

Editor's Note.—The provisions of this section permitting the reception of the copies herein mentioned as evidence, [551]
constitute a statutory exception to the rule of the best evidence. Under this rule it is well established that a party in evidence "unless by rule or order of the court, * * * the foundation of which is that the primary object of all rules of evidence is to promote the administration of justice, and wherever general convenience requires it, the general rule will be bent or construed so as to meet the exigencies of the case."

The limitation placed on the exception contained in this section must be noted. The certified copies are admissible in evidence "under the great seal of the state, is admissible in evidence, under the register of deeds of any other county, be registered in such county, may, upon presentation to the register of deeds of the same county, be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the certified copy of the same, may be given in evidence in any court in the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be admitted as evidence under this section."

§ 8-20. Certified copies registered in another county and used in evidence.—A copy from the office of the register of deeds of any county of the record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of such county, may, upon presentation to the register of deeds of any other county, be registered without further proof, and the record thereof, or a duly certified copy of the same, may be given in evidence in any court in the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (Rev., s. 1599; Code, s. 1253; 1893, c. 119, s. 3; R. C., c. 37, s. 16; 1816, c. 68; C. S. 1763.)

As to variance between original and copy, see note of Ratliff v. Bartlett, 131 N. C. 625, 42 S. E. 827, under section 8-18.

§ 8-21. Deeds and records thereof lost, presumed to be in due form.—Whenever it is shown in any judicial proceeding that a deed or conveyance of real estate has been lost or destroyed, and the register thereof has been registered, and that the register's book containing the copy has been destroyed by fire or other accident, then by way of process and without proof the copy can be used in evidence, and the register thereof is presumed to be in due form and made in the manner provided by law.
§ 8-22. Local: recitals in tax deeds in Haywood and Henderson.—In all legal controversies touching lands in the counties of Haywood and Henderson, in which either party shall claim title under any sale for taxes alleged to have been due and laid, in and for the year one thousand seven hundred and ninety-six, or any preceding year, the recital contained in the deed or assurance, made by the sheriff or other officer conveying or assuring the same, of the taxes having been laid and assessed, and of the same having remained due and unpaid, shall be held and taken to be prima facie evidence of the truth of each and every of the matters so recited. (Rev., s. 1606; Code, s. 1346; R. C., c. 44, s. 11; C. S. 1767.)

§ 8-23. Local: copies of records from Tyrrell.—Copies of records of the county of Tyrrell between the years one thousand seven hundred and thirty-five and one thousand seven hundred and ninety-nine, when copied in a book and certified to by the clerk of the superior court of Tyrrell county as to the records of his office and by the register of deeds as to the records of his office, and deposited in their respective offices in Washington county, shall be treated in all respects as original records and received as evidence in all courts of Washington county. (Rev., s. 1612; 1903, c. 199; C. S. 1768.)

§ 8-24. Local: records of partition in Duplin.—The transcripts made by the clerk of the superior court of Duplin county, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of the reports of committees relating to the partition of real estate on file in his office prior to and up to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, A, and the reports of committees beginning with and subsequent to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, B, shall be as competent evidence as are the original reports of the committees. (1907, c. 395, ss. 3, 4; C. S. 1769.)

§ 8-25. Local: records of wills in Duplin.—The transcripts made by the clerk of the superior court of Duplin county, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of all wills and entries of probate and dates of registration appearing on the same, on file in his office prior to and up to the January term of the county court of Duplin county, one thousand eight hundred and thirty, and entered in a book designated as Record of Wills, A, and duly indexed as provided by law, shall be as competent evidence in any court as are the originals of such wills. (1907, c. 395, ss. 1, 2; C. S. 1770.)

§ 8-26. Local: records of deeds and wills in Anson.—The copies of the deeds and deed books and of the wills and will books made in Anson county under the act of March second, one thousand nine hundred and five, shall have the same force and effect as the original deeds and deed books copied and as the original wills and will books copied, and shall take the place of said original deeds and deed books and wills and will books as evidence in all court procedure; and wherever said deed books or will books are ordered or directed to be produced in court by subpoena or other order of court, the copies made under such act shall be produced, unless the court shall specially order the production of the originals. Copies of the instruments produced in court shall have the same validity and effect as if used for the same purposes, with the same effect, as the original books. (Rev., s. 1615; 1905, c. 663, s. 3; C. S. 1771.)

§ 8-27. Local: records of wills in Brunswick.—Under the provisions of chapter one hundred and six of the laws of one thousand nine hundred and eight, authorizing and directing that all unrecorded wills, dated prior to January first, one thousand eight hundred and seventy-five, on file in the office of the clerk of the superior court of Brunswick county, and which have been duly proved in the form required by law, and bearing the adjudication certificate of the proper officer, shall be recorded in the book of wills in the said office and properly indexed; that all wills recorded in the minutes of the court of pleas and quarter sessions or other books of record in said office shall be transcribed and indexed in the book of wills in said office; and that all wills recorded in the office of the register of deeds of said county shall be properly indexed in the book kept for the purpose in the office of the clerk of the superior court of the county; the record of any instrument or certified copy thereof, recorded under the provisions of this article, shall be admitted in evidence in the trial of any cause, subject to the same rules upon which other wills are admitted. (1908, s. 106; C. S. 1772.)

§ 8-28. Copies of wills.—Copies of wills, duly certified by the proper officer, may be given in evidence in any proceeding wherein the contents of the will may be competent evidence. (Rev., s. 1603; Code, s. 2175; R. C., c. 119, s. 21; 1784, c. 225, s. 6; C. S. 1773.)

Cross Reference.—As to probate of copy of lost will, see §§ 98-4, 98-5.

Certified Copy as Evidence.—Under this section a certified copy of a will is competent evidence in any case wherein the contents of the will may be competent evidence. Hampton v. Hardin, 88 N. C. 592, 594.

Copy of Will Made in Another State.—See annotations under sec. 8-32.

§ 8-29. Copies of wills in secretary of state's office.—Copies of wills filed or recorded in the office of the secretary of state, attested by the secretary, may be given in evidence in any court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised: Provided, that no such will may be given in evidence in any court nor taken as sufficient proof of the devise unless a certificate of probate appear thereon. (Rev., s. 1607; Code, s. 2181; R. C., c. 44, s. 12; 1852, c. 172; 1856-7, c. 22; C. S. 1774.)

§ 8-30. Copies of wills recorded in wrong county.—Whereas, by reason of the uncertainty of the boundary lines of many of the counties of the state, wills have been proved, recorded and registered in the wrong county, whereby titles are insecure; for remedy whereof: The registry
or duly certified copy of the record of any will, duly recorded, may be given in evidence in any of the courts of this state. (Rev., s. 1608; Code, s. 2152; 1858-9, c. 18; C. S. 1775.)

§ 8-31. Copy of will proved and lost before recorded.—When any will which has been proved and ordered to be recorded was destroyed during the war between the states, before it was recorded, a copy of such will, so entitled to be admitted to record, though not certified by any officer, shall, when the court shall be satisfied of the genuineness thereof, be ordered to be recorded, and shall be received in evidence whenever the original or duly certified exemplification would be; and such copies may be proved and admitted to record under the same rules, regulations and restrictions as are prescribed in chapter 98 entitled Burnt and Lost Records. (Rev., s. 1609; Code, s. 2153; 1866-7, c. 127; C. S. 1776.)

§ 8-32. Certified copies of deeds and wills from other states.—In cases where inhabitants of other states or territories, by will or deed, devise or convey property situated in this state, and the original will or deed cannot be obtained for registration in the county where the land lies, or where the property shall be in dispute, a copy of said will or deed (after the same has been proved and registered or deposited, agreeable to the laws of the state where the person died or made the same) being properly certified, either according to the act of congress or by the proper officer of the said state or territory, shall be read as evidence. (Rev., s. 1610; Code, s. 1344; R. C., c. 44, s. 9; 1902, c. 623; C. S. 1777.)

In General.—Records of other states, to be used in evidence in this state, must have the attestation of the clerk of the court whose record is offered, and the seal of the court, if it have one. If there be no seal, this must appear in the certificate of the clerk, and the judge, chief justice, or presiding magistrate of such court must certify that the record is properly attested. Riley v. Carter, 158 N. C. 484, 487, 74 S. E. 663; Kinsley v. Rumborghini, 96 N. C. 19, who gave the certificate, from the certificate of probate on the exemplified copy produced here, it appears that but one witness swore that he subscribed the will as witness in the presence of the testator and the other witness to the will did not appear to have sworn at all, it was held that such a will should not be read in evidence. Blount v. Patton, 9 N. C. 237.

Properly Authenticated Copy Admissible.—A copy of a will, made in another state, with its probate certified by the judge of the court in which it was proved, and accompanied by the testimonial of the governor of that state, that the person who gave that certificate was the proper officer to take such probate, and to certify the same, is a sufficient authentication of the will to authorize its reception as evidence in our courts. Knight v. Wall, 19 N. C. 125.

Incomplete Authentication.—Where a will, proved in another state, bore the certificate of the clerk of the court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication, it was held inadmissible in evidence. Hunter v. Kelly, 27 Conn. 253, 262.

§ 8-33. Copies of lost records in Bladen county.—The clerk of the superior court of the Bladen county shall transcribe the judge’s docket book, and the judges’ books in his office, and all other books kept in said office containing records made since the year one thousand eight hundred and sixty-eight, and the records so transcribed shall have the same force and effect as the original records would have, and shall be received in evidence as the original records and be prima facie evidence of their correctness and of the sufficiency of their probate, though the probates are lost and are not transcribed. (Rev., s. 1611; 1805, c. 415; 1903, c. 65; C. S. 1778.)

Art. 3. Public Records.

§ 8-34. Copies of official writings.—Copies of all official bonds, writings, papers, or documents, recorded or filed as records in any court, or public office, or lodged in the office of the governor, treasurer, auditor, secretary of state, attorney general or adjutant general, shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office where there is such seal, or under his hand when there is no such seal, unless the court shall order the production of the original. Copies of the records of the board of county commissioners shall be evidence when certified by the clerk of the board under his hand and seal of the county. (Rev., s. 1616; Code, ss. 715, 1342; R. C., c. 44, s. 8; 1792, c. 368, s. 11; 1871-2, c. 91; 1868-9, c. 20, s. 21; C. S. 1779.)

Copy Defined.—A copy, within the meaning of this section is a transcript of the original—a writing exactly like another writing. State v. Champion, 116 N. C. 987, 989, 21 S. E. 700. See also Wiggins v. Rogers, 175 N. C. 67, 94 S. E. 685.

The Copy Certified. — The power of an officer, who is the keeper of certain public records, to certify copies is confined to a certification of their contents as they appear by the records themselves, and the records must, therefore, be so certified, for he has no authority to certify to the substance of them, nor that any particular fact, as a copy, appears on them. Wiggins v. Rogers, 175 N. C. 67, 94 S. E. 685.

A "Copy of the Instrument Required."—This section makes competent only the "copies" of official records, etc., and a mere certified statement from the register's office is only evidence of the correctness of the record, and can not be admitted in evidence in place of the original record. State v. Champion, 116 N. C. 987, 989, 21 S. E. 700. (Cited and approved in Wiggins v. Rogers, 175 N. C. 67, 94 S. E. 685.)

Original Record Admitted.—This section does not prevent the admission in the absence of the original record of the record, without more, or by copy.” Again in the same section, "The certificate or the copy of the record is prima facie evidence of the facts contained therein. State v. Voight, 90 N. C. 741, 745; State v. Abernathy, 94 N. C. 345. See also, Riley & Co. v. Carter, 165 N. C. 334, 81 S. E. 414; State v. Hunter, 94 N. C. 829; Blalock v. Whisnant, 266 N. C. 417, 146 S. E. 709.

Some hesitancy was at first shown by the court in reaching this conclusion, due to a contrary ruling in the earlier cases. However, it is now well settled that it would be little less than an absurdity to exclude the best possible evidence, when addeduce, merely because an inferior evidence, by copy, is made admissible (by statute or otherwise).

On this point, it is said by Mr. Greenleaf: "As to the proof of records, this is done by the mere production of the records, without more, or by copy.” Again in the same section, "It is to be observed, that the rule of evidence in this state, if it is not in the same court, should be proved by an exemplification." Greenleaf on Evidence, sec. 501.

In reference to these clauses it is said in Gray v. Davis, 27 Conn. 447, cited and approved in State v. Voight, supra: “But he (the author) does not say, and it is obvious he does not mean, that the contents of a record can not in any court be proved by the original record itself, if it can be produced, but only to state the manner in which proof may be and usually is made.”

There can be no doubt as to the soundness of this ruling, and it would seem to follow that the conclusion would best be placed on the actual wording of this section, and the heads of dealing in such broad inferences. The Legislature has specifically said that the copies, herein made admissible, are to be as competent evidence as the originals. From the very phraseology of this section it does not seem plausible to say it was intended that the admission of the copies should serve to exclude the original record itself.—Ed. Note.
§ 8-35. Authenticated copies of public records.—All copies of bonds, contracts, notes, mortgages, or other papers relating to or connected with any loan, account, settlement of any account or any part thereof, or other transaction, between the United States or any state thereof or any corporation all of whose stock is beneficially owned by the United States or any state thereof, or other transaction, between two or more individuals, either directly or indirectly, and any person, natural or artificial; or extracts therefrom when complete on any one subject, or copies from the books or papers on file, or records of any public office of the state or the United States or of any corporation all of whose stock is beneficially owned by the United States or by any state thereof, directly or indirectly, shall be received in evidence and entitled to full faith and credit in any of the courts of the state where the same has been done, or in any court of the United States or of any state or territory, shall be allowed as evidence. (Rev., s. 1618; Code, s. 1343; R. C., c. 44, s. 7; 1834, c. 4; C. S. 1781.)

§ 8-36. Certificate of commissioner of motor vehicles as to ownership of automobile.—In all civil actions, arising out of an injury to person or property by reason of the operation of a motor vehicle of any kind, evidence as to the display numbers on a particular car, a copy of the record kept by the commissioner of motor vehicles of such display numbers and the persons who obtained them, certified under the hand and seal of said commissioner of motor vehicles shall be competent evidence of the ownership of the motor vehicle inflicting the injury or doing the damage. (1931, c. 88, s. 1; 1943, c. 650.)

Cross Reference.—As to registration and certificate of title for motor vehicles generally, see § 30-59 et seq.

Editor’s Note.—The 1943 amendment substituted "commissioner of motor vehicles" for "commissioner of revenue."

Ambiguous or Indefinite Terms.—Where the written terms contained in the contract are sufficient to pass the property in question to Woodward, therefore, this section evidence of the parties and attendant facts and circumstances may be heard to aid in ascertaining the correct meaning of the terms used, but not to alter what has been written. Ward v. Gay, 133 N. C. 399, 49 S. E. 884.

Not Retroactive in Operation.—There is a general presumption against the retroactive operation of a statute where, if it had been in force, damages sustained thereby would have been created. The demonstration of this section cannot be held to operate retrospectively so as to allow parol testimony to locate land referred to and ambiguously described in a contract made before the passage of the section. Lowe v. Harris, 112 N. C. 473, 17 S. E. 539. Shepherd, C. J., concurs, but further holds that the word "description" used in this section imports such description as can be aided by parol proof. Id.

When Description Sufficient.—A description of land in a deed as that of all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. Buckhorn Land, etc., Co. v. Yarbrough, 179 N. C. 335, 102 S. E. 630. While parol evidence is competent to "fit the description to the thing," it is not competent to establish a line of demarcation. The introduction of specimens of handwriting is in some states permitted to be made by a handwriting expert to test the genuineness of the signature of a party to an action are relevant to the inquiry, it is not required that the witness should have seen the person write before he is permitted to identify the letter by the handwriting, for it is sufficient if he can do so from correspondence formerly had between them. Universal Oil, etc., Co. v. Burney, 174 N. C. 382, 93 S. E. 727; Outlaw v. Bullard, 156 N. C. 541, 61 S. E. 1029.

Comparison by Jury.—Where payment of a note sued on is pleaded and the genuineness of the signature of the payee to a receipt for the amount is in dispute, and an expert in handwriting is called, it is competent to introduce specimens of handwriting, when it does not appear that it could have been to the prejudice of the appellant. As to whether this is otherwise permitted under the provisions of this section, quere? George v. Robinson, 76 N. C. 561. analogy to Proof of Agency.—In Newton v. Newton, 182 N. C. 54, 55, 108 S. E. 336, the court said: "As we understand the statute, the admission of testimony as to the genuineness of a writing by comparison of handwriting, now on the same basis as the declarations of agents. The court determines whether there is prima facie evidence of the genuineness of the writing admitted as a basis of comparison, and then the testimony of the witnesses and 'the writings' (in the plural) themselves are submitted to the jury.

Handwriting Irrelevant—Exclusion Harmless Error.—In this case the handwriting sought to be introduced as evidence before the jury and to be considered by them was irrelevant, and the action of the court in refusing to permit the parties to submit to the jury in order to determine its genuineness, under the statute, was a harmless error. Newton v. Newton, 182 N. C. 54, 108 S. E. 336. Cited in In re Williams’ Will, 197 N. C. 337, 333, 148 S. E. 499; In re Will’s Will, 215 N. C. 259, 1 S. E. 257.

§ 8-41. Bills of lading in evidence.—In all actions by or against common carriers in which it shall be thought necessary to introduce in evidence any bills of lading issued by said common carrier or by a connecting carrier, it shall be competent to introduce in evidence any paper-writing purporting to be the original bill of lading, or a duplicate thereof, upon proof that such paper-writing purporting to be such bill of lading or duplicate was received in due course of mail from consignor or agent of said carrier or connecting carrier, or delivered by said common carrier to the consignee or other person entitled to the possession of the property for which said paper purports to be the bill of lading: Provided, that such purported bill of lading shall not be declared to be the bill of lading unless the said purported bill of lading is first exhibited by the plaintiff or his agent or attorney to the defendant or its attorney, or its agent upon whom process may be served, ten days before the trial where the
point of shipment is in the state, and twenty days when the point of shipment is without the state. Upon such proof and introduction of the bill of lading, the due execution thereof shall be prima facie established. (1915, c. 287; C. S. 1785.)

Cross Reference.—As to definitions of bills of lading, see §§ 21-2, 21-3.

§ 8-42. Book accounts under sixty dollars.—When any person shall bring an action upon a contract, or shall plead, or give notice of, a set-off or counterclaim for goods, wares and merchandise by him sold and delivered, or for work done and performed, he shall file his account with his plea, or with his plea or notice of set-off or counterclaim, and if upon the trial of the issue, or executing a writ of inquiry of damages in such action, he shall declare upon his oath that the matter in dispute is a book account, and that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book, in that case such book may be given in evidence, if he shall make out by his own oath that it doth contain a true account of all the dealings, or the last settlement of accounts between himself and the opposing party, and that all the articles therein contained, and by him so proved, were bona fide delivered, and that he hath given the opposing party all just credits; and such book and oath shall be received as evidence for the several articles so proved to be delivered within two years next before the commencement of the action, but not for any article of a longer standing, nor for any greater amount than sixty dollars. (Rev., s. 1622; Code, s. 591; R. C., 15, s. 1, 1722; C. C. P., s. 577; 717, 86 S. E. 627 and cases cited.

Terms Construed.—In an early case, the words "to make out on his oath" and "to prove," used in this section, are construed to be synonymous terms. Kitchen v. Tyson, 7 N. C. 341.

Other Sections.—Notwithstanding the restrictions contained in sec. 8-51, in relation to a person's testifying as to the account rendered contains a true account of all the dealings, or the last settlement of accounts between himself and a deceased person, when his executor or administrator is a party, he may, as hereinafter provided, testify under this section, Bland v. Piercy, 25 N. C. 77.

§§ 21-2, 21-3.

§ 8-43. Book accounts proved by personal representative.—In all actions where executors and administrators are parties, such book account for all articles delivered within two years preceding the death of the deceased may be proved under the like circumstances, rules and conditions; and in such case, the executor or administrator may prove by himself that he found the account so stated on the books of the deceased; that there are no witnesses, to his knowledge, capable of proving the delivery of the articles which he shall propose to prove by said book, and that he believes the same to be just, and doth not know of any other or further credit to be given than what is therein mentioned: Provided, that if two years shall not have elapsed previous to the death of the deceased, the executor or administrator may prove the said book account, and the suit shall be commenced within three years from the delivery of the articles: Provided further, that whenever by the aforesaid proviso the time of proving a book account in manner aforesaid is enlarged as to the one party, to the same extent shall be enlarged the time as to the other party. (Rev., s. 1623; Code, s. 592; R. C., c. 15, s. 2; 1756, c. 57, s. 2; 1790, c. 465; C. S. 1787.)

An administrator may, under this section, offer in evidence the book accounts of a decedent, containing charges and payments, and made by him. Bland v. Warren, 65 N. C. 372.

§ 8-44. Copies of book accounts in evidence.—A copy from the book of accounts proved in manner above directed may be given in evidence in any such action or setoff as aforesaid, and shall be as available as if such book had been produced, unless the party opposing such proof shall give notice to the adverse party or his attorney, at the joining of the issue, or ten days before the trial, that he will require the book to be produced at the trial; and in that case no such copy shall be admitted as evidence. (Rev., s. 1624; Code, s. 593; R. C., c. 15, s. 3; 1756, c. 57, s. 3; C. C. P., s. 3430; C. S. 1787.)

Production of original after notice.—In all cases under this section and the two preceding sections, it is the duty of the party, who wishes to prove his debt by his own oath, to produce the original account when notice to that effect has been given to him by the other party. Coxe v. Skenes, 25 N. C. 443, 445.

An voluntary destruction of the original will not authorize the introduction of a copy. Coxe v. Skenes, 25 N. C. 443, 445.

§ 8-45. Itemized and verified accounts. In any actions instituted in any court of this state
upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness. (Rev., s. 1625; 1897, c. 480; 1917, c. 32; 1941, c. 104; C. S. 1789.)

Editor’s Note.—Prior to the amendment in 1917 (ratified February 12, 1917) this section was applicable only to accounts for goods sold and delivered. See La Salle Extension Store v. Ozmanski, 174 N. C. 427, 93 S. E. 986; Nall v. Kelly, 169 N. C. 717, 86 S. E. 627. Even before the amendment of this section, where the case was not instituted for goods sold and delivered, but for the first time took the proceedings beyond the operative force of this section, the case was not necessarily dismissed on this account, when the additional evidence offered served to create the prima facie case, the account so verified should be received in evidence, and shall be deemed prima facie evidence of its correctness. (Rev., s. 1625; 1917, c. 32; 1941, c. 104; C. S. 1789.)

Purpose.—This section was designed to facilitate the collection of such accounts where there was no bona fide dispute, and to relieve the plaintiff in such instances of the expense and delay of formally taking depositions. Nall v. Kelly, 169 N. C. 717, 86 S. E. 627.

Verification Essential.—An itemized account to be prima facie evidence of its correctness must be properly verified and stated so as to satisfy an inquidity. Knight v. Taylor, 131 N. C. 84, 42 S. E. 537.

Competency of Witness Required.—Under the terms of this section, as now drawn, an affiant, verifying an account so as to make the same prima facie evidence, must be a competent witness to the facts, and when it appears on the face of the account that he has no personal knowledge of those facts, and that he is an ex parte account so verified should not be received in evidence. Nall v. Kelly, 169 N. C. 717, 86 S. E. 627. And it must appear that he is not ex parte account so verified. See sec. 8-51. See Lloyd & Co. v. Poythress, 185 N. C. 180, 116 S. E. 584.

An itemized, verified statement of an account is an ex parte statement and this section, governing its admission, must be strictly complied with, and the person who verifies the account, being treated as a witness pro tanto must be competent to testify as a witness in respect to the account if called upon at the trial, but where an itemized statement of account offered at the trial is verified by the treasurer of the plaintiff corporation who declares in his affidavit that "he is familiar with the books and business" of the plaintiff it cannot be held as a matter of law that the affiant had no personal knowledge of the transaction, and the exclusion of the statement by the trial court will be held for reversible error. Nall v. Kelly, 169 N. C. 717, 86 S. E. 627. See Pitt & Co. v. Schochet, 198 N. C. 769, 153 S. E. 403.

Subordinate to Section 8-51.—In Lloyd & Co. v. Poythress, 185 N. C. 180, 116 S. E. 584, the court said: "We have held that this section, appearing as a section on the law of evidence, should be construed in subordination to C. S. 1789, [§ 8-51] under the principle announced in Cecil v. High Point, 166 N. C. 421, 91 S. E. 616."

See also, Nall v. Kelly, 169 N. C. 717, 86 S. E. 627.

Prima Facie Case.—In an action to recover for goods sold and delivered, where a verified statement of the account shows that it is for goods sold by the plaintiff to the defendant, the number and kind of articles, the catalogue numbers, price per dozen and discounts allowed, and there are trade terms and abbreviations well understood in the trade, which show more fully the kind of articles, it is properly itemized to make out a prima facie case under this section. Claus v. Lee, 140 N. C. 532, 53 S. E. 433; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 620.

Same.—Non suit.—Where a verified account or affidavit to a statement for goods sold and delivered is insufficient to establish a prima facie case, under the provision of this section, and if this is the only evidence offered, a judgment of non suit on the evidence is properly allowed. Nall v. Kelly, 169 N. C. 717, 86 S. E. 627.

Same—Burden of Proof.—Where a prima facie case has been made out, goods sold and delivered to the defendant, and the latter contends that he, as the agent for the former, was to sell upon commission, and that he had accounted for such sales, except a small balance which he tendered, or offered to submit to judgment for that amount, the burden is upon the defendant to show the fact alleged, and if there is evidence, which is for the determination of the jury upon the question of inquidity.
§ 8-47. Present worth of annuities.—When ever it is necessary to establish the present worth or cash value of an annuity to a person, payable annually during his life, such present worth or cash value may be ascertained by the use of the following table in connection with the mor tuary tables established by law, the first column representing the number of years the annuity is to run and the second column representing the present cash value of an annuity of one dollar for such number of years, respectively:

<table>
<thead>
<tr>
<th>No. of Years</th>
<th>Cash Value of the Annuity of $1</th>
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<tbody>
<tr>
<td>1</td>
<td>$9.943</td>
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<tr>
<td>2</td>
<td>1.833</td>
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<tr>
<td>3</td>
<td>2.673</td>
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<td>4</td>
<td>3.465</td>
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<td>5</td>
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<td>10</td>
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<td>15.699</td>
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<tr>
<td>50</td>
<td>15.754</td>
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The present cash value of the annuity for a fraction of a year may be ascertained as follows: multiply the difference between the cash value of the annuities for the preceding and succeeding full years by the fraction of the year in decimals and add the sum to the present cash value.
value for the preceding full year. When a person is entitled to the use of a sum of money for one year, computed at four and one-half per cent, may be considered as an annuity and the present cash value be ascertained as herein provided: Provided, the interest rate in computing the present cash value of dower shall be six per cent. (Rev., s. 1627; 1905, c. 347; 1927, c. 215; C. S. 1791; 1943, c. 543.)

Editor's Note.—The words "computed at four and one-half per cent." after the word "year" and before the word "may" near the end of the section were placed herein by the Act of 1932, which provided that it "shall apply only to estates hereafter created." This act became effective March 9, 1927.

The 1943 amendment added the proviso at the end of the section.

Applicable Only to Annuities.—This section is intended to apply strictly to annuities, and therefore, in an action to recover damages for injuries causing death, it is error to permit the jury to consider the provisions thereof for the purpose of ascertaining the present value of the intestate's life. Poe v. Railroad, 141 N. C. 525, 526, 54 S. E. 466. See Brown v. Lips, 210 N. C. 199, 185 S. E. 681.

Cross References.—See also, §§ 8-50, 8-51, 8-54, 8-56, and notes thereto. As to general treatment of application of the rule herein contained, see § 8-51 and notes thereto.

Editor's Note.—This section abolishes the proviso law rule which prevented a party who was interested in the result of the verdict and judgment from appearing as a witness. A similar enactment will be found in the codes of practically all the states.

A great number of varying constructions have been given to this section, and the decisions of the cases falling hereunder are not altogether harmonious. However, it seems clear that its provisions must be considered in the light of those contained in sec. 8-51 which place certain restrictions on the general rule embodied in this section. In other words, the provisions of sec. 8-50 form exceptions to this section, and they prevent them from the operation of its general rule, leaving the parties falling within these exceptions to stand upon the same footing as they did prior to the enactment of this section. See Charlotte Oil, etc., Co. v. Rippy, 124 N. C. 643, 645, 32 S. E. 980.

The construction of this section should also be in connection with the provisions of secs. 8-50 and 8-55, since they all relate to the same subject—the competency of the witnesses. Powell v. Strickland, 163 N. C. 393, 397, 79 S. E. 872. This being true, a portion of the notes found under each section will necessarily have some bearing on and may prove helpful to the practitioner in construing one or more of the provisions of the codes. A few of the decided cases are placed under other sections. A few of the decided cases are placed under this section simply to show that the general rule contained in its provisions constitutes the foundation for the decisions under the following sections.

Legatee under Will as Witness.—Under this section removing the disqualification on account of interest, the widow of the testator, who was named as a legatee and devisee in a will, is a competent witness to prove the fact that the script propounded was found among the papers of the deceased. Cornelius v. Brawley, 109 N. C. 542, 548, 14 S. E. 78. Nor will the last provision of the section prevent the widow from testifying in this case. "The whole provision applies only to attesting witnesses to the execution of a will."

Beneficiary under holographic will.—Under this and the following sections one who is a beneficiary under a holographic will may testify to such competent relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. In re Will of Westfield, 188 N. C. 702, 125 S. E. 531.

Executive as Witness.—An executor, named in a will, is a competent witness to testify as to the existence, probate and registration of a will, he being rendered competent by this section, and he is not disqualified by sec. 8-51, as to transactions occurring after the death of the testator, as transactions in which he is not interested he can be considered as a legatee, as well as witness to the will and the testator. Cox v. Beaufort County Lumber Co., 124 N. C. 78, 32 S. E. 381.

Party Testifying in Own Behalf.—The provisions of this section remove the disqualification formerly attaching to witnesses having an interest in the same. Little v. Ratliff, 126 N. C. 262, 35 S. E. 469.

Mortgagee.—Where he is not excluded under the provisions of sec. 8-51, the mortgagee in a chattel mortgage is competent, as a subscribing witness thereto, to prove its execution for admission to probate, inasmuch as this section removes the disqualification formerly attaching to witnesses having an interest. Clark v. Hodge, 116 N. C. 761, 18 S. E. 506.

Fornication and Adultery.—In a trial for fornication and adultery a former defendant as to whom a nolle prosequi has been entered is a competent witness against the other defendant. T. v. Phillips.

Party Testifying in Own Behalf.—The provisions of this section make it permissible for a party to testify in his own behalf. Autry v. Floyd, 127 N. C. 186, 37 S. E. 298; State v. McIntosh, 127 N. C. 623.

Applied in State v. Perry, 210 N. C. 796, 188 S. E. 649, dissenting opinion.

§ 8-50. Parties competent as witnesses.—On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit or other proceeding in court, or before any judge, justice, jury or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose

[500]
half any suit or other proceeding may be brought or defended, shall, except as otherwise provided, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation. (Rev., s. 1630; Code, s. 1351; 1866, c. 43, ss. 2, 3; C. S. 1793.)

Cross Reference.—See also, §§ 8-49, 8-51, 8-54, 8-56 and notes thereto.

In general.—This, and secs. 8-49 and 8-51 should be construed together, and thus construed, they do not prohibit the evidence of the husband as to the conduct of his wife, where she is not a party, in his action against another for damages for criminal conversation with his wife and the alienation of her affections. Powell v. Strickland, 163 N. C. 393, 79 S. E. 872.

At common law, neither the husband nor the wife is allowed to prove the fact of access or non-access; and as such rule is founded "upon decency, morality and public policy," it is not changed by this section, allowing parties to testify in their own behalf. Boykin v. Boykin, 70 N. C. 252; King v. Lourton, 21 Eng. C. L. 312.

Testimony of an Accomplice.—An accomplice may not testify on direct examination to facts tending to incriminate another as to the same crime, or at the same time refuse to answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refuses to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it is error for the court to refuse defendant's motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-examination rendering the testimony-in-chief incompetent. State v. Perry, 210 N. C. 796, 188 S. E. 639. See Const., Art. I, sec. 11.

Testifying against Co-Defendant.—A defendant in a criminal case is, under this section, competent and compellable to testify for or against a co-defendant, provided his testimony does not criminate himself. State v. Medler, 178 N. C. 710, 100 S. E. 591; State v. Smith, 86 N. C. 705. See State v. Perry, 210 N. C. 796, 188 S. E. 639, dissenting opinion.

Same.—Practise Not Commendable.—The practice of sending co-defendants to the grand jury to testify against each other, or one of them, is not commendable. State v. Frizzell, 111 N. C. 722, 16 S. E. 469.

Instructions Not to Incriminate Himself.—In an indictment for an affray, it is not error for the presiding judge to caution the witness (a defendant) before the counsel for the other defendant cross-examines him, that he need not tell anything to incriminate himself. State v. Weeks, 105 N. C. 595, 600. See State v. Perry, 210 N. C. 796, 188 S. E. 639, dissenting opinion.

§ 8-51. A party to a transaction excluded, when the other party is dead.—Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor of a deceased person or lunatic; or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. (Rev., s. 1631; Code, s. 590; C. C. P., s. 343; C. S. 1795.)

I. General Consideration.

II. The Section Disqualifies Whom.

A. Parties to the Action.

B. Persons Interested in the Event of the Action.

1. General Consideration.

2. Applications.

C. Persons Deriving Title or Interest Through Two Preceding Classes.

III. When the Disqualification Exists.

IV. Subject Matter of the Transaction.

V. Exceptions.

VI. Pleading and Practice.

Cross Reference.

See also, §§ 8-49, 8-50, 8-54, 8-56 and notes thereto.

I. GENERAL CONSIDERATION.

Editor's Note.—Mr. Justice Clark in Bunn v. Todd, 107 N. C. 266, 111 S. E. 142, has given the following analytical treatment to this section, which has been cited and approved in many of the cases coming within the principles of this section, and has proved to be a helpful guide-post for the courts in deciding as to the admissibility of the particular evidence involved in the case. It is submitted that if the practitioner, in passing upon the exclusion or non-exclusion of evidence in the case at issue upon this section, will carefully compare the point at issue with the clauses of the following out-line, then much time will have been saved, in addition to having the assurance that he more likely will be correct in his conclusion than if he has not been so said, the substantive part of this resume has been accepted by the great majority (if not all) of the courts. See Fidelity Bank v. Wysong, etc., Co., 177 N. C. 284, 98 S. E. 769; Seals v. Seals, 165 N. C. 409, 81 S. E. 613. It disqualifies—

WHOM.—1. Parties to the action.

2. Persons interested in the event of the action.

3. Persons through or under whom the persons in the first two classes derive their title or interest.

A witness, although belonging to one of these three classes, is incompetent only in the following cases:

WHEN.—To testify in behalf of himself, or the person succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or any one deriving his title or interest through them.

And the disqualification of such person, and in even such cases, is restricted to the following:

SUBJECT-MATTER.—As to a personal transaction or communication between the witness and the person since deceased or a deceased person or lunatic.

And even as to those persons and in those cases there are the following:

EXCEPTIONS.—When the representative of, or person claiming through or under, the deceased person or lunatic is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction or communication. Burnette v. Savage, 92 N. C. 10; Sumner v. Candler, 92 N. C. 634.

The editor has deemed it expedient to use this excellent outline as the basis of his analysis of the section, and, wherever possible, to adhere to the same, making no departures but only continuing the treatment by breaking the lines into further ramifications of the same subjects in order to show the component parts thereof.

Purposes of Section.—The statute was passed to prevent was the giving of testimony by a witness interested in the event, as to a personal transaction or communication between the witness and the deceased person whose lips are forever sealed in death, or by reason of death or lunacy cannot be heard. White v. Mitchell, 190 N. C. 89, 92, 144 S. E. 536.

This section applies to actions in tort as well as actions on contract. Bank v. Williams, 227 N. C. 30, 175 S. E. 832.

Reasons for Exclusion.—The exclusion of such testimony rests not merely upon the ground that the dead man can not have a fair showing, but upon the broader and more practical ground that the other party to the action has no practical ground that the other party to the action has no practical ground to this section, as has been said, the substantive part of this resume has been accepted by the great majority (if not all) of the courts.
the adverse party may "come in." Mansfield v. Wade, 208 N. C. 790, 792, 182 S. E. 475, citing Herring v. Ipock, 187 N. C. 459, 121 S. E. 758.

Instruction to the Court—Section Cannot Be Obtained by

Declaratory Judgment—In an action instituted under the

Declaratory Judgment Act the court has no authority to

instruct a litigant whether to take advantage of the provision of this section, upon the hearing of the case and upon its merits,

since such instructions upon a question of procedure do

not fall within the purview of the act. Redmond v. Farth-

burn, 217 N. C. 676, 9 S. E. (2d) 405.

Testimony Not Within Section—Where a widow is en-

titling during her widowhood to the profits on the land

devised by her deceased husband, but not to his moneys

commingled therewith in a deposit in a bank, the widow dev-

ing the moneys in the deposit. Held, testimony as to her receipt of the money from the crops is competent, not falling within the provisions of this section, and does not affect the title to other money owned by her husband at the time of his death. Redmond v. Farthing, 217 N. C. 678, 9 S. E. (2d) 405.

Same—Conversations with Living Persons. — Where the

widow under the terms of the will of her husband may only

dispose of the moneys in the bank to her credit, and not as such at her death have passed to the remainderman under his will, it may be shown by disinterested witnesses, and if what is done is as objectionable under this section as based upon conversations with other living parties interested

under the husband's will. White v. Mitchell, 196 N. C. 89, 144 S. E. 526.

Record Evidence. — While testimony as to personal trans-

actions with the deceased payee of a note would be incom-

petent to establish defenses to the note over the head of

the personal representative of the payee, record evidence

of such evidence, the statutes being the same as this one,

not give evidence as to conversations with a deceased per-

son, even though the witness took no part in the conver-

sation." See also, Holland v. Holland, 98 Appellate Div.

(N. Y.) 366; Matthews v. Hoagland, 48 N. J. Eq. 455.—Ed.

Rehearsal of Conversation Admissible. —Direct evidence

of a conversation and understanding with the plaintiff's

testator is, under this section, incompetent, but a rehearsal

of that conversation is a part of the res gestae, and


Testimony of Administrator or Personal Representative—Where personal transactions or communications.

See Coomstock v. Comstock, 76 Minn. 140, 44 N. W. 2d 280; part thereto to the testator is not admissible.

Unauthorized conversations with parties to an action wherein the statements of or communications of such conversations or of deceased is not in contradiction of this section. Allen v. Allen, 213 N. C. 264, 195 S. E. 407.

Record and Verifiable Accounts. — Section 8-45 relating to itemized and verified accounts is subordinate to this section. See note of Lloyd & Co. v. Poitthress, 185 N. C. 180, 184, 116 S. E. 584, placed under § 8-45 of the above section. Cited in Bynum v. Fidelity Bank, 219 N. C. 109, 112 S. E. (2d) 899 (dissenting opinion).

II. THE SECTION DISQUALIFIES WHOM.

A. Parties to the Action.

Editor's Note. — The general rule is that a party is not com-

petent to testify as to what passed between himself and another deceased or to convert such a person not a party nor interested in the event of the suit may testify as to such transac-

tion or communication.

It will be seen that this section excludes the testi-

mony of "a party or person interested;" in regard to par-

ties, however, interest is not a necessary prerequisite to

the exclusion of the evidence and it was not the legislative purpose to bar testimony to a person not interested or not but a "person," of course because of the context of the section, must be interested. See Cart-

wright v. Coppersmith, 222 N. C. 573, 24 S. E. (2d) 246.

The following cases under this analysis line will dem-

onstrate when persons are considered or are not consid-

ered parties to the actions therewith.

A "next friend" is not a party to the suit. Mason v. McCormick, 75 N. C. 263. But his liability for costs ren-

ders him incompetent to testify to the transactions or con-

versations had between the plaintiff and defendant. Id. See also Mc-


Testimony of Guardian.—Testimony of a guardian, su-

ing an executor to establish a gift made by a testatrix to

the guardian, as to what occurred between the tes-

\textit{tatrix and executor, was admissible as against the objec-

tion that the guardian could not testify as to any com-

munication or transaction between himself and testatrix. Zhobnoff v. Billant, 187 N. C. 678, 187 S. E. 407.}

Testimony of Tenant.—In an action for goods sold and

delivered to the intestate, a tenant of the intestate who

was furnished with goods from the plaintiff's store, and

settled with the intestate, is competent to testify in the suit

on the plaintiff's behalf as to the intestate's delivery to him of the merchandise because the witness is not a party to the action. Sorrell v. McGhee, 178 N. C. 279, 100 S. E. 344.

Probate of Will.—In a proceeding for the probate of a

will, both propounders and caveators are parties within

the meaning and spirit of this section. In re Will of

Brown, 194 N. C. 593, 190 S. E. 192.

Under this section the beneficiary under a will may not testify to transactions and communications with the de-

ceased, but he may in proceedings of devisavit vel non give his opinion, based on his observations of the mental incapacity of the deceased at the time of the execution of the writing propounded, and then testify to personal transactions he has had with the party, as a part of the basis of his opinion, when evidence of this character is properly so confined upon the trial by instruc-

tions or otherwise, the weight and credibility being for the jury to determine. In re Will of Brown, 194 N. C. 583, 190 S. E. 192.

A defendant executor cannot testify concerning a land

transaction between himself and the intestate, in a suit

brought by creditors of the estate to subject the land

alleged to have been fraudulently conveyed to the defend-


A member of the board of county commissioners is not

a competent witness as to transactions with the defend-

ant's intestate in a suit by the board. Commissioners v. Lash, 89 N. C. 159.

A principal debtor, who was a party to an action to foreclose a mortgage given by his sureties as security for the loan, was an incompetent witness to a contract with the deceased creditor. Benedict v. Jones, 129 N. C. 475, 50 S. E. 223.

Party Acting in Corporate Capacity. — One who is a party to a suit, though in his corporate capacity, is not compe-

tent to testify as to a transaction with a person deceased. Commissioners v. Lash, 89 N. C. 159.

In an action to recover for services rendered deceased, testi-

mony by the plaintiff that plaintiff boarded deceased and was furnished with goods from the plaintiff's store, and

settled with the intestate, is competent to testify in the suit

on the plaintiff's behalf as to the intestate's delivery to him of the merchandise because the witness is not a party to the action. Sorrell v. McGhee, 178 N. C. 279, 100 S. E. 344.

Time and Place of Signing Receipt.—The defendant in an action for money demanded is disqualified by this section, to

prove as to the time and place of signing a receipt by the plaintiff's intestate, in support of his plea of satisfaction. Sumner v. Candler, 86 N. C. 71.

B. Persons Interested in the Event of the Action.

1. General Consideration.

The Rule Stated. — To be incompetent under this sec-

tion a witness must be either a party to the action or in-

terested in the event thereof. Having discussed the ques-

tion, "as to the meaning of a "party" under the preceding analysis line, it next becomes pertinent to examine the subject of "interest" of witnesses and other persons not parties.

To determine when such interest exists so as to render the person incompetent to testify, persons are divided into two classes: a) "persons interested." The true test of the competency of a witness is whether he bears such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another suit. Jones v. Emory, 115 N. C. 158, 20 S. E. 266; Hen-

derson v. McLain, 146 N. C. 339, 59 S. E. 873.

Nature of Interest Involved.—This section does not dis-

qualify a witness merely because he, as distinguished from other persons, is interested in the event of the action, but only such as have a direct and substantial or a direct legal or pecuniary interest in the result. Jones v. Emory, 115 N.
Committee in proving such execution and delivery, his life estate in the grantor, was present and heard the
EB. 515; Helsabécies-y. "Doub; 167 N. C. 205, 83 Sy By 241.o9r.
186 S. E. 248, citing Hall v. Holloman, 136 N. C. 34, 48 S.
est the husband or wife would naturally have in the law-
hibition against the testimony of a "person interested in
fore an interested party in the other's action within the
IN; GC: 230,186 S. EB. 248:
iary interest in the action of the other, and was not there-
each respectively, for personal services rendered by them to
possessor, is reversible error entitling the plaintiff to a new
result of the action. Honeycutt v. Burleson, 198 N. C. 37,
and having no direct, legal or pecuniary interest in the
Wee DSs 0143) Woy Coe 200,755 Sack. 6029s
In an action against the administrator of his de-
deceased brother-in-law to recover certain sums obtained by the
case, the court erred in admitting evidence of the
administered by him, that he collected the vouchers for the
deed executed to declare the heirs of another child estopped to as-
testify for the other, since neither had a direct pecuni-
valid to recover for breach of the deceased's contract to de-
ty, evidence of witnesses not interested in the event as the
In an action against the administrator of a deceased per-
恢复 to declarations of a deceased member of the board and of the superintendent of
 Dichotomy of the meaning of this section are not confined to the parties to the action,
but extend to testimony of a witness interested in the
interests, the means of introducing new in-
qualify is a present interest; that is, one retained by the
subject matter of the suit, but whose interest has since
in failing to insert a reversionary clause therein in accord-
agreement between the grantors and grantee, testimony relating to declarations of a decided member of the board and the superinten-
dx, tending to show that it was agreed that the re-
sionary clause should be inserted, was held not pre-
cluded by this section, the draftsman not being a party
in the event as contemplated by the statute: Ollis v.
Committee in proving such execution and delivery, his
wife having died prior to the grantor and the title there-
being vested in her son, in that his evidence disclosed
personal transaction or communication and he was not a
The Same Being True of Attorney Formerly Holding Note
for Collection.—An attorney formerly holding a note for
collection is not an interested party in the event; the
note within the meaning of this section, prohibiting testi-
mony by interested parties as to transactions with or dec-
monies of the agreement with his wife is not precluded by this
supporting the deed, to the effect that his wife said to him she would
join in, or obtained the party at the time of examination. In reaching this con-
clusion it was said: "Any other construction would make a statute, professedly for the removal of the incom-
petence of witnesses, the means of introducing new in-
1883, except in the cases in which such persons still came under the third class of disqualified persons above [see the
the analysis of I of note] stated.
Witness Must Be Party in Interest.—The testimony of the
witness, in an action against the administrator of his de-
deceased brother-in-law to recover certain sums obtained by the
of persons, i.e. those who have had an interest in the
subject matter of the suit, but whose interest has since
became extinguished by death or otherwise. This disqualification did not exist at common
law, and was struck out of this section of the Code of 1883,
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law, and was struck out of this section of the Code of 1883,
except in the cases in which such persons still came under the third class of disqualified persons above [see the
the analysis of I of note] stated.
Husband as Interested Party in Check Given Wife.—When the husband of the deceased was the payee of a check payable to the deceased and signed by the intestate was introduced in evidence to show an advancement, the husband's daughter was held competent under this section to testify over objection that, although induced by the intestate to draw the check, he was not a party thereto. Vannoy v. Green, 206 N. C. 80, 173 S. E. 229.

Agreement to Bequeath Property in Consideration of Services.—Where the plaintiff, in his own right and as administrator of his intestate, induced the intestate to make an alleged contract made by her mother and another person now deceased, under which her mother performed services to such other person under his agreement that he would make a bequest to him, and such other person was competent to testify to communications or transactions between his mother and such other person and his son, the son was competent under this section, within the contemplation of the statute. Brown v. Adams, 174 N. C. 490, 93 S. E. 289.

C. Persons Deriving Title or Interest Through Two Preceding Classes.

In General.—The words of this section "derives its interest or title by assignment or otherwise" mean—gets from a source—some person, through or under one or more persons, successively, directly or indirectly, immediately, "his interest or title," any valuable interest in part or share of something real or personal, of whatever nature, whether legal or equitable, acquired by assignment, devise or by any other means, or in any other manner. Carey v. Carey, 104 N. C. 171, 10 S. E. 156.

Testimony of Grantee of Deceased Debtor.—In an action in the nature of a creditor's bill, evidence of the brother of the immediate grantee of the deceased debtor was held incompetent as in favor of their sister, claiming title under the witness, the validity of which title was affected by the testimony. Sutton v. Wells, 173 N. C. 1, 94 S. E. 688.

Suits by Plaintiff against Surety.—See post, this note, "When the Disqualification Exists.

§ 8-51

CH. 8. EVIDENCE—WITNESSES

§ 8-51

Interest of Depositor's Son in Action to Recover Moneys Deposited.—In an action by the administrator of a deceased person against a bank to recover moneys deposited by the intestate, resisted on the ground that the deceased predecessor of the common source of title of the parties had agreed as to the boundary of the lands in dispute preliminary to making the deeds, that the deceased had the interest of title in the event to disqualify his testimony as to a contract made by his son's checks, the latter being present at the time, the son was interested in the event since he would be liable to the plaintiff if he was not authorized to draw the checks and the testimony was incompetent under this section, and the fact that a third person was present at the time of the transaction and testified at the trial does not affect this result. Dill-Cramer-Truitt Corp. v. Downs, 201 N. C. 888, 156 S. E. 755.

Suits by Plaintiff against Surety.—See post, this note, "When the Disqualification Exists.

III. WHEN THE DISQUALIFICATION EXISTS.

Editor's Note.—Continuing the treatment as based upon Mr. Justice Clark's resume of this section, it is proper at this place to consider the circumstances which render incompetent the testimony of a witness who with or for more of the three classes of persons who are disqualified by the provision of this section. It will be seen from the outline given under the analysis line "General Considerations" that section (a) of the section, rendered incompetent the testimony of the party suiting in two cases, (1) when he testifies in behalf of himself, or the person succeeding to his title or interest, and (2) when the testimony is against the representative of a deceased person, or any one deriving his title or interest
through him. The following cases will illustrate the principles upon which the inclusion or exclusion of the communication falling within one or both of these subdivisions is founded. They appear in the order as stated in the outline.

Testifying against Interest.—Under this section a witness may testify to communications, even if there by other parties to the suit are injuriously affected and the disqualification applies only when a witness testifies in his own behalf. In re Worth's Will, 129 N. C. 233, 39 S. E. 955.

In proceedings to caveat a will, an heir at law who will receive more as a beneficiary under the will if it is not set aside may testify to declarations made by the testator after the will is executed. Rose v. Rose, 12 N. C. 398, 27 S. E. 117; In re Worth's Will, 129 N. C. 233, 39 S. E. 956.

In an action to declare a deed void on the ground that it was procured by fraud, the deponent, testi

donied by the grantor tending to show that the deed had not been delivered is not incompetent under this section. Gulley v. Smith, 203 N. C. 274, 165 S. E. 710.

Suits against Sureties.—A defendant having an interest in the event of an action is not permitted under this section to testify in his own behalf, for the purpose of contra

dicting a former witness whose testimony tended to show that he was procured and delivered to the grantee from a person deceased. Bushee v. Surles, 77 N. C. 62.

Testifying in Favor of Representative.—Where a witness was not asked to testify against the representative or assignee of a deceased person, the fact testified to could not be made to appear that the knowledge of the witness was derived from, and which was in no sense a transaction with, a representative of the deceased, as will be seen from the catchline "Proof of Handwriting" following in this note, or as to any independent fact which was neither a transaction nor communication with the representative of a deceased person. Wilson, 101 N. C. 596, 600, 8 S. E. 225; Cox v. Beaufort County Lumber Co., 124 N. C. 78, 32 S. E. 381; Davidson v. Bardin, 139 N. C. 1, 51 S. E. 779.

This section does not preclude a witness from testifying to independent facts and circumstances within her observation and knowledge or from giving evidence of what she saw or heard take place between the deceased and another or others, not involving personal or legal transactions with the representative of the deceased. Collins v. Lamb, 215 N. C. 719, 2 S. E. (2d) 863.

Testimony of an interested witness as to independent facts and circumstances, within his own knowledge, or as to what he saw or heard take place between the deceased and another party, is not rendered incompetent by this section, since in such instances the testimony does not relate to a personal transaction or communication between the witness and deceased, and does not in any way impeach the testimony as such. Testimony of third persons present is competent in such cases.

Driving of Car Is "Transaction" within Meaning of Statute.—Where the only evidence of negligence in an action by the wife of the driver to recover for injuries sustained in an automobile accident was her testimony that he was traveling at an excessive speed upon a curve, and that the accident occurred when the car failed to make the curve, and that she had spoken to him in regard to the speed he was driving the car, the driving of the car was a transaction within the meaning of the term as used in this section, and her testimony as to the conversation is competent testimony in this case. Sherrill v. Wilson, 182 N. C. 673, 675, 110 S. E. 95.

In an action against an administrator to recover for personal injuries, the husband of a deceased person who was unable to drive a car and that at the time of the accident there was another person were in the car, when taken in connection with other evidence tending to show that intestate was such other person and customarily drove the car, was within the prohibition of this section, as being of a transaction with a deceased person material in establishing liability on the part of the estate. Davis v. Pearson, 220 N. C. 163, 16 S. E. (2d) 655.

In order to exclude testimony under this provision, it must be made to appear that the knowledge of the witness was derived from a personal or legal transaction with the defendant, and has no connection with the performance of his duty. Thompson v. Onley, 96 N. C. 9, 1, S. E. 620. And it is proper to show whether the witness had knowledge of the transaction which is testified to or as to any independent fact which was neither a transaction nor communication with the deceased. Charlotte Oil, etc., Co. v. Rippy, 123 N. C. 626, 31 S. E. 879.

Facts Occurring Out of Presence of Deceased.—A witness is incompetent, under this section, to testify to communications or relations with the deceased principal when such communications or relations are not sustained. In re Worth's Will, 129 N. C. 233, 39 S. E. 955.

The rule to be deduced from these authorities is that the surety, who comes not within the intendment of the law, stands in the same position and is entitled to the same protection under the testimony affects the estate either directly or indirectly over against the representative or survivor of the principal. The rule to be deduced from these authorities is that the surety, who comes not within the intendment of the law, stands in the same position and is entitled to the same protection under the testamentary act, which is intended to protect the deceased, and his representative, against the representative or survivor of the principal. This section does not preclude a witness from testifying to independent facts and circumstances within her observation and knowledge or from giving evidence of what she saw or heard take place between the deceased and another or others, not involving personal or legal transactions with the representative of the deceased. Collins v. Lamb, 215 N. C. 719, 2 S. E. (2d) 863.

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The rule to be deduced from these authorities is that the surety, who comes not within the intendment of the law, stands in the same position and is entitled to the same protection under the testimony affects the estate either directly or indirectly over against the representative or survivor of the principal. This section does not preclude a witness from testifying to independent facts and circumstances within her observation and knowledge or from giving evidence of what she saw or heard take place between the deceased and another or others, not involving personal or legal transactions with the representative of the deceased. Collins v. Lamb, 215 N. C. 719, 2 S. E. (2d) 863.

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In order to exclude testimony under this provision, it must be made to appear that the knowledge of the witness was derived from a personal or legal transaction with the defendant, and has no connection with the performance of his duty. Thompson v. Onley, 96 N. C. 9, 1, S. E. 620. And it is proper to show whether the witness had knowledge of the transaction which is testified to or as to any independent fact which was neither a transaction nor communication with the deceased. Charlotte Oil, etc., Co. v. Rippy, 123 N. C. 626, 31 S. E. 879.

Facts Occurring Out of Presence of Deceased.—A witness is incompetent, under this section, to testify to communications or relations with the deceased principal when such communications or relations are not sustained. In re Worth's Will, 129 N. C. 233, 39 S. E. 955.

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misleading as being to a substantive fact of which she had knowledge independently of any statement by the deceased. Sutton v. Wells, 173 N. C. 1, 94 S. E. 688.

The rule may be deduced, therefore, that a party in interest may not introduce evidence of any transaction or communication with the deceased or is based upon independent knowledge not derived from such source. Sutton v. Wells, 175 N. C. 1, 94 S. E. 989. In re Will of Inman, 156, 98 S. E. 378; Price Real Estate, etc., Co. v. Jones, etc., 191 N. C. 176, 131 S. E. 587.

Conversation of Deceased with Living Defendant.—This section does not apply to the testimony of an interested witness as to a conversation between her deceased father and a living defendant. This is not testimony concerning a personal transaction. Abernathy v. Skildmore, 190 N. C. 66, 135 S. E. 475.

Testimony Given in Former Trial.—It is competent for the plaintiff’s witness to testify what the deceased maker of the note said unto him, but was not such not be a personal transaction within the meaning of the provisions of this section. Worth v. Wrenn, 144 N. C. 665, 657, 57 S. E. 388; Costen v. McDowell, 197 N. C. 545, 12 S. E. 433.

Proof of Handwriting.—A party interested in the event of a suit is not an incompetent witness, under this section, to prove the handwriting of the deceased person. Riff v. Armfield, 109 N. C. 63, 65; Armfield v. Colvert, 103 N. C. 147, 9 S. E. 461; Sawyer v. Grady, 113 N. C. 42, 18 S. E. 79; Lister v. Lister, 222 N. C. 553, 44 S. E. 246.

The decisions are based on the distinction which is drawn between proving the handwriting and proving the actual signing of the paper, the latter being held to be a transaction within the meaning of this section. A similar distinction was drawn in the case of State v. Maxwell, 64 N. C. 313, the case having been decided prior to the insertion of the word "personal," before the word "transaction." In the Rush Case the court regards this amendment as the legislative recognition of the soundness of that distinction and says that it (the amendment) was "probably induced by the decision in State v. Maxwell."—Ed. Note. § 7-227, 28. 1d (2d) 2549; Ruff v. Armfield, 124 N. C. 78, 82, 32 S. E. 381, it is held that this section does not apply to wills, but that they are governed by sections 31-9 and 31-10; this was placed on the ground that the testator in that section is necessarily a contract or agreement between the parties, and in the case of a will there is ordinarily no transactions between the parties.

By the same reasoning it is held that attesting a will is not a "personal transaction," the witness being of the law and not of the party. Vester v. Collins, 101 N. C. 114, 117 S. E. 687. Again, a beneficiary may testify as to the leaving of a house to another, but not as to the leaving of a writing, as the leaving of a writing need not be a personal transaction. In re Will of Saunders, 177 N. C. 156, 94 S. E. 678.

Circumstances may arise, however, in which the person interested as a beneficiary may attempt to testify as to personal transactions or conversations with the deceased and this testimony would be incompetent as to certain matters relating to the identification of certain claimants, etc. such as being "personal transactions with the deceased, prohibited by this section. Knight v. Everett, 153 N. C. 110, 67 S. E. 328; Dunt v. Currie, 141 N. C. 123, 53 S. E. 533.

Sale of Property by Guardian.—It is competent for the plaintiff to prove the sale by his guardian as this is not a personal transaction within the meaning of this section. State v. Osborne, 67 N. C. 259.

Testimony as to Placement of Deed.—This section does not exclude testimony that the defendant was a holder of a negotiable instrument in due course for the possession of another claimant of the title. Price Real Estate, etc., Co. v. Jones, 191 N. C. 176, 131 S. E. 587.

In a proceeding for dowry, the decision of the question whether the plaintiff left her husband’s home of her own volition or by reason of what the law will recognize as compulsion, is an inquiry that does not involve a communication or transaction with her husband which disqualifies her under this section. Hicks v. Hicks, 142 N. C. 231, 55 S. E. 155.

Claim That Intestate Was Holder in Due Course.—Where the administrator of the deceased claims that his intestate was a holder of a negotiable instrument in due course for value, and relies upon his intestate’s possession to make out a prima facie case, it is not a personal transaction or communication with the deceased, prohibited by statute, for it may be shown in rebuttal that after maturity it was seen in the possession of another claimant of the title. Price Real Estate, etc., Co. v. Jones, 191 N. C. 176, 131 S. E. 587.

Evidence of the declarations of a deceased partner tending to show that the deceased partner made an agreement with the plaintiff for the check to be marked "balance on account" was not to be taken as full settlement is incompetent as a transaction or communication with a deceased person prohibited by this section. Walston v. Minter, 276 N. C. 540, 129 S. E. 319.

Sale of Interest in Partnership.—This section does not apply to a transaction between living persons by which one of them sold to the other his interest in a firm of which the others are partners. Brantly v. Marshall, 166 N. C. 527, 82 S. E. 959.

Bailment.—The burden is on plaintiff to show the contract of bailment sued on, whether express or implied, by competent evidence, and the fact that the alleged bailee is dead, rendering incompetent testimony as to any transaction or communication with him to establish the bailment, is not a circumstance to be considered in passing upon the sufficiency of the evidence actually presented. Troxler v. Brevill, 215 N. C. 640, 3 S. E. (3d) 8.

Settlement of Estate.—Testimony relating to an agreement between administrator and distributee in regard to the settlement of an estate was incompetent in an action by distributee’s administrator to recover assets. Wilder v. Medlin, 215 N. C. 542, 2 S. E. (3d) 249.

Possession of stock, see Jones v. Waldroup, 217 N. C. 178, 17 S. E. (3d) 466.

V. EXCEPTIONS.

Similar Evidence Previously Introduced.—This section does not apply where evidence, similar to that which is being introduced, has previously been introduced and the door has not been opened to the opposing party. Davidson v. West Oxford Land Co., 126 N. C. 704, 705, 35 S. E. 162.

Grounds for Exceptions.—The rule of exclusion, if left absolute in form, might in certain cases, it was thought, tend to make it fair and just in its operation. There is nothing inequitable in requiring that the opposing testimony to that evidence of the party be pertinent. Summer v. Candler, 92 N. C. 634, 66 S. E. 121.

The exception may extend to the introduction of evidence of transactions or communications with a deceased person, prohibited by this section, such evidence must relate to the particular subject-matter of the evidence tested and not to the adverse party to whom the testimony of the deceased person or his representative was pertinent. Summer v. Candler, 92 N. C. 634.

Illustrations.—Where the defendant executor has testified to the fact that it was the same "will," when only for the purpose of showing that the testator was not of the party. Vester v. Collins, 101 N. C. 114, 7 S. E. 687. Again, a beneficiary may testify as to the leaving of a house to another, but not as to the leaving of a writing, as the leaving of a writing need not be a personal transaction. In re Will of Saunders, 177 N. C. 156, 94 S. E. 678.
letters the deceased had written upon the question of whether a charge of fraud was a part of the debt of a firm, it is competent for the plaintiff's witnesses to testify in the plaintiff's behalf, as to other matters relating thereto and tending to fix the deceased with liability as a partner, under the principle that when the defendant has himself "opened the door by his own evidence" the plaintiff may testify as to the completed transaction, and this section prohibiting testimony as to transaction, etc., with a deceased person does not apply. Herring v. Ipool, 147 N. C. 459, 131 S. E. 738.

It is incompetent as a transaction with a deceased person for the plaintiff to testify as to personal services rendered coming within her demand for damages. Pulliam v. Hoge, 192 N. C. 459, 135 S. E. 288.

objection as to witness' competency was overruled, and of the court or other body demanding such a proper administration of justice. (Rev., s. 1631; 1883, c. 159; C. S. 1797.)


In General.—The principle by which a physician may not be compelled to divulge communications and other matters which have come to his knowledge by observation of his professional occupation, or by any other means, is regulated by statute. In this section, the privilege is qualified, and it rests within the discretion of the trial judge, in the administration of justice, to compel the physician, called as a witness, to testify to what he has learned from his observation of the same is necessary to a proper administration of justice. (Rev., s. 1631; 1883, c. 159; C. S. 1797.)

What Information Included.—It is the accepted construction of this statute that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician in the course of his occupation, or by any other means, which he has no right to withhold, and which information was necessary to enable him to prescribe. Smith v. Roper Lumber Co., 147 N. C. 62, 64, 60 S. E. 717; Gartside v. Smith, 201 N. C. 658, 191 S. E. 840.

Relationship of (Physician and Patient Must Exist)—The admissions of one accused of crime are not rendered competent in the absence of the patient alone, and it may be excused on or waives all objections subject to the exceptions included in the section. Smith v. Roper Lumber Co., 147 N. C. 62, 64, 60 S. E. 717; Fuller v. Knights of Pythias, 129 N. C. 318, 40 S. E. 65. See Creech v. Sovereign Camp, W. O. W., 211 N. C. 638, 191 S. E. 840.

Privilege May Be Waived.—The privilege given by this section is for the benefit of the patient alone, and it may be excused on or waives all objections subject to the exceptions included in the section. Smith v. Roper Lumber Co., 147 N. C. 62, 64, 60 S. E. 717; Fuller v. Knights of Pythias, 129 N. C. 318, 40 S. E. 65. See Creech v. Sovereign Camp, W. O. W., 211 N. C. 638, 191 S. E. 840.

Judge's Finding of Record that Testimony Necessary.—Before a physician may testify to matters arising in his confidential relationship with his patient, our statute requires that the physician, called as a witness, shall so decide, and the physician's testimony is "necessary to a proper administration of justice," and in the absence of such finding appearing of record on appeal, it is reversible error for the trial judge upon defendant's objection should have been excluded. Smith v. Roper Lumber Co., 147 N. C. 62, 64, 60 S. E. 717; Fuller v. Knights of Pythias, 129 N. C. 318, 40 S. E. 65. See Creech v. Sovereign Camp, W. O. W., 211 N. C. 638, 191 S. E. 840.

Cited in State v. Wade, 197 N. C. 571, 190 S. E. 32.
excused from testifying on ground that testimony will tend to incriminate him, see §§ 1-357, 14-354, 14-38, 18-8, 18-27.

For article discussing the limits to self-incrimination, see section.


Treated as Other Witnesses.—When the defendant exercises privilege not to testify, he is treated just as any other witness and his demeanor is weighed and tested as that of any other witness. State v. Effer, 85 N.C. 585; State v. Hawkins, 115 N.C. 712, 715, 20 S. E. 623.

Where a defendant in a criminal prosecution testifies in his own behalf, he waives his constitutional privilege not to answer questions tending to incriminate him and is subject to cross-examination for the purpose of impeaching his credibility as other witnesses. State v. Griffin, 201 N.C. 541, 160 S. E. 896.

Extent of Cross Examination Permitted.—Cross examination of a defendant under this section is not confined to matters as to which he has testified in the prosecution but includes all matters which are admissible to impeach, diminish or impair the credit of the witness. State v. Dickerson, 189 N.C. 327, 127 S. E. 256.

Testimony May Be Used in Subsequent Trial.—When a defendant, in a prosecution for another crime, testifies in his own behalf, after having been informed of his privilege not to testify, admissions made by him are competent evidence against him in a subsequent trial. State v. Simpson, 131 N.C. 676, 45 S. E. 567.

Failure to Stand.—The failure of the prisoner charged with homicide to take the witness-stand voluntarily will not constitute a presumption against him. State v. Byrnum, 175 N.C. 777, 95 S. E. 101.

Court need not charge that failure of defendant to testify should not be considered against him in absence of request. State v. Yount, 156, 5, 522 S. E. 401.

Where defendant moved to set aside the verdict on ground that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, and typed notes of the argument of the defendant's counsel, the court erred in not considering the disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness. State v. Cloninger, 77 N.C. 246.

In declaring him to be "a competent witness" we would give that of any "interested witness," perforce impose a burden and the attending disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness. State v. Horne, 209 N.C. 725, 184 S. E. 776.

The right of the defendant to offer testimony of his good character does not depend upon his having been examined as a witness in his own behalf. State v. Hice, 117 N.C. 782, 21 S. E. 357.

"In declaring him to be 'a competent witness' we understand the statute to mean that he shall occupy the same position as any witness and be subject to the same cross-examination, to tell the truth, entitled to the same privileges, receive the same protection, and equally liable to be impeached or discredited." State v. Effer, 85 N.C. 585; State v. Traylor, 121 N.C. 674, 676, 19 S. E. 493.

Same.—Put in Issue by State.—Where, in the trial of a criminal action, the defendant testifies in his own behalf and introduces no evidence as to his general character, but the State introduces evidence to show the bad character of the defendant, it was bad, it was held that such evidence by the State can be considered only as affecting the credibility of the defendant as a witness and not as a circumstance in determining the question of his guilt or innocence. State v. Traylor, 121 N.C. 674, 28 S. E. 493.

Where There Are Two or More Defendants.—Even prior to the enactment of this section one defendant could not oppose the testifying of his codefendant for himself, the State's counsel not objecting. State v. Hamlet, 85 N.C. 525.

Weight Given Testimony as Confessions.—The defendant in a criminal action is competent as a witness in his own defense upon the preliminary hearing of the trial judge, as to whether confessions he had made to the officers of the law were voluntarily made or induced from him contrary to law. State v. Whitener, 191 N.C. 659, 132 S. E. 603.

Admission before Magistrate.—Where a prisoner made certain confessions which were induced by hope, and therefore inadmissible, but a day or so after, upon his examination before a committing magistrate, he asked to be examined as a witness on his own behalf, when he admitted that he had made the confessions, but said that they were false; and when he was informed that his witness was admissible against him, and it was for the jury to say whether they believed the confession, or that part of his evidence declaring that the confessions were false, that was true. State v. Ellis, 97 N.C. 447, 2 S. E. 525.

Weight Given Testimony as Confessions.—When the defendant introduces evidence himself to prove his good character, then that evidence is substantive evidence, and may be considered by the jury as such. State v. Cloninger, 149 N.C. 557, 75 S. E. 123.

Constitutional Provision as to Self-Incrimination.—See N. C. Const., Art. I, § 11, and notes thereto.

Erroneous Instructions.—While it is proper for the court to instruct the jury to scrutinize testimony of a defendant in a criminal prosecution because of his interest in the case, it is error for the court to instruct the jury to scrutinize testimony because of his interest in the case, and the pertinent decisions, and constitutes prejudicial error. State v. Wilcox, 206 N.C. 691, 175 S. E. 122.

Constitutional Provision as to Self-Incrimination.—See N. C. Const., Art. I, § 11, and notes thereto.

Proper Instruction.—The court's remarks to the jury in instructing them that defendant was within his rights in not testifying, and that his failure to testify should not be considered against him, were proper. State v. Deloach, 195 N.C. 219, 148 S. E. 206. State v. Decker, 194 N.C. 765, 139 S. E. 230; State v. Speivey, 198 N.C. 635, 565, 133 S. E. 255; State
§ 8-55. Testimony enforced in certain criminal investigations; immunity.—If any justice of the peace, magistrate of police, mayor of a town, or judge of the supreme or superior courts shall have good reason to believe that any person within his jurisdiction has knowledge of the existence and establishment of any faro-bank, faro-table or other gaming table prohibited by law, or of any place where intoxicating liquors are sold contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice of the peace, magistrate, mayor, or judge to issue to the sheriff of the county or to any constable of the town or township in which such faro-bank, faro-table, gaming table, or place where intoxicating liquors are sold contrary to law is supposed to be, a subpoena, capias ad testificandum, or other summons in writing, commanding such person to appear immediately before such justice of the peace, magistrate, mayor or judge and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of such faro-bank, faro-table or other gaming table, or place where intoxicating liquors are sold contrary to law, and the name and personal description of the keeper thereof. Such evidence, when obtained, shall be considered and held in law as an information on oath, and the justice, magistrate, mayor or judge may thereupon proceed to seize and arrest such keeper and destroy such table, or issue process therefore as provided by law. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any civil or criminal proceeding, and he shall be altogether pardoned of the offenses so done or participated in by him. (Rev., ss. 3721, 1637; Code, ss. 1215, 1050; R. C., c. 55, s. 50; 1858-9, c. 34, s. 1; 1889, c. 353; 1913, c. 141; C. S. 1800.)

Cross Reference.—See also, §§ 18-27.

§ 8-56. Husband and wife as witnesses in civil actions.—In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage); or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. (Rev., s. 1638; Code, s. 588; C. C. 1215, s. 541; 1866, c. 43, ss. 3, 4; 1919, c. 18; C. S. 1901.)

Cross References.—As to competency in criminal actions, see § 8-57 and notes thereto. See also, § 8-50.

Editor’s Note.—For note on privileged communications between husband and wife, see 15 N. C. Law Rev. 282.

In General.—Husbands and wives are competent and compellable to give evidence for or against each other, save only in the particular cases mentioned in the section. Barrows v. Barrington, 69 N. C. 179, 181.

The provisions of this section are quite clear and self-explanatory. The legislative intent is apparent and little room is left for a judicial construction of the clauses herein contained. A few of the leading cases are sufficient to show that the decisions of the various cases arising hereunder have been predicated upon the section as actually worded, without any judicial inferences being drawn by the courts.

Cross Reference.—See also, §§ 18-27.

§ 8-57. Husband and wife as witnesses in criminal actions.—The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but
the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compelled to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any husband or wife competent or compellable to give evidence against each other in any criminal action or proceeding, except to prove the fact of marriage in case of bigamy, and except that in all criminal prosecutions of a husband for an assault and battery upon his wife, or for abandoning his wife, for failure to support, and/or for neglecting to provide for his support, and/or the support of his children, it shall be lawful to examine the wife in behalf of the state against the husband. (Rev. ss. 1834, 1835, 1836; Code, ss. 1855, 1856; 1855-6, c. 23, 1865; 1866-9, c. 209; 1881, c. 110; 1933, C. 15, § 1, 1923, c. 361; C. S. 1802.)

Cross Reference.—As to competency in civil action, see §§ 8-55 and notes thereto.

Editor’s Note.—Public Laws of 1933, cc. 13 and 361, added, near the end of this section, the words “and/or his children” following the words “and/or the support of his children” following the word “support.” For a criticism of this amendment, see 11 N. C. Law Rev. 231.

In General.—Under this section the husband or wife is a competent witness for the defendant in all criminal actions or proceedings. State v. Harrison, 94 N. C. 855. But neither is competent or compellable to give evidence against the other in any criminal proceeding. Id. See State v. Watson, 215 N. C. 387, 1 S. E. (2d) 886.

Under this section a wife is neither competent nor compellable to testify against her husband in a criminal proceeding, hence hearsay evidence of her declarations, not made in his presence or by his authority, which would be prejudicial to the husband, is inadmissible. State v. Reid, 178 N. C. 245, 101 S. E. 103. See State v. Cotton, 218 N. C. 577, 12 S. E. (2d) 246.

Discretion of Trial Judge.—Where the defendant husband is alleged to have stolen certain property, it is competent for him to introduce his wife as a witness to prove from what source he got the money to pay for such property, but unless he introduces her in proper time it rests within the discretion of the trial judge whether her testimony will be admissible. State v. Lemon, 92 N. C. 791, 793.

A wife cannot be compelled to testify against her husband in a criminal action; and when she takes the stand in his behalf in a criminal proceeding, her evidence shall be received. State v. Tola, 222 N. C. 406, 23 S. E. (2d) 321.

Confidential Communication.—Testimony of a witness that at the time of the threats is not of the defendant, by the officers of the law, his wife was present and said to him: “I told you that you would get into it if you did not stay with me like I wanted you to.” To which the reply was: “I had not a confidential communication between husband and wife except of public policy, be admitted in evidence. State v. Brittain, 117 N. C. 783, 23 S. E. 433.

Husband May Testify Against Wife in Assault.—Conversely to the rule herein stated, in this section the witness is not the witness against the defendant; it appears that a husband may testify in assault by the one upon the other. State v. Self, 522; State v. Alderman, 182 N. C. 917, 919, 110 S. E. 59.

In case of assault and battery with intent to kill by poison, with evidence tending to show the previous threats of murder, the wife is competent to testify in connection with the other evidence in the case. State v. Freeman, 197 N. C. 376, 191 S. E. 450.

The confidential communication between husband and wife cannot be exculpating or admissible in evidence.
in the cause from which the subpoenas or commissions issued. (Rev., s. 1642; Code, s. 1371; R. C., c. 31, s. 72; 1810, c. 787; 1832, c. 8; C. S. 1806.)

Cross Reference.—As to depositions generally, see § 8-63.

In General.—Until the transcript is deposited the removal is not consummated and the cause is not constituted so as to give full jurisdiction to the court to which the removal is ordered, hence to meet this situation the provision of this section gives to the clerk of either court the power to issue subpoenas for witnesses. Commissioners v. Lemly, 85 N. C. 342, 146.

Upon removal jurisdiction of the court from which the cause is removed ceases, unless otherwise provided in the order of removal, or by consent of the parties in writing, duly filed. Fisher v. Cid Copper Min. Co., 105 N. C. 123, 10 S. E. 1055.

This section, however, makes one exception to the general rule by allowing the subpoena to be issued from either court. Fisher v. Cid Copper Min. Co., 105 N. C. 123, 10 S. E. 1055.

Time for Depositing Transcript.—The party procuring the order of removal has until the term of the court to which the cause is removed to deposit his transcript. Fisher v. Cid Copper Min. Co., 105 N. C. 123, 10 S. E. 1055.

§ 8-63. Witnesses attend until discharged; effect of nonattendance.—Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and continue to attend from term to term until discharged, when summoned in a civil action or special proceeding, by the court or the party at whose instance such witness shall be summoned, or, when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance the witness was summoned; and in default thereof shall forfeit and pay, in civil actions or special proceedings, to the party at whose instance the subpoena issued, the sum of forty dollars, to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness’s testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars for the use of the state, or the party summoning him. If the civil action or special proceeding shall, in the vacation, be compromised and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge he shall attend the next term, in that case the witness, upon oath made of the facts, shall be entitled to a ticket of the clerk from the court in the same manner as other witnesses, and shall recover from the party at whose instance he was summoned the allowance which is given to witnesses for their attendance, with costs.

No execution shall issue against any defaulting witness for the forfeiture aforesaid but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness. (Rev.,
s. 1643; Code, s. 1356; R. C., c. 31, ss. 60, 61, 62; 1777, c. 115, ss. 37, 38, 43; 1799, c. 528; 1801, c. 591; C. S. 1807.)

Cross Reference.—See also, §§ 6-51, 6-62.

Duty to Attend.—When a subpoena has been served on a witness, he is required by this section to attend from term to term until discharged. State v. Gwynn, 61 N. C. 445.

Non-Attendance Need Not Be Wilful.—This section does not require that the failure of the witness to attend should be "wilful." In re Pierce, 163 N. C. 247, 79 S. E. 507.

When Witness May Elect.—Where two subpoenas are served on a witness, requiring his attendance on the same day at different places distant from each other, he is not bound to obey the writ which may have been first served, but may make his election between them. Ichehour v. Martin, 44 N. C. 466.

Test of Inability to Attend.—In an early case, Eller v. Roberts, 25 N. C. 11, it was held that where a witness alleged that he was unable to attend court, this inability must be decided by reference to the modes of travelling which are in use in the community.

Where Service Had on Transient.—A witness, who is summoned in this State, while casually here, but who resides in another state, cannot be required to pay a forfeiture for non-attendance, if he has returned to his own state and is there at his domicile. Kinsey v. King, 28 N. C. 687.

Attorney Not Exempt.—A witness who fails to appear when the case is called in which he has been subpoenaed to testify is not justified in his default because he is a practicing attorney at law and has cases to try in another county at the date upon which the case was called wherein he was a witness, and the party who subpoenaed him can recover the penalty, with the costs of the motions. In re Pierce, 163 N. C. 424, 79 S. E. 497.

An issue in bastardy is not a "criminal prosecution" so as to subject a defaulting witness to the fine of eighty dollars, prescribed by this section. Ward v. Bell, 52 N. C. 79.

When Witness May Elect.—Where two subpoenas are served on a witness, with a copy of the certificate attached, directing the witness to appear at a time and place certain for the hearing. The judge at the hearing, being satisfied of the desirability of such custody and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If a judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will be cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing, being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness
who disobeys a summons issued from a court of record in this state. (1937, c. 217, s. 2.)

Cross Reference.—As to effect of non-attendance of witness, see § 8-63.

§ 8-67. Witness from another state summoned to testify in this state.—If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court, stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state. (1937, c. 217, s. 3.)

Cross Reference.—See also, § 8-66. As to effect of non-attendance of witness, see § 8-63.

§ 8-68. Exemption from arrest and service of process.—If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not, while in this state, or in a grand jury investigation which has commenced or is about to commence, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state, or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

Cross Reference.—See also, § 8-64.

Res Judicata.—In an action against the driver of a car upon whose service of summons was had while he was in the state in obedience to a summons from a coroner to testify at an inquest, motion to vacate the service was allowed upon the evidence that defendant was a nonresident and that therefore he was exempt from service of process in connection with matters which arose before his entrance into the state in obedience to the coroner's process. In a subsequent action arising out of the same collision, brought in another county by the administrator of a party killed in the collision, service was had upon the defendant at the same time and in the same manner. It was held that the prior adjudication that defendant was a nonresident and was exempt from service under this section was in the nature of a judgment in rem and is res judicata as to the status and residence of the defendant, and is binding upon the administrator under the maxim res judicata pro veritate accipitur, et ab hoc tenetur qui in secundo actio actione upon substantially the same evidence that defendant was a resident of this state and that the service of summons on him was valid must be reversed on appeal even though supported by evidence. Current v. Webb, 220 N. C. 423, 17 S. E. (2d) 614.

§ 8-69. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it. (1937, c. 217, s. 5.)

§ 8-70. Title of article.—This article may be cited as "Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings." (1937, c. 217, s. 6.)

Art. 10. Depositions.

§ 8-71. Manner of taking depositions in civil actions.—Any party in a civil action or special proceeding, upon giving notice to the adverse party or his attorney as provided by law, may take the depositions of persons whose evidence he may desire to use, without any special order therefor, unless the witness shall be beyond the limits of the United States.

Depositions shall be taken on commission, issuing from the court and under the seal thereof, by one or more commissioners, who shall be of kin to neither party, and shall be appointed by the clerk; or depositions may be taken by a notary public of this state or of any other state or foreign country, or by any commissioner of oaths or commissioner of deeds of any foreign country, or by any officer of the army of the United States or marine corps having the rank of captain or higher, by any officer of the United States navy or United States coast guard having the rank of lieutenant, senior grade, or higher, or by any officer of the United States merchant marine having the rank of lieutenant, senior grade, or higher, without a commission issuing from the court. No official seal shall be required of said military or naval officials, but they shall sign their name, designate rank, name of ship or military division, and date, without a commission issuing from the court.

Depositions shall be subscribed and sealed up by the commissioners or notary public, and returned to the court, the clerk whereof or the judge holding the court, if the clerk is a party to the action, shall open and pass upon the same, after having given the parties or their attorneys not less than one day's notice; and all such depositions, when passed upon and allowed by the clerk, without appeal, or by the judge upon appeal from the clerk's order, or by the judge holding the court, when the clerk is a party to the action, shall be deemed legal evidence, if the witness be competent. (Rev. s. 1652; Code, s. 1357; 1911, c. 158: R. C., s. 31, s. 63; 1881, c. 279; 1893, c. 360; 1943, c. 160, s. 1; C. S. 1899.)

Editor's Note.—As this section originally stood, it contained many restrictive clauses which no longer appear. The 1941 amendment added to the second paragraph the
provisions relating to commissioners of oaths or deeds and to officers in the armed forces and in the merchant marine. Section 2 of the amendatory act provided that in all instances in which depositions had been properly taken by a commissioner of oaths, they are validated as though taken pursuant thereto. **Purpose of Section.**—The purpose of this section is to save the inconvenience and cost of taking witnesses to the court, unless the party desiring the testimony of the witness sees fit to summon him to attend the court and testify in person. Sparrow v. Blount, 90 N. C. 514, 516.

**Objection with Party Desiring the Deposition.**—A party may take the deposition; he is not obliged to do so and it is optional with him whether he will or not. Sparrow v. Blount, 90 N. C. 514, 516.

**Right of Cross Examination.**—Where a cause has been referred and regularly proceeded with before a commissioner to take deposition therein, the party has a right to cross-examine the witnesses of the opposing party, which may not be denied him as a matter of law. Sugg v. St. Mary’s Oil Engine Co., 193 N. C. 814, 138 S. E. 169.

**Presumed Regular.**—The presumption is that a deposition has been properly taken when it appears thereon that it was taken by one named in the commission on the day and at the designated place. Yonce v. Broad River Lumber Co., 155 N. C. 259, 71 S. E. 555.

**May Be Taken at Place of Business.**—It is not error to take a deposition in the place of business of one of the parties if such place is named in the notice and there is no suggestion that the other party suffered any prejudice thereby. 120 N. C. 479, 41 S. E. 876.

**May Be Taken before Answer.**—The plaintiff is not required to delay taking the deposition of a witness until the answer is filed. Freeman v. Brown, 151 N. C. 592, 151 S. E. 720.

**Leading Question.**—It is discretionary with the trial judge whether or not answers to leading questions shall be stricken out of the deposition. Bank v. Carr, 130 N. C. 479, 41 S. E. 876.

**Necessity of Sealing.**—A deposition must be sealed up by the commissioners, so as to prevent inspection and alteration. Ward v. Ely, 12 N. C. 372.

Where a deposition was found among the papers, with a commission unattached, and an envelope which appeared to have been used for the purpose of sealing it, it was held that this was sufficient evidence to justify the clerk in finding that the deposition had been taken under such commission, and had been returned to him sealed up by the commissioner, and therefore, that the clerk had done right in passing upon and allowing such deposition to be read. Hill v. Bell, 61 N. C. 122.

**Name of Witness in Commission Not Essential.**—It is not necessary that the name of the witness be connected with the commission issued for taking depositions name the particular witness to whose depositions exceptions are taken, when the notice to take the deposition gave the name of the deponent and the necessity of the commission and the requirement of the statute has been met. Jeffords v. Albemarle Waterworks, 157 N. C. 70, 72 S. E. 624.

**Signature of Witness Unnecessary.**—Where a deposition is otherwise properly authenticated, it should not be refused as evidence because it has not been signed by the witness whose testimony was being taken, this not being required by our statute. Boggs v. Cullowhee Min. Co., 162 N. C. 391, 78 S. E. 274. And the fact that it was signed when neither party was present is not ground for refusing to admit it. Riff v. Yadkin, etc., Co., 189 N. C. 385, 157 S. E. 596.

**Question Need Not Be Written.**—In the taking of a deposition, interrogatories are not required to be in writing, and when there is nothing to indicate that the deposition does not represent the deponent’s own testimony on the matter, it was not written down at the time and in the presence of the witness, a motion to quash should be allowed. Chippewa Valley Bank v. National Bank, 166 N. C. 815, 21 S. E. 668. And not by the Pleading in the Previous Action. While the custom, and the better practice, to attach to a deposition a paper-writing therein referred to, or, if there are more than one deposition, to attach it to one and identify it by number, is commended, and in some cases required, as a matter of record or in the custody of the court, over which the parties have no control, to attach an exemplified copy; it is not required by our statute that a writing be so attached. Fien v. McFarland, 171 N. C. 528, 88 S. E. 625. As to defective forms, see note to Alma McIlrath v. Rhea, 122 N. C. 614, 30 S. E. 128, under section 8-81.

**Notice to Adverse Party Required.**—A party offering to read a deposition as evidence must prove that he has given the notice of the opening of the deposition before the clerk prescribed by this section, or show facts that would amount to a waiver by the opposite party of the statutory require- ment. Berry v. Hall, 105 N. C. 154, 10 S. E. 903. See section 8-72 and notes thereto.

**Power of Clerk.**—This section allowing the clerk to pass upon depositions only applies to the depositions of competent witnesses, to the clerk, unless the party desiring the testimony of the witness sees fit to summon him to attend the court and testify in person. Sparrow v. Blount, 90 N. C. 514, 516.

**An Appeal Essential for Review by Court.**—The superior court has no jurisdiction to decide whether a deposition be regularly taken, except on appeal from the clerk’s decision. Hix v. Fisher, 60 N. C. 474.

**Qualification of Commissioner Presumed.**—A commissioner appointed to take depositions will be presumed to be properly qualified until the contrary is shown. Gregg v. Mallett, 111 N. C. 74, 15 S. E. 916.

**Mistake in Name.**—Where the notice to take a deposition correctly states the name of the commissioner appointed to take them, and is otherwise regular, it is error for the trial judge to exclude the depositions, as evidence, on account of a slight error in the spelling of the commissioner’s name. Hardy v. Phoenix Mut. Life Ins. Co., 167 N. C. 22, 87 S. E. 5.

**Commissioner Related to Parties.**—The commissioner should not be related to either of the parties, but the burden of proving this relationship rests upon the movant. Bank v. Broad River Lumber Co., 155 N. C. 239, 71 S. E. 329.

**Same—Objection.**—An objection that a commissioner to take depositions is related to one of the parties must be taken at the time the depositions are offered before the clerk. Kerr v. Hicks, 131 N. C. 90, 42 S. E. 512.

**Delay of Witness to Answer.**—The commissioner acts for the court and it is the duty of the witness to answer proper questions propounded by him, just as though the examination is conducted before the judge or clerk. Bradley, etc., Co. v. Taylor, 112 N. C. 141, 146, 17 S. E. 69.

**Delay of Commission Insufficient for Continuance.**—Commission to take testimony is taken out of the court, and for the benefit of one of the parties, and he will not thereby make them returnable at the earliest day consistent with convenience. Where, through laches or from a wish to delay the trial, he should not do so, the non-execution of the commission will be adjudged an insufficient reason for asking a continuance. Duncan v. Hill, 19 N. C. 291.
the party objecting to the court of the truth of his allegation. (Rev., s. 1632; Code, s. 1937; 1881, c. 279; C. S. 1810.)

In General.—The object of the notice is to give the party an opportunity to attend and cross-examine; and, while on the one hand, a party will not be forced to attend on Sunday, the notice is required to indicate a place for the purpose of that very suit, so, on the other, it is held that the principle is complied with substantially, if the notice describes the place with reasonable certainty. Givens v. Casey, 31 N. C. 38, 40.

Variation between Notice and Certificate.—A deposition certified to have been taken at the house of J. E. was objected to because the notice was not made at the noticed place for the purpose of that very suit, so, on the other, it is held that it was to be presumed that the notice and certificate referred to the same person. Ellmore v. Mills, 2 N. C. 359.


On a Particular Day for Several Successions.—Notice, given to take a deposition on "the 5th or 6th" of a certain month was held sufficient. Kenedy v. Alexander, 2 N. C. 25.

Conflicting Dates.—Where notice is served that deposition is to be taken at the same time in two different places, so that the party who is notified cannot be present at both, he may attend at either place designated and disregard the notice as to the other place, and deposition taken at the other place will, on motion, be quashed or suppressed, but where he elects to appeal by counsel and cross-examines the witnesses without making any objection at the time, this is a waiver of the objection in the notice. Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613.

Certainty of Place.—A misdescription of a place, in one small particular, in a notice to take depositions will not be fatal, if there be other descriptive terms used in the notice, less liable to mistake, by which such place may be identified. Pursell v. Logan, 52 N. C. 102.

Where Parties Specifically Mentioned.—Where notice was given to take the deposition of certain parties, specifically mentioned, "and others," and depositions of those particularly mentioned were not taken, it was held to be no ground for exception. Pursell v. Logan, 52 N. C. 102.

Notice to One of Joint Defendants.—Upon a bill against joint administrators relative to the acts of the intestate, of whom party specially mentioned was administrator, and notice to the guardian so appointed as to the taking of depositions of witnesses does not comply with the requirements of this section, and upon appearance of the deposition, it is held that the principle is complied with substantially, if it be shown by the certificate of the commissioners, the deposition may be read. Sawrey v. Murrell, 3 N. C. 397. Absent Party or Attorney.—In taking depositions where a party lives out of the State, notice may be given to the absent party, or to his attorney in court. Savage v. Rice, 1 N. C. 19.

§ 8-73. Publication of notice in case of non-resident.—Instead of the notice served upon the adverse party or his attorney in taking depositions in civil actions or special proceedings, when the adverse party is a non-resident and has no attorney of record, it shall be sufficient to publish notice to the adverse party in some newspaper published in the county in which the action is pending, or if no newspaper is published in such county, then in some newspaper in the judicial district, for three consecutive weeks, giving the time and place of taking the deposition and calling the attention of the witness. And when the adverse party is a non-resident and publication of notice cannot be had upon him or his attorney in this state, then one publication of notice to open such deposition shall be sufficient notice. (1913, c. 137; C. S. 1811.)

Cross Reference.—As to publication generally, see §§ 1-98, 1-99.

§ 8-74. Depositions for defendant in criminal actions.—In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this state, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor or prosecuting attorney of the district, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this state, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor or prosecuting attorney of the district, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this state, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor or prosecuting attorney of the district, and
trary suggestion of his Honor, though unintentional, was prejudicial to the defendant.”

Where there are several defendants in the same bill of indictment, it is not necessary to notify each of the others of the taking of a deposition made by one for use as evidence on his behalf. State v. Finley, 118 N. C. 1162, 24 S. E. 495.

A deposition taken under this section is competent to be read in favor of one prisoner, although it contains testimony charging his codefendant with committing the crime. When so read, it is the duty of the presiding judge to instruct the jury that they are not to consider it as evidence against the codefendant but only as evidence in favor of the prisoner who offers it. State v. Finley, 118 N. C. 1162, 24 S. E. 495.

§ 8-75. Depositions in justices' courts.—Any party in a civil action before a justice of the peace may take the depositions of all persons whose evidence he may desire to use in the action; and to do so he may apply to the clerk of the superior court for a commission to take the same, and shall proceed in all things in taking such depositions as if such action was pending in the superior court. When any such depositions are returned to the clerk, they shall be opened and passed upon by the clerk, and delivered to the justice of the peace before whom the trial is to be had; and the reading and using of said depositions shall conform to the rules of the superior court. (Rev., s. 1646; Code, s. 1359; 1872-3, c. 33; C. S. 1813.)

§ 8-76. Depositions before municipal authorities.—Any board of aldermen, board of town or county commissioners or any person interested in any proceeding, investigation, hearing or trial before such board, may take the depositions of all persons whose evidence may be desired for use in said proceeding, investigation, hearing or trial; and to do so, the chairman of such board or such person may apply in person or by attorney to the superior court clerk of that county in which such proceeding, investigation, hearing or trial is pending, for a commission to take the same, and said clerk, upon such application, shall issue such commission, or such deposition may be taken by a notary public of this state or of any other state or foreign county without a commission issuing from any court of record in this state, or by the courts of the states or territories of the United States, arbitrators, referees, and all persons acting under a commission issuing from any court of record in this state, are hereby empowered, they or the clerks of the courts respectively in this state, to which such commission shall be returnable, to issue subpoenas, specifying the time and place for the attendance of witnesses before them, and to administer oaths to said witnesses, to the end that they may give their testimony. And any witness appearing before any of the said persons and refusing to give his testimony on oath touching such matters as he may be lawfully examined unto shall be committed, by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence; which warrant of commitment shall recite what authority the person has to take the testimony of such witness, and the refusal of the witness to give it. (Rev., s. 1649; Code, s. 1369; R. C., c. 31, s. 64; 1777, c. 115, s. 42; 1805, c. 685, ss. 1, 2; 1848, c. 66; 1850, c. 188; C. S. 1816.)

Cross References.—As to attendance of witnesses before commissioners, etc., see § 8-60. See also, § 5-1, subsec. 6, under which refusal of witness to be sworn or answer questions amounts to contempt.

Power Not Exclusively in Commissioner.—The power to commit to jail a person refusing to testify before a commissioner, as provided for in this section, is not given exclusively, if at all, to the commissioner, but he may invoke the aid of the judge from whom he derives his appointment and whose authority is defined. Bradley, etc., Co. v. Taylor, 112 N. C. 141, 17 S. E. 69.

§ 8-78. Attendance before commissioner enforced.—The sheriff of the county where the witness may be shall execute all such subpoenas, and make due return thereof to the commissioner, or other person, before whom the witness is to appear, in the same manner, and under the same penalties, as in the case of process of a like kind returnable to court; and when the witness shall be subpoenaed five days before the time of his required attendance, and shall fail to appear according to the subpoena and give evidence, the default shall be noted by the commissioner, arbitrator, or other person aforesaid; and in case the default be made before a commissioner act-
section of making the objection before trial and in writing are not complied with, the objection to the deposition is waived Woodley v. Haskell, 67 N. C. 157.

For discussion of waiver in general, see 4 N. C. Enc. Dig. 706; as to cross-examination of witnesses, see 4 N. C. Enc. Dig. 707.

§ 8-82. Deposition not quashed after trial begun.——No deposition shall be quashed, or rejected, on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection. (Rev., s. 1647; Code, s. 1360; 1869-70, c. 227, s. 12; C. S. 1820.)

Opportunity to Object before Trial.——Where a deposition was opened on and on file before the trial, and an objection thereto was made for the first time on the trial, it was held that the objection could not be sustained. Morgan v. Royal Fraternal Ass'n, 170 N. C. 75, 81, 86 S. E. 95; citing Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 631. And this is true whether the motion is to quash the deposition in whole or in part. Carroll v. Hodges, 98 N. C. 418, 4 S. E. 199.

Filing as Notice.——Where the deposition had been on file for two or three months before the trial, the appellant's counsel having notice and being present when it was opened by the clerk and ordered by him to be read in evidence on the trial, and they making no objections thereto, it was held that such deposition could not be quashed on oral objection made at the trial. Carroll v. Hodges, 98 N. C. 418, 4 S. E. 199.

As to failure to give notice to adverse party, see note of Bryan v. Jeffreys, 104 N. C. 242, 10 S. E. 167, under section 8-81.

Preservation of Exception.——Where a commissioner to take depositions has, over the objections and exceptions of a party litigant, denied him the right of cross-examination, a party litigant, denied him the right of cross-examination of a witness of his opponent, and the litigant has appealed therefrom to the trial court, and preserved his right, the exception gives notice of the grounds upon which it was based, and on his motion on the trial, the deposition relating to that part of the evidence will be stricken out. Sugg v. Mary's Oil Engine Co., 193 N. C. 814, 138 S. E. 169.

Incompetent Questions.——Since a deposition can be quashed only for irregularities in the taking or incompetency of witnesses, objection should be taken to the questions and answers of the deponent by way of exception and not by motion to quash the depositions. Jefflords v. Allemarle Waterworks, 157 N. C. 10, 72 S. E. 634.

§ 8-83. When deposition may be read on the trial.——Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

1. If the witness is dead, or has become insane since the deposition was taken.
2. If the witness is a resident of a foreign country, or of another state, and is not present at the trial.
3. If the witness is confined in a prison out of the county in which the trial takes place.
4. If the witness is so old, sick or infirm as to be unable to attend court.
5. If the witness is the president of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.
6. If the witness is the governor of the state, or the head of any department of the state government, or the president of the university, or
§ 8-84. Depositions taken in the state to be used in another state:

1. By whom obtained. In addition to the other remedies prescribed by law, a party to an action, suit or special proceeding, civil or criminal, pending in a court without the state, either in the United States or any of the possessions thereof, or any foreign country, may obtain, by the proceedings prescribed by this section, the testimony of a witness and in connection therewith the production of books and papers within the state to be used in the action, suit or special proceeding.

2. Application filed. Where a commission to take testimony within the state has been issued from the court in which the action, suit or special proceeding is pending, or where a notice has been given, or any other proceeding has been taken for the purpose of taking the testimony within the state pursuant to the laws of the state or country wherein the court is located, or pursuant to the laws of the United States or any of the possessions thereof, if it is a court of the United States, the person desiring such testimony, or the production of papers and documents, may present a verified petition to any justice of the supreme court or judge of the superior court, stating generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of the witness is admissible in evidence under this section. Willeford v. Bailey, 132 N. C. 402, 43 S. E. 928.

3. Subpoena issued. Upon the filing of such petition, if the justice of the supreme court or judge of the superior court is satisfied that the application is made in good faith to obtain testimony within the provisions of this section, he shall issue a subpoena to the witness, commanding him to appear before the commissioner named in the commission, or before a commissioner within the state, for the state, territory or foreign country in which the notice was given or the proceeding taken, or before the officer designated in the commission, notice or other paper, by his title or office, at a time and place specified in the subpoena, to testify in the action, suit or special proceeding. Where the subpoena directs the production of books or papers, it shall specify the particular books or papers to be produced, and shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner or to produce the original thereof for inspection, but such books and original papers shall not be taken from the witness. This subpoena must be served upon the witness at least two days, or, in case of a subpoena requiring the production of books or papers, at least five days before the day on which the witness is commanded to appear. A party to an action or proceeding in which the deposition is sought to be taken, or a witness subpoenaed to attend and give his testimony, may apply to the court issuing such subpoena to vacate or modify the same.

4. Witness compelled to attend and testify. If the witness shall fail to obey the subpoena, or
Knowing as a "bill to perpetuate testimony" shall be the relief afforded in courts of equity by what is incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay witness fees and other costs that may have been cover all costs and charges incident to the tak- inion to show cause is made returnable, he shall enforce the order and prescribe the punishment as hereinbefore provided.  

5. Deposit for costs required. The commis- sioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to act under and by virtue of his appointment until as hereinbefore provided.

Art. 11. Perpetuation of Testimony.

§ 8-85. Relief afforded by superior courts.— The relief afforded in courts of equity by what is known as a "bill to perpetuate testimony" shall be afforded by the superior courts of this State. (1905, c. 254, s. 1.)

§ 8-86. How to obtain relief.—Such relief may be obtained either by a special proceeding before the clerk of the superior court, or by a civil action brought to the superior court in term. (1933, c. 254, s. 2.)

§ 8-87. Rules of procedure; admissibility of testimony taken.—Such special proceedings and civil actions shall be governed by the same rules of procedure that govern other special proceedings and civil actions; and the testimony taken therein shall be admissible in the trial of any controversy, under the same regulations and restrictions which govern depositions taken in other cases in which the taking of depositions is provided for by the laws of this State: Provided, however, the evidence so perpetuated shall not be competent against any person who was not served with notice now provided by law for the taking of depositions in civil cases to be present and cross examine said wit- nesses. (1935, c. 254, s. 3.)

Cross Reference.—As to procedure in civil actions, see § 1-88 et seq. As to procedure in special proceeding, see § 1-393 et seq. As to depositions, see § 8-71 et seq.

§ 8-88. Taxing costs.—The costs of such special proceedings and civil actions shall be taxed against the party at whose instance the proceeding is insti- tuted. (1935, c. 254, s. 4.)

Art. 12. Inspection and Production of Writings.

§ 8-89. Inspection of writings.—The court before which an action is pending, or a judge there of, may, in his or his discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may ex- clude the paper from being given in evidence, or punish the party refusing, or both. (Rev., s. 1655; Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1831, c. 1093; C. C. P., s. 331; 1828, c. 7; C. S. 1823.)

Cross Reference.—As to examination of adverse party, see § 1-59 and notes thereto.

Editor's Note.—This section is quite similar to the pro- visions of section 8-90 and must be construed therewith. In many of the cases the courts have used the term "production" when more properly the term "inspection" should be used, as the case was decided primarily under the pro- visions of section 8-90. The reasoning used by the courts would indicate that this use of language has not been con- taining evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may ex- clude the paper from being given in evidence, or punish the party refusing, or both. (Rev., s. 1655; Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1831, c. 1093; C. C. P., s. 331; 1828, c. 7; C. S. 1823.)

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Liberally Construed.—This section is remedial, and should be liberally construed to advance the remedy intended thereby to be afforded. Abbott v. Gregory, 196 N. C. 9, 154 S. E. 29.

Direction of Court.—Whether the trial court shall grant an order for the inspection of writings upon a sufficient affidavit rests in its sound discretion. Dunlap v. London Guaranty, etc., Co., 202 N. C. 651, 163 S. E. 720.

The trial court's refusal to grant plaintiff's motion, for an order that defendant produce certain written statements signed by witnesses, employees of defendant, which state- ments these employees testified they used to refresh their recollection before becoming witnesses, was not error, the grant of such motion being in the discretion of the court, and the record failed to show that the requirements of this and the following section were met by plaintiff, or that the

[ 579 ]
written statements were in court. Star Mfg. Co. v. Atlantic Coast Line R. Co., 223 N. C. 330, 23 S. E. (2d) 32.

While a "reviewing commission for the inspection of papers" will not be ordinarily allowed, an application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party, which relate to the immediate issue in controversy, which cannot be more definitely described, and an order based thereon will be upheld. See Murchison National Bank, 196 N. C. 243, 141 S. E. 241.

Substitute for Bill of Discovery.—This section is prima facie designed and intended to afford the facilities for the inspection of writings. Star Mfg. Co. v. Atlantic Coast Line R. Co., 222 N. C. 330, 23 S. E. (2d) 32.

Must Be Pertinent to Issue.—Upon motion to allow inspection of books, papers, etc., before trial, it must be made to appear that the instrument in question relates to the merits of the action or is pertinent to the issue. Evans v. Seaboard Air Line R. Co., 167 N. C. 415, 83 S. E. 617.

Where No Information Could Be Gained.—Under this section, a person will not be ordered to allow an inspection of the paper-writing if the party making the request knows the contents thereof. Sheek v. Sain, 127 N. C. 265, 37 S. E. 334. The court said: "The object of this section is to enable a party to get information that he did not have by the inspection of writings, or more definite information, or data, than he had already." Id.

Inspection within Specified Time.—This section only authorizes the judge to order one party to exhibit the writing or the books, papers, etc., to another, without limiting him to take a copy of the same, within a specified time. Sheek v. Sain, 127 N. C. 266, 272, 37 S. E. 334. It was not intended that there should be an investigation of the contents of information of past trials with witnesses and lawyers on both sides. Id.

An examination of an adverse party, under § 1-569 et seq., may be joined with an order under this section to inspect writings, in the possession of the defendant, in the proceeding for the production of papers under this section unless the facts are stated upon which the application is based. Maxwell v. McDowell, 50 N. C. 391.

General Allocation.—An appeal lies from an order requiring a person to allow an inspection of paper writings. Sheek v. Sain, 127 N. C. 266, 37 S. E. 334.

Applied to Note of Surety.—For purpose of taking photographic copy thereof, the court in Girard Nat. Bank v. McArthur, 165 N. C. 524, 81 S. E. 327, applied in Long v. Oxford, 104 N. C. 408, 10 S. E., to determine the genuineness of a new promise set up by the plaintiff to defendant's plea of the statute of limitations.


§ 8-90. Production of writings.—The courts have full power, on motion and due notice thereof given, to require the parties to produce books or writings in their possession or control which contain evidence pertinent to the issue, and if a plaintiff shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion, may give the judgment against the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion as aforesaid, may give judgment against him by default. (Rev., s. 1657; Code, s. 1373; R. C., s. 31, s. 25; 1821, c. 1095; 1898, c. 7; C. 1894.)

Discretion of Court.—When the requirements of the application, as set forth in the preceding section, are met, this section does nothing more than vest the granting of such application in the discretion of the judge. Star Mfg. Co. v. Atlantic Coast Line R. Co., 222 N. C. 330, 333, 23 S. E. (2d) 32.

Complaint Essential.—A court cannot under this section order the production of papers by the defendant where no complaint has been filed. See Murchison v. McLeod, 165 N. C. 372, 191 S. E. 720.

Due notice is necessary to enable the party to have the document when called for. McDonald v. Carson, 95 N. C. 377.

Sec. 9-1. Jury list from taxpayers of good character.

9-2. Names on list put in box.

9-3. Manner of drawing panel for term from box.

9-4. Local modifications as to drawing panel.

9-5. Fees of jurors.

9-6. Jurors having suits pending.

9-7. Disqualified persons drawn.

9-8. How drawing to continue.

9-9. Drawing when commissioners fail to draw.

Art. 2. Petit Jurors; Attendance, Regulation and Privileges.

9-10. Summons to jurors drawn; to attend until discharged.

9-11. Summons to males; their disqualifications.


9-14. Juror sworn; judge decides competency.


9-17. Jurors impaneled to try case furnished with accommodations.

Art. 3. Peremptory Challenges in Civil Cases.

9-18. Exemption from civil arrest.

9-19. Exemptions from jury duty.

9-20. Clerk to keep record of jurors.

9-21. Extra or alternate juror; challenges; compensation and duties.

Art. 4. Grand Jurors.

9-22. Six peremptory challenges on each side.

9-23. Where several defendants; challenges apportioned; discretion of judge.

Art. 5. Special Venue.


9-25. Grand juries in certain counties.


9-27. Foreman may administer oaths to witnesses.

9-28. Grand jury to visit jail and county home.

9-29. Special venire to sheriff in capital cases.

9-30. Drawn from jury box in court by judge's order.

9-31. Penalty on sheriff not executing writ or jurors not attending.

Local Modification.—Macon: 1933, c. 62; Yancey: 1929, c. 57, 65.

Editor's Note.—Public Laws 1937, c. 19, applicable only to Ashe county, changed the date for selecting the jury list to the first Monday in March.

Public Laws 1937, c. 200, amended this section by adding the following: "In Ashe county, non-payment of taxes shall not be a bar to jury service nor prevent the placing of the names of persons otherwise qualified upon the jury list for said county."


Section Directory.—The regulations contained in this section, relative to the revision of the jury lists, are directory only and, while they should be observed, the failure to do so does not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners.

Special Statute Allowing Other Method.—Where a statute creating a special criminal court for certain counties allows every facility to the accused for getting a fair and impartial jury, it is not unconstitutional because it does not provide for a discharge of the rule for its production. Fuller v. McMillan, 44 N. C. 206.

Stated in McDonald v. Carson, 94 N. C. 497; Rivenbark v. Shell Union Oil Corp., 217 N. C. 592, 8 S. E. (2d) 919.

§ 8-91. Admission of genuineness.—Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal. (Rev., s. 1638; Code, s. 578: R. C., c. 31, s. 82; R. S., c. 31, s. 80: 1821, c. 1095; 1838, c. 7; C. C. P., s. 331; C. S. 1825.)

Comments by Counsel.—Counsel may comment as to the truth of the contents of an instrument as suggested by its appearance, even after the admission in writing under this section that the instrument is genuine. Knight v. Hough-talling, 85 N. C. 117.
§ 9-2. Names on list put in box.—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and fifty and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 207 N. C. 282, 292, 176 S. E. 401; Rhvys v. Carolina Contracting Co., 219 N. C. 479, 14 S. E. (2d) 531 (dis. op.).

Local Modification.—Buncombe, Cabarrus, Catawba, Forsyth, Guilford, Haywood, Iredell, Wake: 1933, c. 89.

Cross References.—As to manner of drawing panel when commissioners fail to act, see § 9-5. As to drawing of grand jury from those returned as jurors, see § 9-24. As to drawing of special veniremen, see § 9-30. As to drawing jurors in recorders' courts, see § 1-86. As to drawing of petit jurors, see § 9-24.

Boxes Improperly Marked.—Where the partitions of the jury box, instead of being marked "No. 1" and "No. 2," were marked "Jurors Drawn" and "Jurors Not Drawn," the court was advised that a special venire was drawn under the directions of the presiding judge from such boxes was legal.

State v. Potts, 100 N. C. 457, 6 S. E. 657.

Middle Letter Entered Erroneously.—The entering on the scrolls of the middle letter of ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four jurors.

The persons whose names are inscribed on said scrolls shall serve as jurors at the time and in the manner as drawn the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eight other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

Formerly it was held that an indictment could be quashed by the failure to pay taxes due to failure to put the middle letter in the name. State v. Banner, 149 N. C. 519, 521.

§ 9-2. Names on list put in box.—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and fifty and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

(Rev., s. 1958; Code, s. 1728; 1868-9, c. 9, s. 5; 1937, c. 19; 1941, c. 92; C. S. 2313.)

Editor's Note.—Public Laws 1937, c. 19, applicable only to Ashe county changed date for putting names in box to "First Monday in March or a date selected and approved on the first Monday in March."

Public Laws 1941, c. 92, repealed Public Laws 1937, c. 19.

Boxes Improperly Marked.—Where the partitions of the jury box, instead of being marked "No. 1" and "No. 2," were marked "Jurors Drawn" and "Jurors Not Drawn;" the court was advised that a special venire was drawn under the directions of the presiding judge from such boxes was legal. State v. Potts, 100 N. C. 457, 6 S. E. 657.

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The persons whose names are inscribed on said scrolls shall serve as jurors at the time and in the manner as drawn the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eight other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

Formerly it was held that an indictment could be quashed by the failure to pay taxes due to failure to put the middle letter in the name. State v. Banner, 149 N. C. 519, 521.
names of all sorts and conditions of men, white and negro persons, Jew and Gentile, who are qualified to serve under the law. A more perfect system could hardly be devised to insure impartiality. State v. Walls, 211 N. C. 487, 494, 191 S. E. 232.

§ 9-4. Local modifications as to drawing panel.

In Buncombe county forty-eight jurors shall be drawn to serve the first week and twenty-four to serve the second week.

In Cabarrus county the board of county commissioners shall annually draw forty-two jurors for the first week of the January term of superior court of each year and twenty-four jurors for each and every other week of superior court during the year.

In Cumberland county the commissioners may, in their discretion, cause an additional twelve jurors to be drawn, to serve as the jury for the first week.

In Forsyth county the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned, and likewise for the second week. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned.

For the second week thirty jurors shall be drawn and summoned.

In Hertford county fifteen jurors shall be drawn and summoned for the second week.

In Iredell county twenty-four jurors shall be drawn and summoned for the second week.

In McDowell county the board of county commissioners is authorized and empowered to draw as jurors from the box an additional number of jurors to those now provided by law. At each term when grand jury is to be selected, for the first week forty-eight jurors shall be drawn and summoned, and for each subsequent week of the year twenty-four jurors shall be drawn and summoned. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned; for the second week twenty-four jurors shall be drawn and summoned.

In Rockingham county the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned; for the second week twenty-four jurors shall be drawn and summoned. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned; for the second week twenty-four jurors shall be drawn and summoned.

In Rowan county twenty-four jurors shall be drawn and summoned for the second week.

In Stokes county the commissioners shall draw for each term of the superior court, in accordance with law, twenty-four jurors, to be summoned by the sheriff of Stokes county.

In Wayne, Robeson and Granville counties the board of commissioners for the first week of each term of the superior court of said counties for the trial of civil and criminal causes shall cause to be drawn from the jury box forty-two scrolls, and for each additional week or for any court for the trial of civil causes only, said board of commissioners shall draw twenty-four scrolls; provided, that in Wayne county the forty-two scrolls required by this section shall be drawn only at the January and July criminal terms of court; at all other times, thirty-six scrolls shall be drawn from the jury box for each week. (Rev., s. 1959; 1907, c. 239; Ex. Sess. 1913, c. 4; Pub. Laws, 1915, cc. 233, 744, 764; 1921, c. 142; 1923, c. 107, s. 2; 1937, c. 117; 1937, c. 19, s. 4; 1939, c. 140; 1941, cc. 87, 93, 175; C. S. 2315.)

Editor's Note.—By Public Laws 1921, ch. 142, the paragraph relating to Stokes County was added. In 1923 the paragraphs relating to Wayne, Robeson, Granville and McDowell Counties were added.

Public Laws 1941, c. 92, s. 1, repealed Public Laws 1937, c. 19 which added a paragraph relating to Ashe County. The 1939 amendment added the proviso relating to Wayne County which was amended by Public Laws 1941, c. 87. Public Laws 1941, c. 175, added the proviso relating to Cabarrus County. § 9-5. Fees of jurors.—All jurors in the superior court other than special veniremen and tales jurors shall receive such an amount per day as the boards of commissioners of their respective counties may fix, not less than two dollars per day and not more than four dollars per day, and mileage at the rate of five cents per mile while coming to the county-seat and returning home. The said distance to be computed by the usual route of public travel. In the counties of Union, New Hanover, Randolph, Haywood, Polk, Surry, Swain, Alleghany, Anson, Graham, Ashe, Dare, Alexander, Cleveland, Clay, Transylvania, Harnett, Stanly, Mitchell, Burke, Franklin, Greene, Johnston, and Henderson, jurors other than special veniremen and tales jurors shall not receive more than three dollars per day.

Special veniremen and tales jurors shall receive such an amount per day for their attendance upon court as may be fixed by the boards of commissioners of their respective counties, not exceeding three dollars per day. Special veniremen who have been accepted on the panel in the trial of any cause shall receive the pay and mileage of regular jurors. (Rev., s. 2791; 1907, c. 85, 86, s. 1; 1921, c. 62, s. 1; C. S. 3892.)

Local Modifications.—Durham: 1943, c. 321; Harnett: 1933, c. 75; Martin: 1943, c. 173.

Cross References.—As to payment of members of the
§ 9-6. Jurors having suits pending.—If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box. (Rev., s. 1960; Code, s. 1728; 1868-9, c. 9, s. 7; 1806, c. 691; C. S. 2316.)

Cross Reference.—As to grand juror who has suit pending, see § 9-6.

Fundamental Objection.—The circumstance described by this section is a fundamental objection to the juror, when ever it is made to appear, and is a cause of challenge, although the county commissioners may have allowed his name to go upon the venire. Hodges Bros. v. Lassiter, 96 N. C. 251, 30 S. E. 923.

Such juror is incompetent, and the defendant in a criminal action is not required to show affirmatively that the juror was present and participated in the deliberations of the grand jury when the bill was found. State v. Smith, 80 N. C. 410.

§ 9-7. Disqualified persons drawn.—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead. (Rev., s. 1961; Code, s. 1729; 1889, c. 559; 1897, c. 117, s. 5; 1806, c. 694; C. S. 2317.)

§ 9-8. How drawing to continue.—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed. (Rev., s. 1961; Code, s. 1730; 1868-9, c. 9, s. 9; 1806, c. 6, s. 94; C. S. 2318.)

Cross Reference.—See § 9-3 and notes thereto.

§ 9-9. Drawing when commissioners fail to draw.—If the commissioners for any cause fail to draw a jury for any term of the superior court, regular or special, the sheriff of the county and the clerk of the commissioners, in the presence of the court, shall summon from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, or the judge may, in his discretion, at the beginning of the term direct the tales jurors to be drawn from the jury box used in drawing the petit jury for the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to serve on the petit jury, and on any day the court may discharge those who have served the preceding day. The judge may, upon his own motion, or upon the request of counsel for either plaintiff or defendant, instruct the sheriff to summon such jurors outside of the courthouse. It is a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of court. (Rev., s. 1967; Code, s. 1733; R. C., c. 31, s. 29; 1779, c. 157, ss. 4, 6; C. S. 2320.)

Cross Reference.—As to penalty for disobeying summons, see § 9-13.

§ 9-10. Summons to jurors drawn; to attend until discharged. — The clerk of the board of county commissioners shall, within five days from the drawing, deliver the list of jurors drawn for the superior court to the sheriff of the county, who shall summon the persons therein named to attend as jurors at such court. The summons shall be served, personally, or by leaving a copy thereof at the house of the juror, at least five days before the sitting of the court to which the juror is summoned. Jurors shall appear and give their attendance until discharged. (Rev., s. 1976; Code, s. 1733; 1868-9, c. 9, s. 12; R. C., c. 31, s. 29; 1779, c. 157, ss. 4, 6; C. S. 2320.)

Cross Reference.—See § 9-3 and notes thereto.

§ 9-11. Summons to talesmen; their disqualifications. — That there may not be a defect of jurors, the sheriff shall by order of the court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, or the judge may, in his discretion, at the beginning of the term direct the tales jurors to be drawn from the jury box used in drawing the petit jury for the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to serve on the petit jury, and on any day the court may discharge those who have served the preceding day. The judge may, upon his own motion, or upon the request of counsel for either plaintiff or defendant, instruct the sheriff to summon such jurors outside of the courthouse. It is a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of court. (Rev., s. 1967; Code, s. 1733; R. C., c. 31, s. 29; 1779, c. 156, s. 69; 1911, c. 15; 1915, c. 10; C. S. 2321.)


Tales Jurors Defined.—A tales is a supply of such men as are summoned on the first panel in order to make up the deficiency. Boyer v. Teague, 106 N. C. 576, 621, 11 S. E. 665.

Qualifications of Tales Juror.—A tales juror must have the same qualification as a regular juror, with the additional one of being a freeholder. State v. Sherman, 115 N. C. 773, 20 S. E. 711. This includes the requirement as to being a taxpayer. State v. Hargrove, 100 N. C. 484, 6 S. E. 185; State v. Sherman, 115 N. C. 773, 20 S. E. 711. But it is not a disqualification of such a juror that his name does not appear on the list of the county commissioners. Lee v. Lee, 71 N. C. 139.

Selection.—Although this section seems to imply that tales jurors are to be selected for the court by the executive officers, it is done upon special terms and conditions, and at the court's discretion only; under the provisions of the state constitution, the court is the only body possessing the power to make the selection.
them in advance when such a course best promotes the ends of justice. Lupton v. Spencer, 173 N. C. 126, 91 S. E. 717.

None of Original Panel Necessary.—The trial judge, in his discretion, may discharge any jurors or jury, and is not required to reserve one juror of the original panel to "build the panel up." Boyer v. Teague, 106 N. C. 577, 11 S. E. 665. But the clerk is authorized by this section. State v. Manship, 174 N. C. 798, 94 S. E. 2.

"Freeholders."—A freeholder is one who owns land in fee, or for life, or for some indefinite period. As there are legal and equitable estates, so there are legal and equitable freeholders. State v. Ragland, 75 N. C. 12. The reality must be shown. This is the county where the court is held. State v. Cooper, 83 N. C. 620. Where a defendant is in possession of land, and where the court is to sit, the sheriff is authorized to direct the sheriff to summon "other jurors, being freeholders within the county, within or without the courthouse. State v. Manship, 174 N. C. 798, 94 S. E. 2.

A finding by the trial judge that persons drawn were not freeholders is conclusive on appeal. State v. Register, 133 N. C. 746, 46 S. E. 21.

Regular Jurors Discharged.—Where the regular jurors have been discharged by the trial judge for the term, evidently under the impression that the business of the court was over, and on the following day there remains a criminal case regularly coming up for trial on a defect of jurors, the judge, within his discretion, is authorized to direct the sheriff to summon others, being freeholders within the county, within or without the courthouse. State v. Manship, 174 N. C. 798, 94 S. E. 2.

Instruction of Court Held Not to Be an Order under This Section.—Where upon adjournment the court instructed the sheriff to summon a number of men to act as jurors, it is not an order under this section. The sheriff may at any time before the trial begin discharge any jurors who fail to give their attendance, and defendants in possession of land, having failed to exhaust their respective challenges to the jurors summoned being subject to all the qualifications of talesmen, and defendants having failed to exhaust their respective challenges to the poll, defendants' exceptions to the refusal of their motions could not be sustained. State v. Anderson, 208 N. C. 771, 182 S. E. 643.

§ 9-12. How talesmen summoned when sheriff interested.—When, in the trial of any action before a jury, the sheriff of the county in which the case is to be tried is a party to or has any interest in the action, or when the presiding judge finds upon investigation that the sheriff of the county is not a suitable person, on account of indirect interest in or relative to the cause of action, to be entrusted with the summoning of the tales jurors in any particular case pending, such judge or other presiding officer may cause some other person to summon the jurors in place of the sheriff. (Rev., s. 1968; 1889, c. 441; C. S. 2322.)


§ 9-13. Penalty for disobeying summons.—Every person on the original venire summoned to appear as a juror who fails to give his attendance until duly discharged shall forfeit and pay for the use of the county the sum of twenty dollars, to be imposed by the court; but each delinquent juror shall have until the next succeeding term to make his excuse for his nonattendance, and if, he renders an excuse deemed sufficient by the court, he shall be discharged without costs. Every person, instead of the sheriff or sheriff's deputies, who shall not appear and serve during the day when the court shall be required to reserve one juror of the original panel to "build the panel up." State v. Vick, 123 N. C. 955, 45 S. E. 656.

Method of Taking Advantage of Error.—The action of a trial judge in determining that a juror, if erroneous, is ground for a challenge to the arraignment, and where the motion to quash and set aside the entire panel, and in the absence of such challenge a defendant cannot be allowed to have the advantage of removing jurors in the same cause. State v. Moore, 120 N. C. 570, 26 S. E. 697.

§ 9-15. Questioning jurors without challenge.—The court, or any party to an action, civil or criminal, shall be allowed, in selecting the jury to make inquiry as to the fitness and competency [585]
of any person to serve as a juror, without having such inquiry treated as a challenge of such person; and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged. (1913, c. 31, s. 6; C. S. 2335.)

§ 9-16. Causes of challenge to juror drawn from box.—It shall not be a valid cause of challenge that a juror called from those whose names are drawn from the box is not a freeholder or has served on the jury within two years prior to the court at which the case is tried or has not paid the taxes assessed against him during the preceding two years. In other respects the cause of challenge shall be the same as now provided by law, and nothing herein shall modify any law authorizing jurors to be summoned from counties other than the county of trial. (1913, c. 31, ss. 5, 7; 1933, c. 130; C. S. 2326.)

See 11 N. C. Law Rev., 218, for discussion as to effect of the 1933 amendment to this section.

Editor’s Note.—Public Laws 1933, c. 130, inserted, at the end of the first sentence of this section, the clause “or has not paid the taxes assessed against him during the preceding two years.”

§ 9-17. Jurors impaneled to try case furnished with accommodations.—When a jury, impaneled to try any case, is put in charge of an officer of the court, the said officer shall furnish said jury with such accommodation as the court may order, and the same shall be paid for by the party casting the same, or by the county, under the order and in the discretion of the judge of the court. (Rev., s. 1978; Code, s. 1756; 1876-7, c. 175; 1889, c. 44; C. S. 2327.)

Effect on Verdict of Refusal to Furnish Refreshments.—Where a jury retired at 11 a. m., to consider their verdict, which was returned at 3 p.m., such verdict cannot be impeached because the sheriff declined to give them refreshments, except water, until they agreed on a verdict, or until the judge should tell him to take them to dinner. Gaither v. Generator Co., 121 N. C. 384, 28 S. E. 546.

§ 9-18. Exemption from civil arrest.—No sheriff or other officer shall arrest under civil process any juror during his attendance on or going to and returning from any court of record. All jurors on service shall be void, and the defendant and such motion shall be discharged. (Rev., s. 1979; Code, s. 1755; R. C., c. 31, s. 31; 1779, c. 157, s. 10; C. S. 2328.)

Section Does Not Repeal Common-Law Exemption.—This section does not by implication repeal the common-law exemption of nonresidents from service of process while in the State in attendance in court either as witnesses or as suitors. Cooper v. Wyman, 122 N. C. 794, 29 S. E. 947. See also, Greenleaf v. Peoples Bank, 133 N. C. 292, 45 S. E. 638.

§ 9-19. Exemptions from jury duty.—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of trains, and all members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors. On the first day of January and July of each year, the commanding officer of each company, troop, battery, detachment, or division of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, of North Carolina, shall file with the clerk of the superior court of the county in which such company, troop, battery, detachment, or division is located a statement giving the name and rank of each member of his organization who has performed all military duties during the preceding six months; and any member of such military organization whose name does not appear upon such statement shall not receive the benefit of the exemption provided for herein during the six months immediately following the filing of the statement.

The board of county commissioners of any county in North Carolina may, in their discretion, exempt any ex-confederate soldier in their county from jury duty who shall apply to them for exemption.

The clerk of the superior court of each county is hereby empowered to excuse from jury duty any person or persons exempt under the first sentence of this section prior to the convening of the term of court for which such person or persons are required to serve as jurors. (Rev., s. 1980; Code, ss. 1723, 2269; 1885, c. 289; 1889, c. 265; 1887, c. 32; 1891, c. 118; 1900, c. 333, 588; 1913, c. 38, s. 1; 1913, c. 162; 1945, c. 217, 228, 260; 1917, c. 200, s. 89; 1931, c. 410; 1937, c. 151; 1937, c. 224, s. 2; 1943, c. 343; C. S. 2339, 6870.)

Editor’s Note.—The Act of 1931 added “brakemen” to the first paragraph of this section.

The first 1937 amendment added the last paragraph. And the second 1937 amendment made the section applicable to the officers reserve corps, the enlisted reserve corps and the naval reserves.

The 1943 amendment made the section applicable to radio broadcast technicians, announcers, and optometrists.

Exemption Not a Contract.—Exemption from jury duty is not a contract, but a mere privilege, and may be revoked by the Legislature at any time. State v. Cantwell, 142 N. C. 604, 55 S. E. 320.

§ 9-20. Clerk to keep record of jurors.—The clerk of the superior court shall record alphabetically in a book kept for the purpose the names of all grand and petit jurors and talemen who serve in his court, with the term at which they serve. (Rev., s. 1891; 1893, c. 52, s. 3; C. S. 2330.)

§ 9-21. Extra or alternate juror; challenges; compensation and duties.—In the trial in the Superior Court of any case, civil or criminal, when it appears to the judge presiding that the trial is likely to be protracted, upon direction of the judge after the jury has been duly impaneled and sworn, an additional or alternate juror shall be selected in the same manner as the regular jurors in such case were selected, but each party shall be entitled to two peremptory challenges as to such alternate juror; such additional or alternate juror shall likewise be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and shall attend at
all times upon the trial with the jury and shall obey all orders and admonitions of the court to the jury and, when the jurors are ordered kept together in any case, said alternate juror shall be kept with them. Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey any order or admonition of the court to the jury, shall receive the same compensation as other jurors, and except as hereinafter provided shall be discharged upon the final submission of the case to the judge before the final submission of the case to the jury a juror becomes incapacitated or disqualified, or by reason of illness or death in his family, or other sufficient reason in the opinion of the court, he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror.

(1931, c. 103; 1939, c. 35.)

Editor’s Note.—In 9 N. C. L. Rev. 378, this statute and its background are discussed.

The amendment inserted in the last sentence the words "or by reason of illness or death in his family, or other sufficient reason in the opinion of the court." The 1939 amendment inserted in the last sentence the words "or by reason of illness or death in his family, or other sufficient reason in the opinion of the court." Constitutional. — The essential attributes of trial by jury guaranteed by Art. I, sec. 13, are the number of jurors, their impartiality and a unanimous verdict, and this section does not infringe upon same, the alternate not being technically a juror until a member of the jury has died or been discharged and the alternate is made a juror by order of the court, and the verdict being finally returned by the unanimous verdict of twelve good and lawful men.


§ 9-22. Six peremptory challenges on each side.

The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the jury upon the panel in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily six jurors upon the said panel, without showing any cause therefor, which shall be allowed by the court. (Rev., s. 1964; Code, s. 406; R. C., c. 31, s. 33; 1935, c. 459, s. 2; 1945, c. 447, s. 1; C. S. 2331.)

Cross References.—As to challenge of alternate juror, see §9-23. As to peremptory challenges in a criminal case, see §§ 15-161 and 15-162.

Editor’s Note.—By the amendment of 1935 the number of peremptory challenges was increased from four to six.

In General.—As in the case of challenges for cause, the right is given to challenge but such right does not constitute the right to select jurors. Ives v. Railroad, 142 N. C. 131, 45 S. E. 74; Medlin v. Simpson, 144 N. C. 397, 57 S. E. 24.


More Parties than One.—Whether there are one or more plaintiffs or defendants, only four (now six) peremptory challenges to the jury on either side are allowable. Bryan v. Harrison, 76 N. C. 360.

Acceptance.—Where a juror has been accepted it is error to permit a peremptory challenge. Dunn v. Railroad, 141 N. C. 393, 43 S. E. 452.


§ 9-23. Where several defendants; challenges apportioned; discretion of judge. —When there are two or more defendants in a civil action the judge presiding at the trial, if it appears to the court that there are divers and antagonistic interests between the defendants, may in his discretion apportion among the defendants the challenges now allowed by law to defendants, or he may increase the number of challenges to not exceeding four to each defendant or class of defendants representing the same interest. In either event, the same number of challenges shall be allowed each defendant or class of defendants representing the same interest. The decision of the judge as to the nature of the interests and number of challenges shall be final. (Rev., s. 1965; 1903, c. 357; C. S. 2332.)


Art. 4. Grand Jurors.

§ 9-24. How grand jury drawn.—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the number of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court. (Rev., s. 1969; Code, s. 404; R. C., c. 31, s. 33; 1779, c. 157, s. 11; C. S. 2333.)

Twelve Jurors Sufficient.—Eighteen jurors are not necessary to the finding of an indictment, but twelve are sufficient in North Carolina as at common law. State v. Stewart, 199 N. C. 340, 127 S. E. 260.

Wilson County.—Chapter 189, Public-Local Laws 1937, providing that the board of county commissioners of Wilson county shall select grand juries in the county "in the manner prescribed by law," merely empowers the board to draw grand juries in the manner prescribed by this section, and the act is a valid exercise of legislative power. State v. Peacock, 220 N. C. 63, 16 S. E. 2d (2d) 452.


§ 9-25. Grand juries in certain counties.—At the first fall and spring terms of the criminal courts held for the counties of Craven, Gaston, Guilford, Mecklenburg, Moore, Pitt, Richmond, New Hanover, McDowell, Durham, Cumberland, Lenoir, Columbus, Nash, Johnston, Vance, Wayne, Iredell, and Wake, grand juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring terms, respectively. In the event of vacancies occurring in the grand jury of Pitt county, the judge holding the court of said county may, in his discretion, order a new juror drawn to take the oaths prescribed and to fill any vacancy occurring thereon.

At any time the judge of the superior court presiding over either the criminal or civil court of New Hanover, McDowell, Durham, Cumberland, and Lenoir counties may call said grand jury to assemble and may deliver unto said grand jury an additional charge. The said judge presiding over either the criminal or civil court of New Hanover, McDowell, Durham, Cumberland, and Lenoir counties may at any time discharge said grand jury from further service, in which event he shall cause a new grand jury to be drawn which shall serve during the remainder of the said fall or spring term. The first nine members of the grand jury chosen at the first term of the superior court of Cumberland and Lenoir counties for the trial of...
criminal causes in the year of one thousand nine hundred twenty-two shall serve during the spring and fall terms, and at the first of such courts of the fall and spring terms thereafter, nine additional jurors shall be chosen to serve for one term; provided, however, that the first nine members of the grand jury chosen at the first term of the superior court of McDowell County for the trial of criminal cases after January first, one thousand nine hundred and forty-three, shall serve for one year and until their successors are chosen and qualified, and at the first of such courts of the fall and spring terms thereafter nine additional jurors shall be chosen to serve for one year and until their successors are chosen and qualified.

At any time the judge of the superior court presiding over the criminal court of Columbus county may call said grand jury to assemble and may deliver unto said jury an additional charge. The said judge presiding over the criminal court of Columbus county may at any time discharge said grand jury from further service, and may cause a new grand jury to be drawn, which shall serve during the remainder of the said fall and spring term.

Every grand juror drawn and summoned in Robeson county shall serve for a period of twelve months.

At the spring term of the criminal court held for the county of Gates, and for the county of Henderson, grand jury shall be drawn, the presiding judge shall charge it as provided by law, and they shall serve for twelve (12) months: Provided, that at any time the judge of the superior court presiding over the criminal courts of Gates county or Henderson county may call said jury to assemble and may deliver unto said grand jury an additional charge: Provided further, that the judge of the superior court presiding over the criminal courts of Gates county and of Henderson county may at any time discharge said grand jury from further service, and may cause a new grand jury to be drawn, which shall serve during the remainder of the said twelve (12) months: Provided, further, that the first nine members of the grand jury chosen at the fall term of the superior court of Gates county for the trial of criminal cases in the year one thousand nine hundred and forty-three shall serve during the fall and spring terms, and at the spring and fall terms thereafter, nine additional jurors shall be chosen to serve for one year.

At the April term of superior court held for the county of Hoke a grand jury shall be drawn, the presiding judge shall charge it as provided by law, and it shall serve until the following April term, Hoke superior court: Provided, that at any time the judge of the superior court presiding over either criminal or civil court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge: Provided further, that the judge of the superior court presiding over either criminal or civil court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge: Provided further, that the judge of the superior court presiding over either criminal or civil court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge, and it shall serve the remaining fall and spring terms respectively. In the event of any vacancy occurring in the grand jury of Johnston, Wayne or Iredell County by death, removal from the county, sickness, or otherwise, the presiding judge may, in his discretion, order such vacancy, or vacancies, filled by drawing sufficient jurors to fill said vacancy or vacancies from the jury box, and said juror or jurors so chosen shall take the oath prescribed by law, and shall fill the unexpired term of the juror or jurors whose places they were drawn to fill. The presiding judge shall have the power, in his discretion, to appoint an assistant-foreman of the grand jury in the counties of Johnston, Wayne and Iredell and said assistant-foreman so appointed shall serve in the counties aforesaid a period of one year from the time of their selection.

In the selection of a grand jury for Bertie County for the fall term of one thousand nine hundred and twenty-seven and annually thereafter, there shall be drawn and summoned forty men, in the manner now provided by law, from which a grand jury of eighteen shall be selected by the presiding judge of the superior court, which said grand jury shall serve for a period of one year from the time of their selection.

The persons drawn for service in the grand jury at the term at which said grand jury is selected, and who are not selected to serve on the grand jury, shall serve on the petit jury for the week of the term at which the grand jury is selected: Provided, that at other terms of the Superior Court of Bertie County, both civil and criminal, there shall be drawn and summoned, in the manner now provided by law, twenty persons from which the jury for the term of court for which they are drawn shall be selected.

At the first term of court for the trial of criminal cases in Durham county after the first day of July, one thousand nine hundred and twenty-nine, there shall be chosen a grand jury as now provided by law, and the first nine members of said grand jury chosen at said term shall serve for a term of one year, and the second nine members of said grand jury so chosen shall serve for a term of six months, and thereafter at the first regular and not special term of criminal court after the first days of January and July of each year there shall be chosen nine members of said grand jury to serve for a term of one year.

The grand jurors for Davidson County shall be drawn at the first fall and spring terms of the criminal courts held in the County of Davidson, and the judge shall charge them as provided by law, and the jurors so drawn shall serve during the remaining fall and spring terms respectively.

In the event of any vacancy occurring in the grand jury of Johnston, Wayne or Iredell County by death, removal from the county, sickness, or otherwise, the presiding judge may, in his discretion, order such vacancy, or vacancies, filled by drawing sufficient jurors to fill said vacancy or vacancies from the jury box, and said juror or jurors so chosen shall take the oath prescribed by law, and shall fill the unexpired term of the juror or jurors whose places they were drawn to fill. The presiding judge shall have the power, in his discretion, to appoint an assistant-foreman of the grand jury in the counties of Johnston, Wayne and Iredell and said assistant-foreman so appointed shall serve in the counties aforesaid a period of one year from the time of their selection.

In the selection of a grand jury for Bertie County for the fall term of one thousand nine hundred and twenty-seven and annually thereafter, there shall be drawn and summoned forty men, in the manner now provided by law, from which a grand jury of eighteen shall be selected by the presiding judge of the superior court, which said grand jury shall serve for a period of one year from the time of their selection.

The persons drawn for service in the grand jury at the term at which said grand jury is selected, and who are not selected to serve on the grand jury, shall serve on the petit jury for the week of the term at which the grand jury is selected: Provided, that at other terms of the Superior Court of Bertie County, both civil and criminal, there shall be drawn and summoned, in the manner now provided by law, twenty persons from which the jury for the term of court for which they are drawn shall be selected.

At the first term of court for the trial of criminal cases in Durham county after the first day of July, one thousand nine hundred and twenty-nine, there shall be chosen a grand jury as now provided by law, and the first nine members of said grand jury chosen at said term shall serve for a term of one year, and the second nine members of said grand jury so chosen shall serve for a term of six months, and thereafter at the first regular and not special term of criminal court after the first days of January and July of each year there shall be chosen nine members of said grand jury to serve for a term of one year.

The grand jurors for Davidson County shall be drawn at the first fall and spring terms of the criminal courts held in the County of Davidson, and the judge shall charge them as provided by law, and the jurors so drawn shall serve during the remaining fall and spring terms respectively.

In the event of any vacancy occurring in the grand jury of Johnston, Wayne or Iredell County by death, removal from the county, sickness, or otherwise, the presiding judge may, in his discretion, order such vacancy, or vacancies, filled by drawing sufficient jurors to fill said vacancy or vacancies from the jury box, and said juror or jurors so chosen shall take the oath prescribed by law, and shall fill the unexpired term of the juror or jurors whose places they were drawn to fill. The presiding judge shall have the power, in his discretion, to appoint an assistant-foreman of the grand jury in the counties of Johnston, Wayne and Iredell and said assistant-foreman so appointed shall serve in the counties aforesaid a period of one year from the time of their selection.
pointed shall, in the absence or disqualification of the foreman, discharge the duties of the foreman of said grand jury.

At the first term of court for the trial of criminal cases in New Hanover County after the first day of July, one thousand nine hundred and thirty-seven, there shall be chosen a grand jury as now provided by law, and the first nine members of said jury chosen at said term shall serve for a term of one year, and the second nine members of said jury so chosen shall serve for a term of six months, and thereafter at the first term of criminal court after the first days of January and July of each year there shall be chosen nine members of said grand jury to serve for a term of one year.

At each August term of the superior court hereafter held for the county of Scotland the grand jury drawn as now provided by law shall be charged by the presiding judge as provided by law, and said grand jury shall serve until the next succeeding March term of the superior court for Scotland County and until its successor has been drawn and has qualified; at each March term of the superior court hereafter held for the county of Scotland the grand jury drawn as now provided by law shall be charged by the presiding judge as provided by law, and said grand jury shall serve until the next succeeding August term of the superior court for Scotland County and until its successor has been drawn and has qualified; said grand jury shall attend every term of the superior court held in said county in which criminal cases may under the law be tried during the term of service of said grand jury and until it has been discharged; at any time the judge of the superior court presiding over either criminal, civil, or mixed terms of court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge; the judge of the superior court presiding over criminal, civil, or mixed terms of court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge.

§ 9-26. Exceptions for disqualifications. — All exceptions to grand jurors found on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived. But no indictment shall be quashed, nor shall judgment thereon be arrested, by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue. (Rev., s. 1970; Code, s. 1741; 1907, c. 36, s. 1; C. S. 2335.)

Grand Jury of Twelve Men.—An indictment found by a grand jury of twelve men is good, provided all of the twelve concur in finding the bill. State v. Perry, 122 N. C. 1018, 29 S. E. 384.

Duty of Grand Jurors.—It is not only the right but it is the duty of grand jurors, of their own motion, to originate prosecutions by making presentments of all violations of law which have come under the personal observation or knowledge of each juror, or of which they have credible information. State v. Wilkes, 104 N. C. 647, 10 S. E. 453.

A party litigant does not have the right to select jurors, but only to challenge or reject them. State v. Peacock, 230 N. C. 63, 16 S. E. (2d) 452.

Member of Petit Jury.—The fact that a member of the grand jury which returned a true bill for perjury was one of the petit jury that tried the issues in an action wherein it was charged the perjury was com-
mitted, is not good ground for alating or quashing the indictment. He was bound by his oath as a grand juror to communicate to his fellows the information he had acquired as a petit juror. State v. Wilcox, 104 N. C. 847, 19 S. E. 433.

§ 9-27. Foreman may administer oaths to witnesses.—The foreman of every grand jury duly sworn and impaneled in any of the courts has power to administer oaths and affirmations to persons to be examined before it as witnesses: Provided, that the oath or affirmation, except those whose names are endorsed on the bill of indictment by the officer prosecuting in behalf of the state, or by direction of the court, the foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the jury. In case of the absence of the foreman, or in case of his inability to serve, the presiding Judge shall appoint an acting foreman, who shall have all powers vested by law in the foreman. (Rev. s. 1971; Code, s. 1742; 1879, c. 13; 1929, c. 228; C. S. § 2336.)

Editor's Note.—The Act of 1929 added the last sentence to this section.
The trial judge has the discretionary power to issue a writ of venire facias, instead of directing the jurors to be drawn from the jury box, and the court's action in issuing the writ is not reviewable in the absence of abuse of discretion. State v. Casey, 212 N. C. 352, 193 S. E. 411.

An objection by a prisoner charged with capital offense, that the jurors summoned under this section, or drawn from the box under section 9-30, are disqualified, is untenable since both are drawn from the jury box as prescribed by section 9-30, is untenable since the latter method is purely discretionary. State v. Smart, 111 N. C. 669, 28 S. E. 546.

The ordering of a special venire where the prisoner is charged with a capital offense, and the manner in which it should be summoned or drawn, when so ordered, whether selected by the sheriff under this section, or drawn from the box under section 9-30, are both discretionary with the judge of the superior court, and unless an objection goes to the whole panel of jurors, it may not be taken advantage of by a challenge to the array, unless there is partiality or misconduct of the sheriff shown, or some irregularity in making out the list. State v. Levy, 187 N. C. 581, 122 S. E. 368.

Juror May Have Served Within Two Years.—A juror summoned on a special venire is not rendered incompetent because he has served on the jury in the same court within two years. Only tales jurors come within the proviso of sec. 9-11 and, in order that they may be disqualified, it must appear that they have not only been summoned, but have acted as jurors within that time. State v. Whitefield, 221 N. C. 161, 25 N. E. 576.

Special Venire Selected without Partiality.—A challenge to the array on the ground that the sheriff and his deputies, under instructions by the sheriff, selected for the special venire the special veniremen, good character, who had not served on the jury within the past two years and who lived in townships in the county other than the township in which the crime was committed and townships contiguous thereto, is properly refused, the instructions of the sheriff being in compliance with this section, and the action of the sheriff and the deputies showing no partiality, misconduct and irregularity in making out the list. State v. Dixon, 215 N. C. 438, 2 S. E. 2d 371.

Special Venire Selected without Regard to Color.—It is no ground of exception that a special venire was selected from the freeholders of the county without regard to color, or no reference having been had to the jury list constituted by the county court. State v. Taylor, 61 N. C. 598.

Accessory May Be Tried by Special Venire.—Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a juror selected from a special venire ordered in the case. State v. Register, 133 N. C. 746, 46 S. E. 21.

Special Venire by Court in Consequence of the Sheriff's Failure to Perform His Duty.—When a special venire has been ordered by the court for the trial of a capital offense, the veniremen, being selected by the sheriff in his discretion, not from the jury box, are subject to the same rules and penalties as are prescribed for tales jurors. State v. Avant, 202 N. C. 680, 163 S. E. 806.

§ 9-30. Drawn from jury box in court by judge's order.—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court with him the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen.

The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing hall be completed from box number two after the same has been well shaken. (Rev., s. 1974; Code, s. 1739; 1897, c. 364; 1913, c. 31, s. 2; C. S. 2339.)

Cross Reference.—As to qualification of jurors, see § 9-1 and annotations thereto.

§ 9-31. Penalty on sheriff not executing writ or jurors not attending.—If any sheriff fails duly to execute and return such writ of venire facias, he shall be fined by the court not exceeding one hundred dollars. All jurors so summoned shall attend until discharged by the court, under the same rules and penalties as are prescribed for other jurors. (Rev., ss. 1975, 3603; Code, s. 1740; R. C., c. 35, s. 31; 1830, c. 27, s. 2; C. S. 2340.)

Cross Reference.—As to rules and penalties prescribed for other jurors, see § 9-10 et seq.

Amendment of Return on Writ.—Where a sheriff, in making his return on a writ as a special venire, omitted, by mistake, the name of one who on the face thereof, "Received October 15, 1893, executed October 30, 1893, by summoning one hundred and fifty men," it was within the discretion of the court, at the term to which the return was returned to allow the defendant to correct the same, and to return a further venire to be summoned at once from the by-standers. State v. Stanton, 118 N. C. 1182, 24 S. E. 536.

Matters Affecting Entire Panel.—In the absence of any allegation that the sheriff acted corruptly or with partiality in summoning the venire, or that anything had been done affecting "the integrity and fairness of the entire panel," it is not a ground of challenge to the array that the sheriff failed to summon several of the special venire drawn from the jury box or that the jurors were not approved by the county commissioners. State v. Stanton, 118 N. C. 1182, 24 S. E. 536.

The integrity and fairness of the entire panel of jurors summoned in obedience to a writ of special venire are not affected by the fact that one man named in the writ had removed from the county and that another named therein was dead when the jury list was revised by the commissioners. Neither are they affected by the fact that one of these named on the venire was not summoned, nor by the fact that the sheriff in copying the list of the venire furnished to him omitted, by mistake, the name of one who in consequence was not summoned. State v. Whitt, 113 N. C. 716, 18 S. E. 715.

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Chapter 10. Notaries.

Sec. 10-1. Appointment and commission; term of office; revocation of commission.—The governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries public, and shall issue to each a commission. Any commission so issued by the Governor or his predecessor, shall be revokable by him in his discretion upon complaint being made against such notary public and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission.

Whenever the Governor shall have revoked the commission of any notary public appointed by him, or his predecessor in office, it shall be his duty to file with the clerk of the court in the county of such notary public a copy of said order and mail a copy of same to said notary public.

Any person holding himself out to the public as a notary public, or any person attempting to act in such capacity after his commission shall have been revoked by the Governor, shall be guilty of a misdemeanor and upon conviction be punishable in the discretion of the court, as provided for in other misdemeanors.

Cross References.—As to validating acknowledgments before notaries under age, see § 10-10. As to validation of depositions; revocation of commission—In State v. Knight, supra, the decision, with the great Chief Justice Clark dissenting, held that a notary public was not a public officer, that the Legislature could not change its character by simply making a change in its name. This was so held in spite of the fact that, as pointed out by Mr. Chief Justice Clark, there was no constitutional provision as to notaries public, and that the place was wholly a creation of legislative enactment. In Opinion of Justices, 165 Mass. 599, 601, 43 N. E. 927, 32 L. R. A. 350, the court said: "Where an office is created by statute . . . the qualifications required . . . are wholly within the control of the Legislature, unless there is some limitation put upon the Legislature by the Constitution." And in Bank v. Smith (Tenn.), 37 S. W. 1102, it was said: "All that is needed to enable one to be a de jure female notary public is an enacting act of the Legislature."

However correct or incorrect may have been the conclusion of the court in State v. Knight, supra, by the very reasoning in that case, women are now eligible as notaries public. Federal and State constitutional amendments now insure to women the right to the ballot on equal terms with men. Article VI, sec. 7, of the Constitution of North Carolina is as follows: "Every voter in North Carolina, except as in this article disquilled, shall be eligible to office," etc. Women are not included within the exceptions numbered. See Lee v. Dunn, 73 N. C. 995; Spruill v. Bateman, 163 N. C. 588, 77 S. E. 760. Therefore, limited as is the office of a notary public, the position of notary public is a public office, it follows that women are eligible to the office of notary public.

Chapter 10. Notaries.
§ 10-2

CH. 10. NOTARIES

§ 10-2. To qualify before clerk; record of qualification.—Upon exhibiting their commissions to the clerk of the superior court of the county in which they are to act, the notaries shall be duly qualified by taking before said clerk an oath of office, and a certificate of the commission shall be deposited with the clerk and filed among the records, and he shall note on his minutes the qualification of the notary public. (Rev., ss. 2347, 2348; Code, ss. 3304, 3305; C. S. 3174.)

Cross References.—As to the oath prescribed for officers, see § 11-11. As to when an attorney is disqualified, see § 47-8.

§ 10-3. Clerks notaries ex officio; may certify own seals.—The clerks of the superior court may act as notaries public, in their several counties, in the exercise of their office as clerks, and may certify their notarial acts under the seals of their respective counties. (Rev., s. 2349; Code, s. 3306; R. C., c. 75, s. 3; 1833, c. 7, ss. 1, 2; C. S. 3174.)

A clerk of the superior court, is, by virtue of his office, a notary public, and the taking of acknowledgments must be referred to the exercise of his notarial authority. Lawrence v. Hoiges, 92 N. C. 672, 681.

§ 10-4. Powers of notaries.—Notaries public, in and out of the state, have power to take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, to take depositions and to administer oaths and affirmations in matters incident or belonging to the duties of their office, and to take affidavits to be used before a court, judge or other officer, within the state, and have power to take the private examination of females covert. (Rev., s. 2350; Code, s. 3307; 1866, c. 30; 1879, c. 128; C. S. 3175.)

Cross Reference.—As to the taking of affidavits to be used before a court, see § 3-8.

Powers.—A notary public is recognized by the universal law of civilized and commercial nations; but his powers are confined to the authentication of commercial papers and to the protesting of bills of exchange and the like. Benedict, Hall & Co. v. Hall, 76 N. C. 113, 114.

By statute in this State the powers of notaries public have been extended beyond those which were incident to the office by the universal law-merchant, and permitted to the presentment of bills of exchange for acceptance or payment and the protest thereof for nonpayment or refusal to accept; they may now take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds, and other instruments of writing, etc., permitted to take acknowledgments, affidavits and oaths, &c., and may examine as a witness and were believed. Pipe and Foundry Co. v. Keith & Co., 114 N. C. 178, 184, 19 S. E. 109.

§ 10-5. Notaries public, who are stockholders, etc., permitted to take acknowledgments, administer oaths, &c. — It shall be lawful for any notary public who is a stockholder, director, officer, or employee of a bank or other corporation to take the acknowledgment of any party to any written instrument executed by or for such corporation, or to administer an oath to any other stockholder, director, officer, employee, agent of such corporation, or to protest for non-acceptance or non-payment of bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by such corporation: Provided, it shall be unlawful for any notary public to take the acknowledgment of an instrument executed by or for a bank or other corporation of which he is a stockholder, director, officer, or employee, where such notary is individually a party to such instrument, or to protest against any negotiable instrument owned or held for collection by such corporation, where such notary is individually a party to such instrument. (1937, c. 183.)

§ 10-6. May exercise powers in any county.—Notaries public have full power and authority to perform the functions of their office in any and all counties of the state, and full faith and credit shall be given to any of their official acts wherever the same shall be made and done. (Rev., s. 2351; 1891. c. 248; C. S. 3176.)

A notary public resident out of the State has no authority to take affidavits to be used in the courts of this State. Hall & Co. v. Hall, 76 N. C. 113, 114.

§ 10-7. Expiration of commission to be stated after signature.—Notaries public shall state after each official signature by them the date of the expiration of their commissions; but the failure to do so shall not thereby invalidate their official acts. (Rev., s. 2351a; C. S. 3177.)

§ 10-8. Fees of notaries.—Notaries public and other persons acting as such shall be allowed the sum of fifty cents for protesting for nonacceptance or for nonpayment, or for both when done at the same time, any order, draft, note, bond or bill for any other reason when he is an employee of the grantor, the sum of ten cents for each notice sent in connection therewith. For other necessary services, where no fee is fixed, they shall be allowed twenty cents for every ninety words.
Cases of protest concerning vessels or other cargoes shall not be affected by this section. (Rev., s. 8860; Code, s. 3749; 1889, c. 446; 1895, c. 296; 1903, c. 784; C. S. 3178.) The fees of notaries public are created and regulated by statute. Cigar & Vinegar Co. v. Carroll, 124 N. C. 555, 559, 32 S. E. 959.

§ 10-9. Notarial seal.—Official acts by notaries public shall be attested by their notarial seals. (Rev., s. 2532; C. S. 3179.)

Cross Reference.—As to validation of deeds and probate and registration thereof where notarial seals have been omitted, see §§ 47-102 and 47-103.

Courts Take Judicial Notice.—It was said in Pierce v. Indseth, 106 U. S. 546, 1 S. Ct. 418, 27 L. Ed. 254: "The court will take judicial notice of notarial seals, or signatures to instruments recognized by the commercial law of the world." State v. Knight, 169 N. C. 333, 338, 85 S. E. 418.

Name in Seal.—The statute authorizing a notary public to take acknowledgment of deeds does not require that his name or any name shall be used in the notarial seal, and the seal appended to the certificate is presumably his in the absence of evidence to the contrary; hence, where the fact of the execution of deed by a notary public is adjudged to have been proved by such seal and certificate, it is not rebutted by the mere fact that the notary signs his name, "Geo. Theo. Somner" and the seal has on it the name of "Theo. Somner." Deans v. Pate, 114 N. C. 194, 19 S. E. 146.

§ 10-10. Acts of minor notaries validated.—All acts of notaries public for the state of North Carolina who were not yet twenty-one years of age at the time of the performance of such acts are hereby validated; and in every case where deeds or other instruments have been acknowledged before such notary public who was not yet twenty-one years of age at the time of taking of said acknowledgment, such acknowledgment taken before such notary public is hereby declared to be sufficient and valid. (1941, c. 233.)

Cross References.—As to validation of defective acknowledgments before notaries public in certain conveyances, see §§ 47-52, 47-53, 47-162.

Chapter 11. Oaths.


Sec. 11-1. Oaths to be administered with solemnity.

Art. 2. Forms of Official and Other Oaths.

Sec. 11-8. When deputies may administer.

Sec. 11-9. Administration by certain officers.

Sec. 11-10. When county surveyors may administer oaths.

Art. 3. Forms of Official and Other Oaths.

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

§ 11-1. Oaths to be administered with solemnity.—Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity. (Rev., s. 2533; R. C., c. 76, s. 1; 1777, c. 108, s. 2; C. S. 3188.) This "solemnity" applies not only to the substance of the oath, but to the form and manner of taking it and of administering it. State v. Davis, 69 N. C. 383, 385.

Object of Statutes.—It is manifest, by a perusal of the statutes, that they were not intended to alter any rule of law, but the sole object was to prescribe forms for the sake of convenience and uniformity. State v. Pitt, 166 N. C. 268, 271, 80 S. E. 1060.

Double Sanction to Oath of Witness.—The law requires two guarantees of the truth of what a witness is about to state; he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction to his oath. Shaw v. Moore, 49 N. C. 25, 26.

Sufficiency of Belief.—A person who believes in the existence of a Supreme Being, who EXISTS. . .
Objection to Oath of Incompetent after Verdict.—Where a juror is incompetent to be sworn because an atheist (State v. Davis, 80 N. C. 412) and the objection is not discovered until after the verdict is returned it vests in the discretion of the trial judge. State v. Lambeth, 93 N. C. 618; State v. Council, 129 N. C. 511, 39 S. E. 814, 816.

Objection to Manner of Administering after Verdict.—Where a juror is incompetent to be sworn because an atheist (State v. Benjamin, 89 N. C. 225) and his counsel let him acquiesce in the manner in which the oath was taken, to object after the verdict would simply make it a trial not a decision upon the merits but a trial by jury. If in the presence of the prisoner and his counsel he was called upon to speak, the prisoner should not be heard after the verdict has gone against him. State v. Byrd, 34 N. C. 377; State v. Patricke, 48 N. C. 443; Braggs v. Byrd, 9 N. C. 441; State v. Council, 129 N. C. 511, 39 S. E. 814, 816.

Failure to Administer.—In State v. Gee, 92 N. C. 135, where a juror need not repeat the words "so help me God". State v. Knight, 84 N. C. 790.

Ministerial Act.—The administration of an oath is a ministerial act, and by the direction of the court, but is the act of the court. State v. Davis, 69 N. C. 383, 385.

Oath of Incompetent after Verdict.—Where a juror was sworn in the presence of the prisoner, but was called upon to speak, the prisoner should not be heard after the verdict had gone against him. State v. Mace, 86 N. C. 668, 670. Objection to Manner of Administering after Verdict.—Where a juror was sworn in the presence of the prisoner, but was called upon to speak, the prisoner should not be heard after the verdict had gone against him. State v. Mace, 86 N. C. 668, 670.

Partiality of Juror.—"As to form of oaths, see § 11-11. As perjury, see § 14-299.

Editor's Note.—The 1941 amendment dispensed with the former requirement that the Holy Gospel be kissed as part of the administration of an oath. For case relating to the requirement, see State v. Owen, 72 N. C. 605, 612.

Application to Witnesses.—After this manner, every witness (Rev. s. 3309; Code, R. C. c. 76, s. 1; 1777, c. 108, s. 2; 1941, c. 11; S. C. § 3189.)

Sufficiency of Juror's Oath.—An oath administered to a juror in words prescribed by statute is sufficient: the juror need not repeat the words "so help me God." 2 Bush, Cr. Law, secs. 862, 982; State v. Mazon, 90 N. C. 676, 678.

Validity of Irregular Oath.—To hold invalid an oath that did not follow the very words of the statute would be to require public oaths to be perjury and slander," in the language of the Supreme Court of Tennessee, "could often find, in slight variances from the prescribed form, a means of escape from condign punishment which justice invokes. Undoubtedly an oath, administered substantially according to the prescribed form, will be valid, and if taken falsely the party will be guilty of perjury, 21 Johns. 31; 12 Ves. 320. And in the language of Green, C. J., in State v. Daylor, 38 N. Y. (N. Y.), 49: "The Legislature did not design to prescribe the precise form of the oath, the slightest deviation from the words of which would prove fatal." State v. Mazon, 90 N. C. 676, 678.

Same.—Same.—Juror's Oath in Capital Cases.—"Although the juror may say "the word you swear" at the commencement of the oath of jurors in a capital case, and mars the comeliness of judicial proceedings, we do not think that it vitiates the oath. State v. Owen, 72 N. C. 605, 612.

The manner of swearing is, as Judge Pearson says, merely a form "adapted to the religious belief of the general mass of citizens for the sake of convenience and uniformity." State v. Witt, 166 N. C. 268, 271, 80 S. E. 1060.

Presumption.—"The administration of an oath to a witness is an official act of the court; and it being shown affirmatively and by the evidence that an oath was administered to the defendant in open court or by the examining judge, a presumption arises that it was rightly done. State v. Mace, 86 N. C. 668, 670.

Willful Violation.—A willful violation of such an oath in a material matter is perjury, and no other. This is the general rule. State v. Davis, 69 N. C. 383, 385.

When Deputy Clerk May Administer.—The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff in an action of claim and delivery. Jackson v. Buchanan, 89 N. C. 74.


Administration of oath with uplifted hand.—When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel: and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has impregnated on his own head. (Rev., s. 2354; Code, s. 3309; R. C. c. 76, s. 1; 1777, c. 108, s. 2; 1941, c. 11; S. C. § 3189.)


Administration of oath with uplifted hand.—When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel: and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has impregnated on his own head. (Rev., s. 2354; Code, s. 3310; R. C. c. 76, s. 2; 1777, c. 108, s. 3; S. C. § 3190.)


Presumption as to Manner.—Where it appears that the registrar administered the prescribed oath to electro's, but that he did not swear them on the Bible, it will be inferred, in the absence of direct proof to the contrary, that the oath was taken with uplifted hand, as specified by the section, and was accepted as a valid mode of administering it, by both the registrar and the elector. Administering the oath in such manner is sufficient to meet the requirements of the election law. State v. Nicholson, 102 N. C. 465, 9 S. E. 545.


Affirmation of Quakers and others.—The solemn affirmation of Quakers, Moravians, Dunkers and Mennonites, made in the manner heretofore used and accustomed, shall be admitted as evidence in all civil and criminal actions; and in all cases where they are required to take an oath to support the constitution of the state, or of the United States, or an oath of...
office, they shall make their solemn affirmation in the words of the oath beginning after the word “swear”; which affirmation shall be effectual to all intents and purposes. (Rev., s. 2356; Code, s. 3311; R. C., c. 76, s. 3; 1777, c. 108, s. 4; 1777, c. 115, s. 42; 1819, c. 1019; 1821, c. 1119.)

Quakers and some others who have conscientious scruples about swearing at all, are permitted to “affirm.” State v. Davis, 69 N. C. 383, 385.

§ 11-5. Oaths of corporations.—In all cases where a corporation is appointed administrator, executor, collector, or to any other fiduciary position, of which fiduciary an oath is required by law, such oath may be taken by such corporation by and through any officer or agent of said corporation who is authorized by law to verify pleadings in behalf of such corporation; and any oath so taken shall be valid as the oath of such corporation. Any oath heretofore taken in the name of a corporation as such fiduciary is hereby validated as the oath of such corporation. (1919, c. 89, ss. 1, 2; C. S. 3192.)

Cross References.—As to verification of pleadings by corporations, see § 1-147.

§ 11-6. Oath to support constitution of United States; all officers take.—All members of the general assembly, and all officers who shall be elected or appointed to any office of trust or profit within the state, shall, agreeably to act of congress, take the following oath or affirmation:

I, A. B., do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States; so help me, God.

Which oath shall be taken before they enter upon the execution of the duties of the office. (Rev., s. 2357; Code, s. 3313; R. C., c. 76, s. 5; 1791, c. 342, s. 2; C. S. 3193.)

Cross References.—As to what constitutes an office or place of trust or profit within the meaning of this section, see §§ 128-1, 128-13. See also, Const. Art. VI, s. 7, for oaths of Quakers and others, see § 11-4.

As to public officers, see §§ 11-6 and Const., Art. VI, s. 7.

§ 11-7. Oath or affirmation to support state constitution; all officers to take.—Every member of the general assembly, and every person who shall be chosen or appointed to hold any office of trust or profit in the state, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation:

I, A. B., do solemnly and sincerely swear (or affirm) that I will support the Constitution of the State and of the United States, to the best of my knowledge and ability; so help me, God.

Where such person shall be of the people called Quakers, Moravians, Mennonites or Dunkers, he shall take and subscribe the following affirmation:

I, A. B., do solemnly and sincerely declare and affirm that I will truly and faithfully demean myself as a peaceful citizen of North Carolina; that I will be subject to the powers and authorities that are or may be established for the good government thereof, not inconsistent with the constitution of the state and constitution of the United States, either by yielding an active or passive obedience thereto, and that I will not abet or join the enemies of the state, by any means, in any conspiracy whatever, against the state; that I will disclose and make known to the legislative, executive or judicial powers of the state all treasonable conspiracies which I shall know to be made or intended against the state. (Rev., s. 2358; Code, s. 3312; R. C., c. 76, s. 4; 1751, c. 342, s. 1; C. S. 3194.)

Cross References.—As to oath with uplifted hand, see § 11-11. As to administration of oaths by Quakers and others, see § 11-4. As to public officers, see §§ 11-6 and Const., Art. VI, s. 7.

§ 11-8. When deputies may administer.—In all cases where any civil officer, in the discharge of his duties, is permitted by the law to administer an oath, the deputy of such officer, when discharging such duties, shall have authority to administer it, provided he is a sworn officer; and the oath thus administered by the deputy shall be as obligatory as if administered by the principal officer, and shall be attended with the same penalties in case of false swearing. (Rev., s. 2359; Code, s. 3316; R. C., c. 76, s. 7; 1836, c. 27, s. 2; C. S. 3195.)

Cross References.—As to administration of homestead appraiser’s oath, see § 1-371 and annotations. See also, annotations to § 11-2.

§ 11-9. Administration by certain officers.—The chairman of the board of county commissioners and the chairman of the board of education of the several counties may administer oaths in any matter or hearing before their respective boards. (Rev., s. 2262; 1899, c. 89; 1889, c. 539; C. S. 3196.)

Cross Reference.—As to power of sheriff to administer oath to homestead appraiser, see § 1-371.

§ 11-10. When county surveyors may administer oaths.—The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in laying off widows’ dower, in establishing boundaries and in surveying vacant lands under warrants. (Rev., s. 2361; Code, s. 3314; 1881, c. 144; C. S. 3197.)

Art. 2. Forms of Official and Other Oaths.

§ 11-11. Oaths of sundry persons; forms.—The oaths of office to be taken by the several persons hereafter named shall be in the words following the names of said persons respectively:

Administrator

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B., and a true and perfect inventory thereof return according to law; and that

[ 596 ]
all other duties appertaining to the charge re-
posed in you, you will well and truly perform,
according to law, and with your best skill and
ability; so help you, God.

Attorney at Law
I, A. B., do swear (or affirm) that I will truly
and honestly demean myself in the practice of an
attorney, according to the best of my knowledge
and ability; so help me, God.

Attorney-General, State Solicitors and
County Attorneys
I, A. B., do solemnly swear (or affirm) that I
will well and truly serve the state of North Car-
olina in the office of attorney-general (solicitor
for the state or attorney for the state in the county of ......... ); I will, in the execution
of my office, endeavor to have the criminal laws
fairly and impartially administered, so far as in
me lies, according to the best of my knowledge
and ability; so help me, God.

Auditor
I, A. B., do solemnly swear (or affirm) that I
will well and truly execute the trust reposed in
me as auditor, without favor or partiality, ac-
cording to law, to the best of my knowledge
and ability; so help me, God.

Book Debt Oath
You swear (or affirm) that the matter in dis-
put is a book account; that you have no means
to prove the delivery of such articles, as you pro-
pose to prove by your own oath, or any of them,
but by yourself; and you further swear that the
account rendered by you is just and true; and
that you have given all just credits; so help you,
God.

Book Debt Oath for Administrator
You, as executor or administrator of A. B,
swear (or affirm) that you verily believe this ac-
count to be just and true, and that there are no
witnesses, to your knowledge, capable of proving
the delivery of the articles therein charged; and
that you found the book or account so opened
and do not know of any other or further credit
to be given than what is therein given; so help
you, God.

Clerk of the Supreme Court
I, A. B., do swear (or affirm) that, by myself
or any other person, I neither have given, nor
will give, to any person whatsoever, any gra-
tuity, gift, fee or reward, in consideration of my
election or appointment to the office of clerk of
the superior court for the county of ........... ; nor
have I sold, or offered to sell, nor will I sell or
offer to sell, my interest in the said office; I also
solemnly swear that I do not, directly or indi-
rectly, hold any other lucrative office in the state;
and I do further swear that I will execute the
office of clerk of the superior court for the county of ........... without prejudice, favor, affection
or partiality, to the best of my skill and ability; so
help me, God.

Commissioners Alloting a Year's Provisions
You and each of you swear (or affirm) that
you will lay off and allot to the petitioner a year's
provisions for herself and family, according to
law, and with your best skill and ability; so help
you, God.

Commissioners Dividing and Allotting Real
Estate
You and each of you swear (or affirm) that, in
the partition of the real estate now about to be
made by you, you will do equal and impartial
justice among the several claimants, according to
their several rights, and agreeably to law; so help
you, God.

Commissioner of Wrecks
I, A. B., do solemnly swear (or affirm) that I
will truly and faithfully discharge the duties of a
commissioner of wrecks, for the district of
............., in the county of ............., accord-
ing to law; so help me, God.

Constable
I, A. B., do solemnly swear (or affirm) that
I will well and truly serve the state of North
Carolina in the office of constable; I will see and
cause the peace of the state to be well and truly
preserved and kept, according to my power; I will
arrest all such persons as, in my sight, shall ride
or go armed offensively, or shall commit or make
any riot, affray or other breach of the peace; I
will do my best endeavor, upon complaint made
to me, to apprehend all felons and rioters or per-
sions riotously assembled, and if any such offend-
ers shall make resistance with force, I will make
hue and cry, and will pursue them according to
law, and will faithfully and without delay execute
and return all lawful precepts to me directed; I
will well and truly, according to my knowledge,
power and ability, do and execute all other things
belonging to the office of constable, so long as I
shall continue in office; so help me, God.

Cotton Weigher for Public
I, ............., public weigher for the city of
............. (or as the case may be), do sol-
emnly swear that I will justly, impartially and
without any deduction, except as may be allowed
by law, weigh all cotton that may be brought to
me for that purpose, and tender a true account
thereof to the parties concerned, if required so
to do; so help me, God.

Entry-Taker
I, A. B., do solemnly swear (or affirm) that I
will well and impartially discharge the several
duties of the office of entry-taker for the county of
............. according to law; so help me,
God.
§ 11-11  EXECUTOR

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; and that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help you, God.

§ 11-11  JURY, LAYING OFF DOWER

You and each of you swear (or affirm) that you will, without partiality and according to your best judgment, lay off and allot to A. B., widow of C. D., such dower in the lands of said C. D. as by law she is entitled to; so help you, God.

§ 11-11  JUDGE OF THE SUPREME COURT

I, A. B., do solemnly swear (or affirm) that in my office of justice of the supreme court of North Carolina I will administer justice without respect to persons, and do equal right to the poor and the rich, to the state and to individuals; and that I will honestly, faithfully, and impartially perform all the duties of the said officer according to the best of my abilities, and agreeably to the constitution and laws of the state; so help me, God.

§ 11-11  JUDGE OF THE SUPERIOR COURT

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of judge of the superior court of the said state; I will do equal law and right to all persons, rich and poor, without having regard to any person. I will not willingly or unwillingly take, by myself or by any other person, any fee, gift, gratuity or reward whatsoever, for any matter or thing by me to be done by virtue of my office, except the fees and salary by law appointed; I will not maintain, by myself or by any other person, privately or openly, any plea or quarrel depending in any of the said courts; I will not delay any person of common right by reason of any letter or command from any person or persons in authority to me directed, or for any other cause whatsoever; and in case any letter or orders come to me contrary to law, I will proceed to enforce the law, such letters or order notwithstanding; I will not appoint any person to be clerk of any of the said courts but such of the candidates as appear to me sufficiently qualified for that office; and in all such appointments I will nominate without reward, hope of reward, prejudice, favor or partiality or any other sinister motive whatsoever; and finally, in all things belonging to my office during my continuance therein, I will faithfully, truly and justly, according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

§ 11-11  JUSTICE OF THE PEACE

I, A. B., do solemnly swear (or affirm) that as justice of the peace of the county of ..., in all articles in the commission to me directed, I will do equal right to the poor and the rich, to the best of my judgment and according to the laws of the state; I will not, privately or openly, by myself or any other person, be of counsel in any quarrel or suit depending before me; the fines and amercements that shall happen to be made, and the forfeitures that shall be incurred, I will cause to be duly entered without concealment; and I will not willingly or unwillingly take, by myself or by any other person for me, any fee, gift, gratuity or reward whatsoever for any matter or thing by me to be done by virtue of my office, except such fees as are or may be directed and limited by statute; but well and truly I will perform my office of justice of the peace; I will not
delay any person of common right, by reason of any letter or order from any person in authority to me directed, or for any other cause whatever; and if any letter or order come to me contrary to law I will proceed to enforce the law, such letter or order notwithstanding. I will not direct or cause to be directed to the parties any warrant by me made, but will direct all such warrants to the sheriffs or constables of the county, or the other officers or ministers of the state, or other indifferent persons, to do execution thereof; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, and according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

Register of Deeds
I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of ..., in all things according to law; so help me, God.

Secretary of State
I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of secretary of state of the state of North Carolina, during my continuance in office, according to law; so help me, God.

Sheriff
I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of ..., county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

Standard Keeper
I, A. B., do swear (or affirm) that I will not stamp, seal or give any certificate for any yards, weights or measures, but such as shall, as near as possible, agree with the standard in my keeping; and that I will, in all respects, truly and faithfully discharge and execute the power and trust by law reposed in me, to the best of my ability and capacity; so help me, God.

State Treasurer
I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of state treasurer, in all things according to law, and account for the public taxes; and I will not, directly or indirectly, apply the public money to any other use than by law directed; so help me, God.

Stray Valuers
You swear (or affirm) that you will well and truly view and appraise the stray, now to be valued by you, without favor or partiality, according to your skill and ability; so help you, God.

Surveyor for a County
I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of surveyor for the county of ..., according to law; so help me, God.

Treasurer for a County
I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of ..., in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

Witness to Depose before the Grand Jury
You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Capital Trial
You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the state and A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Criminal Action
You swear (or affirm) that the evidence you shall give to the court and jury in this action between the state and A. B. shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in Civil Cases
You swear (or affirm) that the evidence you shall give to the court and jury in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness to Prove a Will
You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

General Oath
Any officer of the state or of any county or township, the term of whose oath is not given above, shall take an oath in the following form: I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of ..., according to the best of my skill and ability, according to law; so help me, God. (Rev., 1903, c. 604; 1874-5, c. 58, s. 2; R. C., c. 76, s. 6; C. S. 3199.)

Cross Reference.—As to oath of members of finance committee of county, see § 153-45.
§ 12-1. No public-local or private act may amend or repeal public law unless latter is referred to in caption.

Sec. 12-2. Repeal of statute not to affect actions.—The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute. (Rev., s. 2830; Code, s. 3764; R. C., s. 108, s. 1; 1830, c. 4; 1879, c. 163; 1881, c. 48; C. S. 3948.)

Section Not Obligatory.—As the laws of our Legislature do not bind both, except in so far as they may be absolute contracts, this section cannot be taken as merely a rule of construction, but no application where the intention of the Legislature clearly and explicitly appears to the contrary. Dyer v. Ellington, 136 N. C. 941, 945, 36 S. E. 177.

Repeal after Services Rendered.—Where a statute was in force when certain services were rendered, it was held that the plaintiff’s right had become absolute, and no subsequent repeal could invalidate it. Cupple v. Commissioners, 138 N. C. 536, 2 S. E. 359.

Action Commenced before Repeal.—By express terms of the section, the repeal of a statute does not affect an action theretofore commenced under it. Smith v. Morganston Ice Company, 159 N. C. 151, 74 S. E. 961.

Same.—For Penalty or Forfeiture.—Under the provisions of the same act a suit for a forfeiture or penalty is not discontinued by a repeal of the statute giving the penalty. State v. Williams, 97 N. C. 455, 2 S. E. 165; Grocery Co. v. Southern R. Co., 136 N. C. 396, 48 S. E. 801; Epps v. Smith, 121 N. C. 539, 48 S. E. 416.

Remedial Legislation.—In case of a remedial legislation, the general rule is not so strict, and such statutes are not infrequently given retrospective effect where the language under which the new remedy is created and such remedy is to promote the meaning and purpose of the Legislature. Connecticut and E. Ins. Co. v. Talbot, 113 Ind. 373; Ex Parte Brickley, 53 Ala. 47; People ex rel Collins v. Spicer, 99 N. Y. 335; cited and approved in Waddill v. Masten, 172 N. C. 582, 90 S. E. 694.

Mere Court Procedure.—The rule that statutes may be construed to have retrospective effect does not prevail when the consequence of the court proceeding is merely to institute, or designate of new parties to an action instituted, or to substitute or designation of new parties deemed necessary to a proper determination of the controversy or authorized to maintain and enforce a recognized or existing right. Waddill v. Masten, 172 N. C. 582, 90 S. E. 694.

Limitation of Actions.—While the Legislature has the power to extend or reduce the time in which an action may be brought, this is subject to the restriction that when the limitation is shortened a reasonable time must be given for the commencement of an action before the statute works a change, except in cases where the Legislature has given the action a prospective effect. (Rev., s. 2830; Code, s. 3764; R. C., s. 108, s. 1; 1830, c. 4; 1879, c. 163; 1881, c. 48; C. S. 3948.)

A retroactive law is one that in some way affects the rights and liabilities of parties incident to and growing out of a transaction that has passed. Waddill v. Masten, 172 N. C. 584, 90 S. E. 694.

Maxim “Leges Posteriorese Priores Contrarias Abrogant.”—To give operation to the maxim, leges posteriores priores contrarias abrogant, the latter law must be in conflict with the former; therefore, when a later statute is in conflict with an earlier, ipso facto, there is an abrogation or repeal of the former. Kesler v. Smith, 66 N. C. 154.

General Rule—Prospective Effect.—The general rule is that a statute will be given prospective effect in case in question clearly forbids such a construction. Mann v. Allen, 171 N. C. 219, 88 S. E. 235; Elizabeth City v. Commissioners, 146 N. C. 559, 60 S. E. 416; Waddill v. Masten, 172 N. C. 582, 90 S. E. 694.

Limitation is destroyed or a statute giving the cause of action is repealed unless the caption of said public-local or private act shall make specific reference to the Public Law it attempts to repeal, alter or change. (1929, c. 250, s. 1.)


Sec. 12-3. Rules for construction of statutes.

§ 12-3. Rules for construction of statutes.—In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the same statute, that is to say:

1. Singular and plural number, masculine gender, etc. Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine

[ 600 ]
gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.

2. Authority, to three or more exercised by majority. All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

3. "Month" and "year." The word "month" shall be construed to mean a calendar month, unless otherwise expressed; and the word "year," a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord."

4. Leap-year, how counted. In every leap-year the increasing day and the day before, in all legal proceedings, shall be counted as one day.

5. "Oath" and "sworn." The word "oath" shall be construed to include "affirmation," in all cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall be construed to include the word "affirmed."

6. "Person" and "property." The word "person" shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary. The words "real property" shall be coextensive with lands, tenements and hereditaments. The words "personal property" shall include moneys, goods, chattels, choses in action and evidences of any court or public office shall be required by law to be affixed to any paper issuing from such office, or containing any other mode of representing words and letters: Provided, that in all cases where a written signature is required by law, the same shall be a sufficient designation of the person to whom the same shall be ascertained by the language used in it. Traders Nat. Bank v. Lawrence Mfg. Co., 96 N. C. 298, 3 S. E. 363.

8. "Seal."—In all cases in which the seal of any court or public office shall be required by law to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal, made by any court or office, the word "seal" shall be construed to include the words "written" and "in writing."—The words "written" and "in writing," when used by way of reference to any section of a statute, shall be construed to mean the section next preceding or following that in which such reference is made; unless when some other section is expressly designated in such reference.

9. "Will."—The term "will" shall be construed to include codicils as well as wills.

10. "Written" and "in writing."—The words "written" and "in writing" may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters: Provided, that in all cases where a written signature is required by law, the same shall be in a proper handwriting, or in a proper mark.

11. "State" and "United States."—The word "state," when applied to the different parts of the United States, shall be construed to extend to and include the District of Columbia and the several territories, so called; and the words "United States" shall be construed to include the said district and territories and all dependencies.

12. "Imprisonment for one month," how construed. The words "imprisonment for one month," wherever-used in any of the statutes, shall be construed to mean "imprisonment for thirty days."

13. "Governor," "senator," "solicitor," "elector," "executor," "administrator," "collector," "juror," and "auditor."—The words "governor," "senator," "solicitor," "elector," "executor," "administrator," "collector," "juror," and "auditor," and any other words of like character shall when applied to and include the District of Columbia and the other parts of the United States, shall be construed to mean a calendar month, unless otherwise expressed; and the word "year," a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord."

14. "Written" and "in writing."—The words "written" and "in writing," when used by way of reference to any section of a statute, shall be construed to mean the section next preceding or following that in which such reference is made; unless when some other section is expressly designated in such reference.

15. "Preceding" and "following."—The words "preceding" and "following," when used by way of reference to any section of a statute, shall be construed to mean the section next preceding or following that in which such reference is made; unless when some other section is expressly designated in such reference.

16. "Seal."—In all cases in which the seal of any court or public office shall be required by law to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal, made by any court or office, the word "seal" shall be construed to include the words "written" and "in writing."—The words "written" and "in writing," when used by way of reference to any section of a statute, shall be construed to mean the section next preceding or following that in which such reference is made; unless when some other section is expressly designated in such reference.

17. "Will."—The term "will" shall be construed to include codicils as well as wills.

18. "Written" and "in writing."—The words "written" and "in writing" may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters: Provided, that in all cases where a written signature is required by law, the same shall be in a proper handwriting, or in a proper mark.

19. "State" and "United States."—The word "state," when applied to the different parts of the United States, shall be construed to extend to and include the District of Columbia and the several territories, so called; and the words "United States" shall be construed to include the said district and territories and all dependencies.
§ 12-3  CH. 12. STATUTORY CONSTRUCTION

what has no need of interpretation, or, when the words have a definite and precise meaning, to go elsewhere for the construction of the statute; or where the words used in the statute do not in any sense point to the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the phraseology of the provision, but also by considering its words ordi-

Law Existing at Time of Enactment.—To discover the true meaning of a statute, consideration should be given to the law as it existed at the time of its enactment, the public policy of the law as it may be ascertained from the statute where the language is of doubtful meaning, the statute where the language is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its objects. Fortune v. Commissioners, 140 N. C. 322, 52 S. E. 950; State v. Parlow, 91 N. C. 559, 552.

The use of inapt, inaccurate or improper terms or phrases will not invalidate the statute, provided the real meaning of the Legislature can be gathered from the context or from the general purpose and tenor of the enactment. Fortune v. Commissioners, 140 N. C. 322, 52 S. E. 950.

Mistakes or Omissions.—Legislative enactments are not to be defeated on account of mistakes or omissions, any more than other writings, provided the intention of the Legisla-

ture can be collected from the whole statute. If the mis-
take renders the intention uncertain, the court will look to the title and preamble as well as the body or purview of the act for assistance in arriving at it, and not until all these fail can the act be held inoperative. Toomey v. Golds-

Impossible Requirements.—In the construction of a statute the court will avoid attributing to the legislature the in-

terpretation which had been placed on the for-

word, Chapter 12, Statutory Construction

Mark this bill to do a subsequent statute, best with the construc-

tion is to be given to the later statute. Conn. v. Hartwell, 3 Gray, 450; Ruchmabaye v. Mottchmed, Eng. L. & Eng. 84; Bourgeois v. Charity Church, 157 S. E. 961; Adams v. Field, 21 Vt. 256. It is presumed that the Legislature which passed the latter statute knew the judicial construction which had been placed on the for-

mer one, and such a construction becomes a part of the law." Bridgers v. Taylor, 102 N. C. 86, 89, 8 S. E. 893.

Permissible to Look at Other Statutes.—To ascertain the mischief which an act of the Legislature was intended to re-

move, it is permissible, in the interpretation thereof, to con-

sider other statutes, related to the particular subject, or to

move, it is permissible, in the interpretation thereof, to con-

sider other statutes, related to the particular subject, or to

preceding, which would tend most

§ 12-3  CH. 12. STATUTORY CONSTRUCTION

same—Affidavit of Legislators. In interpreting a statute it is not permissible to show its intent and meaning by use of an affidavit, when such must be gathered from the act itself. Goin v. Trustees Indian Training School, 169 N. C. 736, 86 S. E. 629.

Harmonizing Context. It is the duty of the Court to ascer-

tain the intention of the Legislature, and to effectuate its pur-


Effectuation of Purpose. When there is no absolutely formal test for determining whether a statute is mandatory or directory, the meaning and intention of the Legislature must gov-

ern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would fol-

ow from construing it in the one way or the other. Black's Statutory Construction, 134; Scrull v. Davenport, 178 N. C. 364, 368, 100 S. E. 527.

III. SIMILAR AND RELATED ACTS.

A. In General.

Words and Phrases in One Statute Read in a Subsequent Act.—Dwarris on Statutes, 274, says: "That words and phrases, the meaning of which, in a Statute, has been ascer-

tered, are, when read in a subsequent Statute, to be un-

derstood in the same sense," and in the note of Judge Potter on the same page, it is said that "where the terms of a Stat-

ute which has received judicial construction are used in a later Statute, whether passed by the Legislature of the same State or county, or by that of another, that construction is to be given to the later Statute. Conn. v. Hartwell, 3 Gray, 450; Ruchmabaye v. Mottchmed, Eng. L. & Eng. 84; Bourgeois v. Charity Church, 157 S. E. 961; Adams v. Field, 21 Vt. 256. It is presumed that the Legislature which passed the latter Statute knew the judicial construction which had been placed on the for-

mer one, and such a construction becomes a part of the law." Bridgers v. Taylor, 102 N. C. 86, 89, 8 S. E. 893.

Permissible to Look at Other Statutes.—To ascertain the mischief which an act of the Legislature was intended to re-

move, it is permissible, in the interpretation thereof, to con-

sider other statutes, related to the particular subject, or to

Understand the Act. The legislature contemplates that its intention shall be ascertained from its words as embodied in it. and courts are not at liberty to accept the understanding of any in-

dividual as to the legislative intent. State v. Boon, 1 N. C. 191; Drake v. Drake, 15 N. C. 110; Adams v. Turrentine, 30 N. C. 134; Hines v. Wilmington, etc., Railroad, 95 N. C. 434; Jones v. Hartford Ins. Co., 88 N. C. 499, 500; State v. Mc-

Dufte, 44 N. C. 131; State v. Partlow, 91 N. C. 559, 552.

Same—Same—Affidavit of Legislators. In interpreting a statute it is not permissible to show its intent and meaning by use of an affidavit, when such must be gathered from the act itself. Goin v. Trustees Indian Training School, 169 N. C. 736, 86 S. E. 629.
completely to secure the rights of all persons affected by such legislation. Black's Interpretation of Laws (1896), p. 60, sec. 32; State Board v. White Oak Buckle Drainage District, 127 N. C. 222, 226, 98 S. E. 597.

B. Statutes in Pari Materia.

Statutes relating to the same subject-matter should be considered together; and if there are any two statutes, each substituting one law, giving effect to all parts of the statute when possible; and the history of the legislation may be considered in the effort to ascertain the uniform and consistent purpose of the Legislature. Allen v. Reidsville, 65 N. C. 695, 101 S. E. 526. Where a former act has been repealed, or has expired by its limitation when it is in pari materia, it must be construed together. Pieke v. White Oak Buckle Drainage District, 177 N. C. 222, 226, 98 S. E. 597.

Where there are different statutes in pari materia, though made at different times, or even where they have expired, not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other. Walser v. Jordan, 124 N. C. 683, 33 S. E. 139.

Same—Apparent Conflict.—"Where two statutes on the same subject, or on related subjects, are, in effect, part of the same law, and are to be construed together, so as to give effect not only to the distinct parts or provisions of the laws, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, which much seems to have been the legislative purpose. Weston on Statutes, 12th ed. p. 510. In such a case, the one statute cannot be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the Legislature. United States v. Underwood, 127 U. S. 406, 32 L. Ed. 180, 8 S. Ct. 1194; State v. Stolt, 17 Wallace, 425; Longlois v. Longlois, 48 Mo. 60; Casey v. Harred, 5 Clarke (Iowa) 1; State v. Custer, 65 N. C. 339; The Code, sec. 3767; State v. Bundick, 112 N. C. 862, 864, 17 S. Eq. 491.

Acts of Same Session of Legislature.—All acts of the same session are to be construed together, and as a whole, and in every clause, unaffected by any expression or not. Walser v. Jordan, 124 N. C. 683, 33 S. E. 139. Where a former act has been repealed, or has expired by its limitation when it is in pari materia, it must be construed together. Pieke v. White Oak Buckle Drainage District, 177 N. C. 222, 226, 98 S. E. 597.

Act Declaratory of Intent of Previous Act.—An act of the Legislature declaratory of the intent of a previous act will not control the judiciary in the construction of the first act in cases prior to the declaratory act. Rodwell v. Harris, 132 N. C. 45, 41 S. E. 540.

Private and Local Acts.—Private as well as local acts, are, as a whole, and in every clause, unaffected by any repeal of the general law. State v. Womble, 112 N. C. 862, 864, 17 S. E. 491.

C. Amendatory and Repealing Acts.

When Act Purports to Be Amendatory.—Where a statute refers to a prior legislative enactment, and in the caption and body of the act purports to be amendatory, substituting and repealing the laws, the legislative intent cannot be construed to repeal the former act. Toomy v. Goldsboro Lumber Co., 171 N. C. 178, 88 S. E. 215.

Amended and Amending Acts Construed Together.—Where an amendment to an existing statute is enacted the proper method of arriving at their true intent and meaning is by construing together. Keish v. Lockhart, 171 N. C. 451, 88 S. E. 640; Township Road Comm. v. Board of Com'res, 178 N. C. 221, 190 S. E. 135.

When Amendatory Act Refers to Wrong Section.—If a section in an amendatory act refers to a section of the act amended by number, and the section referred to does not express the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section. Toomy v. Goldsboro Lumber Co., 171 N. C. 178, 181, 88 S. E. 215, quoting People v. Calavita, 203 N. Y. 464.

Erroneous Statement of Date.—An act of the Legislature subsequent to and in amendment of a former Act of the same session and correcting an ambiguity therein, is not invalidated by the fact that the date of ratification of the amendment does not correspond. It plainly appears beyond cavil, what prior Act is referred to. State v. Woolard, 119 N. C. 579, 25 S. E. 719.

Summary of Rules of Construing Repealing Acts.—In Winship's 4 Corpus Juris, ch. 49, sect. 417, it was said: "Upon a perusal of the authorities it appears that the courts have generally given their sanction to the following rules of construction: (1) That a statute repeals not only the provisions of an older statute by a later one by mere implication. State v. Woodsie, 30 N. C. 104; Simonton v. Lanier, 71 N. C. 498. (2) The implication, in order to be operative, must be necessary, and the legislative intent between the two acts makes the latter abrogates the older only to the extent that it is inconsistent and irreconcilable with it. Wood v. United States, 16 Peters, 341, 363, 10 L. Ed. 987; Chew Heong v. United States, 112 U. S. 536, 549, 28 L. Ed. 770, 5 S. Ct. 255; St. Louis v. Independent, 17 Mo. 146. A later and older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinctive parts or provisions of the later statute not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, which much seems to have been the legislative purpose. Weston on Statutes, 12th ed. p. 510. In such a case, the one statute cannot be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the Legislature. United States v. Underwood, 127 U. S. 406, 32 L. Ed. 180, 8 S. Ct. 1194; State v. Stolt, 17 Wallace, 425; Longlois v. Longlois, 48 Mo. 60; Casey v. Harred, 5 Clarke (Iowa) 1; State v. Custer, 65 N. C. 339; The Code, sec. 3767; State v. Bundick, 112 N. C. 862, 864, 17 S. Eq. 491.

Repeal of Act Giving Forfeiture.—The repeal of an act of Assembly giving a forfeiture for an offense is a repeal of that act only, and does not affect a later statute under the act repealed, unless there be a special exception to the contrary. Governor v. Howard, 5 N. C. 465.

Repeal of Repealing Act.—The repeal of a statute repealing a former statute saves the latter in force. Brinkley v. Swigegood, 65 N. C. 630.

Implied Repeal by Lessening Degree of Crime.—It is perfectly settled as a rule of construction that if, by the combination of the two acts, there is an implied repeal of an older statute, and a statute which is not a repeal, but serves to lessen the degree of a crime, it is so interpreted as to lessen the grade and mitigate the punishment, the latter is to that extent an implied repealer of the former. State v. Upholster, 31 N. C. 454, 477.

When Acts Irreconcilably Inconsistent.—A later statute repeals, by implication, an older statute, with which it is irreconcilably inconsistent, to the extent of such repugnancy. But the two statutes must be reconciled if that can be done by any fair construction. State v. Massey, 103 N. C. 356, 9 S. E. 632.

IV. STATUTES STRICTLY CONSTRUED.

A. In General.

In Derogation of Common Law.—A statute in derogation of the common law must be strictly construed. Swift & Co. v. Tempello, 14 N. Y. 564.

Acts Limiting Rights to Contract.—Statutes restricting or disabling persons capable of contracting in the making of contracts, being in derogation of common right, and especially those penal in their nature, must be strictly construed. Governor v. How ard, 5 N. C. 465.

Mandatory Act.—No provision, it would seem, could be more mandatory, in form or substance, than a statute declaring that the body required to observe its requirements. Spruill v. Dauphin, 178 N. C. 364, 368, 109 S. E. 527.

State v. Stolt, 17 Wallace, 425; Longlois v. Longlois, 48 Mo. 60; Casey v. Harred, 5 Clarke (Iowa) 1; State v. Custer, 65 N. C. 339; The Code, sec. 3767; State v. Bundick, 112 N. C. 862, 864, 17 S. E. 491.

Statutory deprivations for failure to give strict and extended beyond the requirements of the words employed. Skinner v. Thomas, 171 N. C. 98, 67 S. E. 976.

Acts Restricting Private Acts.—Statutes which restrict the private rights of the party charged or the property in which the public have no concern should be strictly construed. Nance v. Southern Railway, 149 N. C. 366, 63 S. E. 116.

Local Lien Law.—In Orinoco Supply Co. v. Masonic, etc., Star Home, 163 N. C. 513, 79 S. E. 964; it was held that a lien law applicable to certain counties only, was local in nature, and except to being general lien laws of the State, must be strictly construed.

A remedial statute should be liberally construed, according to its intent, so as to advance the remedy and repress the evil. Cape Lookout Co. v. Gold, 167 N. C. 62, 67, 83 S. E. 3.

B. Criminal Statutes.

Rule for Construction of Penal Statutes.—It is familiar learning that penal statutes must be strictly construed, and the plaintiff, before he is entitled to recover the penalty, must bring his case strictly within the language and meaning of the statute. They must be construed sensibly, as all
other instruments, but not liberally, so as to stretch their meaning beyond what the words will warrant. 36 Cyc., 1185, 1186, 1187; Sears v. Whitaker, 136 N. C. 37, 48 S. E. 517; Alexander v. Atlantic Coast Line R. Co., 71 N. C. 93, 99 S. E. 697; Coble v. Schofield, 72 N. C. 42; Hamlet Grocery Co. v. Southern R. Co., 170 N. C. 241, 244, 87 S. E. 57; State v. Godfrey, 97 N. C. 507, 1 S. E. 779.

§ 12-4, Construction of amended statute.—Where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment. (Rev., s. 2832; Code, s. 3766; 1868-9, c. 270, s. 22; 1870-1, c. 111; C. S. 3950.)


Time of Enactment of New Proviso.—By this section when a part of the statute is amended, the new proviso is considered as having been enacted at the time of the amendment, and the act of 1885, amendatory of the Code of 1883 is subject to this rule of construction. Leak v. Gay, 107 N. C. 466, 12 S. E. 312.

Amendment of a statute operates from its enactment, leaving in force the portions which are not altered. Nichols v. Board, 125 N. C. 13, 34 S. E. 71.

Re-enacted Contemporaneous with Repeal.—It was held in State v. Williams, 117 N. C. 753, 23 S. E. 250, that: "The re-enactment by the Legislature of a law in the term of a former law at the same time it repeals the former law, is not, in contemplation of law, a repeal, but it is a re-affirmance of the former law, whose provisions are thus continued without any intermission." Bishop, Stat. Crimes, sec. 381; State v. Sutton, 100 N. C. 474, 6 S. E. 687; State v. Gumber, 37 Wis. 298; State v. Southern R. Co., 125 N. C. 666, 673, 34 S. E. 527; State v. Bellamy, 120 N. C. 212, 27 S. E. 113.

Bill of Indictment.—If a statute creating an offense is amended in any important particular, a bill of indictment for an offense committed before the act was amended, but which was found after the passage of the amending act, should charge the offense under the old act, and contain an averment that the offense was committed before the amendment was passed. State v. Massey, 97 N. C. 465, 2 S. E. 445.

Misdemeanor Made Punishable by Fine or Imprisonment.—A public-local law making an act a misdemeanor is not repealed by a statute, making the same offense for the first time punishable by "a fine or imprisonment in the discretion of the court," and a felony for the second offense; the later statute expressly stating in the heading of the chapter that it was amendatory, and for the better enforcement, of the former statute, and that it was to take effect from and after its ratification; and where the prohibited offense has been committed prior to the enactment of the latter act, it is punishable under the prior law. State v. Mull, 178 N. C. 748, 101 S. E. 89.
### Division III. Criminal Law and Procedure.

<table>
<thead>
<tr>
<th>Chap.</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>Citizenship Restored</td>
<td>609</td>
</tr>
<tr>
<td>14</td>
<td>Criminal Law</td>
<td>610</td>
</tr>
<tr>
<td>15</td>
<td>Criminal Procedure</td>
<td>708</td>
</tr>
<tr>
<td>16</td>
<td>Gaming Contracts and Futures</td>
<td>756</td>
</tr>
<tr>
<td>17</td>
<td>Habeas Corpus</td>
<td>760</td>
</tr>
<tr>
<td>18</td>
<td>Regulation of Intoxicating Liquors</td>
<td>770</td>
</tr>
<tr>
<td>19</td>
<td>Offenses against Public Morals</td>
<td>798</td>
</tr>
</tbody>
</table>
Chapter 13. Citizenship Restored.

§ 13-1. Petition filed.—Any person convicted of an infamous crime, whereby the rights of citizenship are forfeited, desiring to be restored to the same, shall file his petition in the superior court, setting forth his conviction and the punishment inflicted, his place or places of residence, his occupation since his conviction, the meritorious causes which, in his opinion, entitle him to be restored to his forfeited rights, and that he has not before been restored to the lost rights of citizenship. (Rev., s. 2675; Code, ss. 2938, 2940; R. C. c. 58, ss. 1, 3; 1840, c. 36, s. 4; C. S. 385.)

Cross References.—As to infamous crimes generally, see §§ 14-1, 14-2, 14-3. See also, the North Carolina Const., Art. II, § 11; Art. VI, § 8.

§ 13-2. When and where petition filed.—At any time after the expiration of two years from the date of discharge of the petitioner, the petition may be filed in the superior court of the county in which the applicant is at the time of filing and has been for five years next preceding a bona fide resident, or in the superior court of the county, at term, where the indictment was found upon which the conviction took place; and in case the petitioner may have been convicted of an infamous crime more than once, and indictments for the same may have been found in different counties, the petition shall be filed in the superior court of that county where the last indictment was found. (Rev., s. 2676; Code, ss. 2940, 2941; 1897, c. 110; R. C., c. 58, ss. 3, 4; 1840, c. 36, s. 3; 1933, c. 243; C. S. 386.)

Editor's Note.—Prior to the amendment by Public Laws 1933, c. 245, the petition was permitted to be filed after "four years from the date of conviction," instead of "two years from the date of discharge" as is now permitted.

§ 13-3. Notice given.—Upon filing the petition the clerk of the court shall advertise the substance thereof, at the courthouse door of his county, for the space of three months next before the term when the petitioner proposes that the same shall be heard. (Rev., s. 2677; Code, s. 2938; R. C., c. 58, s. 3; 1840, c. 36; C. S. 387.)

§ 13-4. Hearing and evidence.—The petition shall be heard by the judge at term, at which hearing the court shall examine all proper testimony which may be offered, either by the petitioner as to the facts set forth in his petition or by any one who may oppose the grant of his prayer. The petitioner shall also prove by five respectable witnesses, who have been acquainted with the petitioner's character for three years next preceding the filing of his petition, that his character for truth and honesty during that time has been good; but no deposition shall be admissible for this purpose unless the petitioner has resided out of this state for three years next preceding the filing of the petition. (Rev., s. 2678; Code, ss. 2938, 2939; 1897, c. 110; 1901, c. 533; R. C., c. 58, ss. 1, 2; 1840, c. 96; C. S. 389.)

§ 13-5. Decree.—At the hearing the court, on being satisfied of the truth of the facts set forth in the petition, and on its being proved that the character of the applicant for truth and honesty is good, shall decree his restoration to the lost rights of citizenship, and the petitioner shall accordingly be restored thereto. (Rev., s. 2679; Code, s. 2938; R. C., c. 58, s. 1; 1840, c. 36; C. S. 389.)

§ 13-6. Procedure in case of pardon or suspension of judgment.—Any person convicted of any crime, whereby the rights of citizenship are forfeited, and the judgment of the court pronounced does not include imprisonment anywhere, and pardon has been granted by the governor, or the court suspended judgment on payment of the costs, and the costs have been paid, such person may be restored to such forfeited rights of citizenship upon application, by petition, to the judge presiding at any term of the superior court held for the county in which the conviction was had, one year after such conviction. The petition shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and that pardon has been granted by the governor, and also that said crime was committed without felonious intent, and shall be verified by the oath of the applicant and accompanied by the affidavits of ten reputable citizens of the county, who shall state that they are well acquainted with the applicant and that in their opinion the crime was committed without felonious intent. No notice of the petition in such case shall be necessary, and no advertisement thereof be made, but the same shall be heard by the judge, upon its presentation, during a term of court; and if he is satisfied as to the truth of the matters set out in the petition and affidavits, he shall decree the applicant's restoration to the lost rights of citizenship, and the clerk shall spread the decree upon his minute docket: Provided, that in all cases where the court suspended judgment it shall not be necessary to allege or prove that pardon has been granted by the governor, and in such cases the petition may be made and the forfeited rights of citizenship restored at any time after conviction. (Rev., s. 2680; 1899, cc. 44, 249; 1905, c. 547; C. S. 390.)

Application.—This section is not applicable where one has been convicted of an infamous crime, imprisoned, and
CHAPTER 14. CRIMINAL LAW

§ 13-7. Restoration of rights of citizenship to persons committed to certain training schools.
—Any person convicted of any crime whereby any rights of citizenship are forfeited, and the judgment of the court pronounced provides a sentence, and such sentence is suspended upon the condition that such person be admitted to and remain at one of the following schools: Eastern Carolina Industrial Training School for Boys, the Stonewall Jackson Manual Training and Industrial School, the Morrison Training School for Negro Boys, or the State Home and Industrial School for Girls, until lawfully discharged, and upon payment of costs, such person may be restored to such forfeited rights of citizenship upon application and petition to the judge presiding at any term of the superior court held in the county in which the conviction was had, at any time after one year from the date of the lawful discharge from any such school. (1937, c. 384, s. 1.)

§ 13-8. Contents of petition; affidavits of reputable citizens; hearing; decree of restoration.—
The petition provided for in § 13-7 shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and shall recite that the costs of suit have been paid, the lawful discharge of the applicant from the school to which he or she was admitted, and that applicant has never before had restored to him lost rights of citizenship, which petition shall be verified by the oath of the applicant, and accompanied by the affidavits of ten reputable citizens of the county in which said conviction took place, who shall state that they are well acquainted with the applicant, and that they are of the opinion that the applicant should have restored to him the lost rights of citizenship. The petition shall be heard by the judge during a term of court, and if he is satisfied as to the truth of the matters set out in the petition and the affidavits, he shall decree the applicant's restoration to the lost rights of citizenship and the clerk shall spread the decree upon his minute dockets. (1941, c. 184, s. 1.)

Cross Reference.—As to punishment for involuntary manslaughter, see § 14-8.

§ 13-9. Restoration of citizenship to persons convicted, etc., of involuntary manslaughter.—Any person who has been convicted of, or confessed guilt to, the crime of involuntary manslaughter and is not actually serving a term in the state prison or on the roads of the state may, at any subsequent term of the superior court of the county in which the conviction was had, or the confession of guilt made, make application and petition the court for a restoration of all forfeited rights of citizenship. (1941, c. 184, s. 1.)

§ 13-10. Contents of petition; supporting affidavits; hearing and decree.—The petition provided for in section 13-9 shall set out the nature of the crime committed, the time of conviction or confession of guilt, the judgment of the court, and shall recite that the costs of suit have been paid, and that applicant has never before had restored to him lost rights of citizenship, which petition shall be verified by the oath of the applicant, and accompanied by the affidavits of ten reputable citizens of the county in which said conviction or confession of guilt took place, who shall state that they are well acquainted with the applicant, and that they are of the opinion that the applicant should have restored to him the lost rights of citizenship. The petition shall be heard by the judge during a term of court, and if he is satisfied as to the truth of the matters set out in the petition and the affidavits, he shall have the authority to decree the applicant's restoration to the lost rights of citizenship and the clerk shall spread the decree upon his minute dockets. (1941, c. 184, s. 2.)


SUBCHAPTER I. GENERAL PROVISIONS.

Art. 1. Felonies and Misdemeanors.
Sec.
14-1. Felonies and misdemeanors defined.
14-2. Punishment of felonies.
14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, etc.
14-4. Violation of town ordinance misdemeanors; punishment.

Art. 2. Principals and Accessories.
14-5. Accessories before the fact; trial and punishment.
14-6. Punishment of accessories before the fact.
14-7. Accessories after the fact; trial and punishment.

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

Art. 3. Rebellion.
14-8. Rebellion against the state.
14-9. Conspiring to rebel against the state.
CHAPTER 14. CRIMINAL LAW

Art. 7. Rape and Kindred Offenses.
14-22. Punishment for assault with intent to commit rape.
14-23. Emission not necessary to constitute rape and buggery.
14-24. Obtaining carnal knowledge of married woman by personating husband.
14-25. Attempted carnal knowledge of married woman by personating husband.
14-26. Obtaining carnal knowledge of virtuous girls between twelve and sixteen years old.
14-27. Jurisdiction of court; offenders classed as delinquents.

Art. 8. Assaults.
14-29. Castration or other maiming without malice aforethought.
14-31. Maliciously assaulting in a secret manner.
14-32. Assault with deadly weapon with intent to kill resulting in injury.
14-33. Punishment for assault.
14-34. Assaulting by pointing gun.

Art. 9. Hazing.
14-35. Hazing; definition and punishment.
14-36. Expulsion from school; duty of faculty to expel.
14-37. Certain persons and schools excepted; copy of article to be posted.
14-38. Witnesses in hazing trials; no indictment excepted; self-criminating testimony.

Art. 10. Kidnapping and Abduction.
14-40. Enticing minors out of the state for the purpose of employment.
14-41. Abduction of children.
14-42. Conspiring to abduct children.

Art. 11. Abortion and Kindred Offenses.
14-44. Using drugs or instruments to destroy unborn child.
14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.
14-46. Concealing birth of child.

Art. 12. Libel and Slander.
14-47. Communicating libelous matter to newspapers.

Art. 13. Injuring Others by Use of High Explosives.
14-49. Willful injury a felony; punishment.
14-50. Conspiracy declared a felony; punishment.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

Sec.
14-51. First and second degree burglary.
14-52. Punishment for burglary.
14-54. Breaking into or entering houses otherwise than burglariously.
14-55. Preparation to commit burglary or other house-breakings.
14-56. Breaking into or entering railroad cars.
14-57. Burglary with explosives.

Art. 15. Arson and Other Burnings.
14-59. Burning of certain public and other corporate buildings.
14-60. Setting fire to schoolhouse.
14-61. Burning or attempting to burn certain bridges and buildings.
14-62. Setting fire to churches and certain other buildings.
14-63. Burning boats and barges.
14-64. Burning of gin-houses, tobacco houses and stables.
14-65. Fraudulently setting fire to dwelling-houses.
14-66. Willful and malicious burning of personal property.
14-67. Attempting to burn dwelling-houses and certain other buildings.
14-68. Failure of owner of property to comply with orders of public authorities.
14-69. Failure of officers to investigate incendiary fires.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Art. 16. Larceny.
14-70. Distinction between grand and petit larceny abolished.
14-71. Receiving stolen goods.
14-72. Larceny of property, or the receiving of stolen goods, not exceeding fifty dollars in value.
14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.
14-74. Larceny by servants and others employees.
14-75. Larceny of chose in action.
14-76. Larceny, mutilation, or destruction of public records and papers.
14-77. Larceny, concealment or destruction of wills.
14-78. Larceny of ungathered crops.
14-79. Larceny of ginseng.
14-80. Larceny of wood and other property from land.
14-81. Larceny of horses and mules.
14-82. Taking horses or mules for temporary purposes.
14-83. [Repealed.]
14-84. Larceny of taxed dogs misdemeanor.
14-85. Pursuing or injuring livestock with intent to steal.
14-86. Destruction or taking of soft drink bottles.
CHAPTER 14. CRIMINAL LAW

Art. 17. Robbery.
14-87. Robbery with firearms or other dangerous weapons.
14-88. Train robbery.
14-89. Attempted train robbery.

Art. 18. Embezzlement.
14-90. Embezzlement of property received by virtue of office or employment.
14-91. Embezzlement of state property by public officers and employees.
14-92. Embezzlement of funds by public officers and trustees.
14-93. Embezzlement by treasurers of charitable and religious organizations.
14-94. Embezzlement by officers of railroad companies.
14-95. Conspiring with officers of railroad companies to embezzle.
14-96. Embezzlement by insurance agents and brokers.
14-97. Appropriation of partnership funds by partner to personal use.
14-98. Embezzlement by surviving partner.

14-100. Obtaining property by false tokens and other false pretenses.
14-101. Obtaining signatures or property by false pretenses.
14-102. Obtaining property by false representation of pedigree of animals.
14-103. Obtaining certificate of registration of animals by false representation.
14-104. Obtaining advances under promise to work and pay for same.
14-105. Obtaining advances under written promise to pay therefor out of designated property.
14-106. Obtaining property in return for worthless check, draft or order.
14-107. Worthless checks.
14-108. Obtaining property or services from slot machines, etc., by false coins or tokens.
14-109. Manufacture, sale, or gift of devices for cheating slot machines, etc.
14-110. Obtaining entertainment at hotels and boarding-houses without paying therefor.
14-111. Fraudulently obtaining credit at hospitals and sanatoriums.
14-112. Obtaining merchandise on approval.
14-113. Obtaining money by false representation of physical defect.

Art. 20. Frauds.
14-114. Fraudulent disposal of mortgaged property.
14-115. Secrecy of property to hinder enforcement of lien.
14-116. Fraudulent entry of horses at fairs.
14-117. Fraudulent and deceptive advertising.
14-118. Blackmailing.

14-119. Forgery of bank-notes, checks and other securities.
14-120. Uttering forged paper.
14-121. Selling of certain forged securities.

Art. 17. Robbery.
14-122. Forgery of deeds, wills and certain other instruments.
14-123. Forging names to petitions and uttering forged petitions.
14-124. Forgery certificate of corporate stock and uttering forged certificates.
14-125. Forgery of bank-notes and other instruments by connecting genuine parts.

SUBCHAPTER VI. CRIMINAL TRESPASS.
Art. 22. Trespasses to Land and Fixtures.
14-126. Forcible entry and detainer.
14-127. Malicious injury to real property.
14-128. Injury to trees, woods, crops, etc., near highway; depositing trash near highway.
14-129. Taking, etc., of certain wild plants from land of another.
14-130. Trespass on public lands.
14-131. Trespass on land under option by the federal government.
14-132. Disorderly conduct in and injuries to public buildings.
14-133. Erecting artificial islands and lumps in public waters.
14-134. Trespass on land after being forbidden; license to look for estrays.
14-135. Cutting, injuring, or removing another’s timber.
14-136. Setting fire to grass and brush lands and woodlands.
14-137. Wilfully or negligently setting fire to woods and fields.
14-138. Setting fire to woodlands and grass lands with campfires.
14-139. Starting fires within five hundred feet of areas under protection of state forest service.
14-140. Certain fires to be guarded by watchman.
14-141. Burning or otherwise destroying crops in the field.
14-142. Injuries to dams and water channels of mills and factories.
14-143. Taking unlawful possession of another’s house.
14-144. Injuring houses, churches, fences and walls.
14-145. Unlawful posting of advertisements.
14-146. Injuring bridges.
14-147. Removing, altering or defacing landmarks.
14-148. Removing or defacing monuments and tombstones.
14-149. Interfering with graveyards.
14-150. Disturbing graves.
14-151. Interfering with gas, electric and steam appliances.
14-152. Injuring fixtures and other property of gas companies; civil liability.
14-153. Tampering with engines and boilers.
14-154. Injuring wires and other fixtures of telephone, telegraph and electric-power companies.
14-155. Making unauthorized connections with telephone and telegraph wires.
14-156. Injuring fixtures and other property of electric-power companies.
14-157. Felling trees on telephone and electric-power wires.
14-158. Interfering with telephone lines.
CHAPTER 14. CRIMINAL LAW

Sec. 14-159. Injuring buildings or fences; taking possession of house without consent.

Art. 23. Trespasses to Personal Property.
14-160. Malicious injury to personal property.
14-161. Malicious removal of packing from railroad coaches and other rolling stock.
14-162. Removing boats or their fixtures and appliances.
14-163. Injuring livestock not inclosed by lawful fence.
14-164. Taking away or injuring exhibits at fairs.

14-165. Malicious or wilful injury to hired personal property.
14-166. Sub-letting of hired property.
14-167. Failure to return hired property.
14-168. Hiring with intent to defraud.
14-169. Violation made misdemeanor.

Art. 25. Regulating the Leasing of Storage Batteries.
14-170. "Rental battery" defined; identification of rental storage batteries.
14-171. Defacing word "rental" prohibited.
14-172. Sale, etc., of rental battery prohibited.
14-173. Repairing another's rental battery prohibited.
14-174. Time limit on possession of rental battery without written consent.
14-175. Violation made misdemeanor.
14-176. Rebuilding storage batteries out of old parts and sale of, regulated.

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

14-177. Crime against nature.
14-178. Incest between certain near relatives.
14-179. Incest between uncle and niece and nephew and aunt.
14-180. Seduction.
14-182. Issuing license for marriage between white person and negro; performing marriage ceremony.
14-183. Bigamy.
14-184. Fornication and adultery.
14-185. Inducing female persons to enter hotels or boarding-houses for immoral purposes.
14-186. Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife.
14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined.
14-189. Obscene literature.
14-190. Indecent exposure; immoral shows, etc.
14-191. Sheriffs and deputies to report violations of two preceding sections.
14-192. Cutting or painting obscene words or pictures near public places.
14-193. Exhibition of obscene or immoral pictures; posting of advertisements.

Sec. 14-194. Circulating publications barred from the mails.
14-195. Using profane or indecent language on passenger trains.
14-196. Using profane or indecent language to female telephone operators.
14-197. Using profane or indecent language on public highways, counties exempt.
14-198. Lewd women within three miles of colleges and boarding-schools.
14-199. Obstructing way to places of public worship.
14-200. Disturbing religious assembly by certain exhibitions.
14-201. Permitting stone-horses and stone-mules to run at large.

Art. 27. Prostitution.
14-203. Definition of terms.
14-204. Prostitution and various acts abetting prostitution unlawful.
14-206. Reputation and prior conviction admissible as evidence.
14-207. Degrees of guilt.

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Art. 28. Perjury.
14-209. Punishment for perjury.
14-210. Subornation of perjury.
14-211. Perjury before legislative committees.
14-212. Perjury in court-martial proceedings.
14-213. False oath to statement of insurance company.
14-214. False oath to procure benefit of insurance policy or certificate.
14-215. False oath to statement required of fraternal benefit societies.
14-216. False oath to certificate of mutual fire insurance company.

Art. 29. Bribery.
14-218. Offering bribes.
14-220. Bribery of jurors.

14-221. Breaking or entering jails with intent to injure prisoners.
14-222. Refusal of witness to appear or to testify in investigations of lynchings.
14-223. Resisting officers.
14-224. Failing to aid police officers.
14-225. False, etc., reports to police radio broadcasting stations.
14-226. Intimidating or interfering with jurors and witnesses.
14-227. Failing to attend as witness before legislative committees.

Art. 31. Misconduct in Public Office.
14-228. Buying and selling offices.
14-229. Acting as officer before qualifying as such.
14-230. Willfully failing to discharge duties.
CHAPTER 14. CRIMINAL LAW

14-231. Failing to make reports and discharge other duties.
14-232. Swearing falsely to official reports.
14-234. Director of public trust contracting for his own benefit.
14-235. Speculating in claims against towns, cities and the state.
14-236. Acting as agent for those furnishing supplies for schools and other state institutions.
14-237. Buying school supplies from interested officer.
14-238. Soliciting during school hours without permission of school head.
14-239. Allowing prisoners to escape; burden of proof.
14-240. Solicitor to prosecute officer for escape.
14-241. Disposing of public documents or refusing to deliver them over to successor.
14-242. Failing to return process or making false return.
14-243. Failing to surrender tax-list for inspection and correction.
14-244. Failing to file report of fines or penalties.
14-245. Justices of the peace soliciting official business or patronage.
14-246. Failure of ex-justice of the peace to turn over books and papers.
14-247. Private use of publicly owned vehicle.
14-248. Obtaining repairs and supplies for private vehicle at expense of State.
14-249. Limitation of amount expended for vehicle.
14-250. Publicly owned vehicle to be marked.
14-251. Violation made misdemeanor.
14-252. Five preceding sections applicable to cities and towns.

Art. 32. Misconduct in Private Office.
14-253. Failure of certain railroad officers to account with successors.
14-254. Malfeasance of corporation officers and agents.

Art. 33. Prison Breach and Prisoners.
14-255. Escape of hired prisoners from custody.
14-256. Prison breach and escape.
14-257. Permitting escape of or maltreating hired convicts.
14-258. Conveying messages and weapons to or trading with convicts and other prisoners.
14-259. Harboring or aiding escaped prisoners.
14-260. Injury to prisoner by jailer.
14-261. Confining prisoners to improper apartments.
14-262. Requiring female prisoners to work in chain-gang.
14-263. Classification and commutation of time for prisoners other than state prisoners.
14-264. Record to be kept; items of record.
14-265. Commutation of sentences for Sunday work.

Art. 34. Custodial Institutions.
14-266. Persuading inmates to escape.

Art. 35. Offenses against the Public Peace.
14-269. Carrying concealed weapons.
14-270. Sending, accepting or bearing challenges to fight duels.
14-271. Engaging in and betting on prize fights.
14-272. Disturbing picnics, entertainments and other meetings.
14-273. Disturbing schools and scientific and temperance meetings; injuring property of schools and temperance societies.
14-274. Disturbing students at schools for women.
14-275. Disturbing religious congregations.
14-276. Detectives going armed in a body.
14-277. Impersonation of peace officers.

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

Art. 36. Offenses against the Public Safety.
14-278. Malicious injury of property of railroads and other carriers; causing death or other physical injury thereby.
14-279. Injuring without malice property of railroads and other carriers; causing death or other physical injury thereby.
14-280. Shooting or throwing at trains or passengers.
14-281. Operating trains and street cars while intoxicated.
14-282. Displaying false lights on seashore.
14-283. Exploding dynamite cartridges and bombs.
14-284. Keeping for sale or selling explosives without a license.
14-285. Failing to enclose marl beds.
14-286. Giving false fire alarms; molesting fire alarm system.
14-287. Leaving unused well open and exposed.
14-288. Unlawful to pollute any bottles used for beverages.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Art. 37. Lotteries and Gaming.
14-289. Advertising lotteries.
14-290. Dealing in lotteries.
14-291. Selling lottery tickets and acting as agent for lotteries.
14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.
14-292. Gambling.
14-293. Allowing gambling in houses of public entertainment; duty of police officers; penalty.
14-295. Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.
14-296. Illegal slot machines and punchboards defined.
14-297. Allowing gaming tables, illegal punchboards or slot machines on premises.
Sec. 14-298. Gaming tables, illegal punchboards and slot machines to be destroyed by justices and police officers.
14-299. Property exhibited by gamblers to be seized; disposition of same.
14-300. Opposing destruction of gaming tables and seizure of property.
14-301. Operation or possession of slot machine; separate offenses.
14-302. Punchboards, vending machines, and other gambling devices; separate offenses.
14-303. Violation of two preceding sections a misdemeanor.
14-304. Manufacture, sale, etc., of slot machines and devices.
14-305. Agreements with reference to slot machines or devices made unlawful.
14-306. Slot machine or device defined.
14-308. Declared a public nuisance.
14-309. Violation made misdemeanor.

Art. 38. Marathon Dances and Similar Endurance Contests.
14-310. Dance marathon and walkathons prohibited.
14-311. Penalty for violation.
14-312. Each day made separate offense.

14-313. Selling cigarettes to minors.
14-314. Aiding minors in procuring cigarettes; duty of police officers.
14-315. Selling or giving weapons to minors.
14-316. Permitting young children to use dangerous firearms.
14-317. Permitting minors to enter barrooms, billiard rooms and bowling alleys.
14-318. Exposing children to fire.
14-319. Marrying females under fourteen years old.
14-320. Separating child under six months old from mother.
14-321. Failing to pay minors for doing certain work.

Art. 40. Protection of the Family.
14-322. Abandonment of family by husband.
14-323. Evidence that abandonment was willful.
14-324. Order to support from husband's property or earnings.
14-325. Failure of husband to provide adequate support for family.

Art. 41. Intoxicating Liquors.
14-327. Adulteration of liquors.
14-328. Selling recipe for adulterating liquors.
14-329. Manufacturing or selling poisonous liquors.
14-330. Selling or giving away liquor near political speaking.
14-331. Giving intoxicants to unmarried minors under seventeen years old.
14-332. Selling or giving intoxicants to unmarried minors by dealers; liability for exemplary damages.

Art. 42. Public Drunkenness.
14-333. Public drinking on railway passenger cars; copy of section to be posted.

Sec. 14-334. Public drunkenness and disorderliness.
14-335. Local: Public drunkenness.

Art. 43. Vagrants and Tramps.
14-336. Persons classed as vagrants.
14-337. Police officers to furnish list of disorderly houses; inmates competent and compellable to testify.
14-338. Tramp defined and punishment provided; certain persons excepted.
14-339. Trespassing and the carrying of dangerous weapons by tramps.
14-340. Malicious injuries by tramps to persons and property.
14-341. Arrest of tramps by persons who are not officers.

Art. 44. Regulation of Sales.
14-342. Selling or offering to sell meat of diseased animals.
14-343. Unauthorized dealing in railroad tickets.
14-344. Sale of athletic contest tickets in excess of printed price.
14-345. Sale of cotton at night under certain conditions.

Art. 45. Regulation of Employer and Employee.
14-347. Enticing servant to leave master.
14-348. Local: Hiring servant who has unlawfully left employer.
14-349. Enticing seamen from vessel.
14-350. Secreting or harboring deserting seamen.
14-351. Search warrants for deserting seamen.
14-352. Appeal in cases of deserting seamen regulated.
14-353. Influencing agents and servants in violating duties owed employers.
14-354. Witness required to give self-criminating evidence; no suit or prosecution to be founded thereon.
14-356. Conspiring to blacklist employees.
14-357. Issuing nontransferable script to laborers.

Art. 46. Regulation of Landlord and Tenant.
14-358. Local: Violation of certain contracts between landlord and tenant.
14-359. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.

Art. 47. Cruelty to Animals.
14-360. Cruelty to animals; construction of section.
14-361. Instigating or promoting cruelty to animals.
14-362. Bear-baiting, cock-fighting and similar amusements.
14-363. Conveying animals in a cruel manner.

Art. 48. Animal Diseases.
14-364. Selling, using or exposing diseased animals.

Art. 49. Protection of Livestock Running at Large.
14-365. Failing to show hide and ears of livestock killed while running at large.
Sec. 14-366. Molesting or injuring livestock.
14-367. Altering the brands of and misbranding another's livestock.
14-368. Placing poisonous shrubs and vegetables in public places.
14-369. Wounding, capturing or killing of homing pigeons prohibited.

14-370. Wrongfully obtaining or divulging knowledge of telephonic messages.
14-371. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly.
14-372. Unauthorized opening, reading or publishing of sealed letters and telegrams.

14-373. Bribery of baseball players, umpires, and officials.
14-374. Acceptance of bribes by baseball players, umpires, or officials.
14-375. Completion of offenses set out in sections 14-373, 14-374.
14-377. Intentional losing of baseball game or aiding therein.
14-378. Venue.
14-379. Bonus or extra compensation.
14-380. Application of article.

Art. 52. Miscellaneous Police Regulations.
14-381. Desecration of state and national flag.
14-382. Pollution of water or lands used for dairy purposes.
14-383. Cutting timber on town watershed without disposing of boughs and debris; misdemeanor.
14-384. Injuring notices and advertisements.
14-385. Defacing or destroying public notices and advertisements.
14-386. Erecting signals and notices in imitation of those of railroads.
14-387. Operating automobile while intoxicated.
14-388. [Repealed.]

SUBCHAPTER I. GENERAL PROVISIONS.

Art. 1. Felonies and Misdemeanors.
§ 14-1. Felonies and misdemeanors defined.—A felony is a crime which is or may be punishable by either death or imprisonment in the state's prison. Any other crime is a misdemeanor.

Common Law Provisions.—Up to the time this section was passed the somewhat arbitrary common-law rule was followed as to what crimes were felonies, what were misdemeanors and under that, conspiracy, and even such grave crimes as perjury and forgery, were misdemeanors. State v. Mallett, 125 N. C. 718, 725, 34 S. E. 651; State v. Holder, 153 N. C. 606, 608, 69 S. E. 66. See State v. Hill, 91 N. C. 561.

For article on punishment for crime in North Carolina, See 17 N. C. Law Rev. 205.

Section Constitutional.—This section is held to be constitutional in State v. Lytle, 138 N. C. 738, 744, 51 S. E. 66.

Punishment Determines Classification of Offenses.—By this section, North Carolina adopted the rule, now almost universally prevalent, by which the nature of the punishment determines the classification of offenses; those which may be punished capitaly or by imprisonment in the penitentiary are felonies (as to which there is no statute of limitations), and all others are misdemeanors, as to which prosecutions in this State are barred by two years. State v. Mallett, 125 N. C. 718, 725, 34 S. E. 651.


It should be noted that there are exceptions to this general rule. The legislature has the power to style any offense a misdemeanor, notwithstanding it is punishable in the state's prison. Examples of this appear in sections 14-278, 14-280 and 44-25 where the offenses are specifically declared to be misdemeanors although they are punishable in the State's Prison. See State v. Holder, 153 N. C. 605, 608, 69 S. E. 66. See also Editor's Note under section 14-3.

Offence Need Not Be Specified.—It is not necessary to prescribe that an act is a misdemeanor or felony, as the punishment affixed determines that. State v. Lewis, 142 N. C. 636, 630, 55 S. E. 600.

Indictment Must Use Word “Feloniously.”—Since all criminal offenses punishable with death or imprisonment in a State prison were by this section declared felonies, indictments wherein there has been a failure to use the word "feloniouly," as characterizing the charge in the latter class [616]
of cases, have been declared fatally defective. State v. Wilson, 116 N. C. 597, 21 S. E. 692; State v. Skidmore, 109 N. C. 795, 14 S. E. 63; State v. Shaw, 117 N. C. 764, 16 S. E. 99; State v. Fry, 112 N. C. 948, 19 S. E. 352; State v. Holder, 153 N. C. 606, 608, 69 S. E. 66. See State v. Callett, 211 N. C. 563, 191 S. E. 27. But this principle does not hold good where the law has expressly provided against it.

In section 15-145 the statute has prescribed a form of indictment for perjury (which is by section 14-109 a felony) and left out the word "feloniously." And in State v. Harris, 145 N. C. 456, 59 S. E. 115 the court held that in the case of perjury it was unnecessary that the word appear. See State v. Holder, supra, at page 609.

Same—New Bill Obtained.—But the bill should not be quashed; the defendant should be held until a new bill is obtained. State v. Skidmore, 109 N. C. 795, 14 S. E. 63.

Penitentiary Unknown to Common Law.—The penitentiary, being a modern device, unknown to the common law, punishment in it is not mentioned by the common law. State v. McNeill, 75 N. C. 15, 16.

The use of the word "penitentiary," in prescribing the punishment for one convicted under a criminal statute, has the same legal significance as the words "State's Prison," both meaning the place of punishment in which convicts sentenced to imprisonment and hard labor are confined by the authority of law. State v. Burnett, 184 N. C. 783, 115 S. E. 57.

Concurrence of General and Local Laws.—Our general prohibition statutes, prohibiting the manufacture or sale of intoxicating liquors, generally provide that if the penalty prescribed by the local law shall have the effect of repealing local or special statutes upon the subject, but they shall continue in full force and in concurrence with the general law except where otherwise provided, they shall be taken as a modification of the local laws. Thus the statute makes the offense a misdemeanor, punishable by imprisonment, in the county jail or penitentiary not exceeding two years, etc., the person convicted thereunder is guilty of a felony, by this section, the offense a misdemeanor, punishable by imprisonment, in the same legal significance as the words "State's Prison," used by the legislature in the Code, though the words "or State prison" were omitted.

By this section the legislature has prescribed a form of punishment in the discretion of the court, or if the offense be infamous, by imprisonment in the county jail or State's Prison, under this section, and is a misdemeanor, punishable by imprisonment and hard labor.

Where Section Applies.—This section applies only where an act is prohibited or made unlawful, without the nature of the punishment being specified. State v. Rippy, 127 N. C. 516, 517, 37 S. E. 148.

It shall not be said that a matter of public grievance, or commands a matter of public convenience, all such offenses contrary to the prohibition or command of the statute are misdemeanors at common law, notwithstanding the fact that no specific punishment is prescribed and which are "infamous or done in secrecy and malice, or with deceit and intent to defraud," punishable in the state prison.

Interpreting, then, this addition to § 14-3, in connection with § 14-1, it makes the particular offense in the instant case, being beyond the scope of any local law; and unless it be excepted where the offense is a conspiracy to commit a misdemeanor, be guilty of a felony and punished by imprisonment in the county jail or state prison for not less than four months nor more than ten years, or shall be fined. (Rev., s. 3293; Code, s. 1097; R. C., c. 34, s. 120; 1097, c. 1; C. S. 4173.)

Cross References.—As to uttering worthless check, see §§ 114-106 and 114-107. As to statute of limitations for misdemeanors, see § 15-1.

Editor's Note.—The Act of 1927 amended this section by inserting the words "or state prison." The effect of this amendment is to make misdemeanors, where no specific punishment is prescribed and which are "infamous or done in secrecy and malice, or with deceit and intent to defraud," punishable in the state prison.

In interpreting, then, this addition to § 14-3, in connection with § 14-1, it makes the particular offense in the instant case, being beyond the scope of any local law; and unless it be excepted where the offense is a conspiracy to commit a misdemeanor, be guilty of a felony and punished by imprisonment in the county jail or state prison for not less than four months nor more than ten years, or shall be fined. (Rev., s. 3293; Code, s. 1097; R. C., c. 34, s. 120; 1097, c. 1; C. S. 4173.)
offense in the same manner as larceny is punished; that is, confinement in the State's prison or county jail for not less than four months, nor more than ten years. State v. Brittain, 137 N. C. 458, 50 S. E. 270.

Attempt to Commit Crime against Nature.—While an attempt to commit a felony is a misdemeanor, when such misdemeanor is infamous, or done in secrecy and malice, or with deceit and intent to defraud, it is punishable by imprisonment in the state's prison, and is made a felony by this section, and an attempt to commit the crime against nature is infamous and is punishable by imprisonment in the state's prison, if made after the definition of the section. State v. Spivey, 213 N. C. 45, 195 S. E. 1.

What Amounts to Confession of Felony.—A plea of guilty to a felony, by an incurting defendant, though after conviction, is a confession of a felony under this section, although § 14-76 designates such offense as a misdemeanor. State v. Harwood, 206 N. C. 87, 173 S. E. 24.

Discretion of Trial Judge.—Where the extent of the punishment is referred to the discretion of the trial judge, his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. State v. Smith, 174 N. C. 804, 807, 93 S. E. 919; State v. Willer, 94 N. C. 402.

Excessive Punishment.—The word "or," in criminal statutes, cannot be interpreted to mean "and," when the effect is to increase the case of punishment. State v. Driver, 78 N. C. 423; State v. Miller, 94 N. C. 904. State v. Farrant, 141 N. C. 844, 45 S. E. 954.

Effect of Consent of Defendant.—No consent of the defendant, volitionally, secretly, and maliciously given aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, is a confession of a felony under this section, although § 14-76 designates such offense as a misdemeanor.

State v. Brite; vay seo:

Failure to Prescribe Penalty.—The violation of a valid town ordinance is made a misdemeanor by this section, and the defense that the ordinance did not prescribe a penalty therefor is untenable. State v. Rozook, 179 N. C. 768, 103 S. E. 67.

Where Fine Provided It Must Be Certain.—An ordinance which imposes a fine is invalid if it is not certain as to the amount of the fine. State v. Irvin, 126 N. C. 599, 55 S. E. 430.

Provision in Ordinance for Arrest Void.—When a municipal ordinance imposed a penalty for its violation, and provided that the offender was "liable to a fine of one hundred dollars upon conviction thereof," it was held, that so much of the ordinance as provided for the arrest was void, but the other provisions were valid. State v. Earhardt, 107 N. C. 708, 16 S. E. 436.

Personal Notice to Offender Sufficient.—The requirement of the charter of a city or town that its ordinances shall be printed and published, is to bring such ordinances to the attention of the public, and to inform them of the existence of such ordinance. State v. Hunter, 106 N. C. 598; State v. Webber, 107 N. C. 962, 967, 12 S. E. 598.

Where Ordinance Violation Not Punishable.—Prior to the passage of this section there was no way provided for the enforcement of obedience to town ordinances; a violation of such ordinances was not a misdemeanor. State v. Beacham, 125 N. C. 652, 34 S. E. 447; Shaw v. Kennedy, 107 N. C. 841, 842, 11 S. E. 619; State v. Prevo, 178 N. C. 740, 743, 101 S. E. 370.

Violation of Invalid Ordinance No Offense.—The violation of a valid ordinance is, under the provision of this section, not a criminal offense to disregard a law enacted without authority. State v. Hunter, 106 N. C. 795, 11 S. E. 366; State v. Webber, 107 N. C. 962, 967, 12 S. E. 598.

Failure to Prescribe Penalty.—The violation of a valid town ordinance is made a misdemeanor by this section, and the defense that the ordinance did not prescribe a penalty therefor is untenable. State v. Rozook, 179 N. C. 768, 103 S. E. 67.

State Must Show Violation of Valid Ordinance.—Upon the conviction of a criminal action for the violation of a city ordinance, under this section the State must show that the ordinance in question was a valid one, as well as the violation as charged in the warrant. State v. Prevo, 178 N. C. 740, 101 S. E. 370; State v. Snipes, 161 N. C. 242, 26 S. E. 240; State v. Lucien, 127 N. C. 242, 50 S. E. 598.

And where the state fails to show that the original act of incorporation authorized the enactment of an ordinance, it fails to make out the case, for the legislature never intended to make the ordinance to be enforced under the provisions of this section, a conviction of which is not a conviction of a punishable misdemeanor. State v. Threadgill, 76 N. C. 17, 19.

Defects in Warrant May Be Waived.—Ordinarily defects in the form of a warrant for violating a city ordinance may be waived, and an action may be so considered when a plea of not guilty is entered by the defendants. State v. Prevo, 178 N. C. 740, 101 S. E. 370.

Form of Indictment.—It is not necessary, in indictments for violations of city ordinances, to set out the ordinance in the warrant. It is sufficient to refer to it by such indicia, as point it out with sufficient certainty. State v. Cainen, 94 N. C. 880; State v. Merritt, 83 N. C. 679, 679.

In an indictment under this section for loud and boisterous swearing, it is not necessary to set out the words used by the defendant. State v. Cainen, 94 N. C. 880.

No Removal under Section 7147.—In a prosecution for violations of town ordinances, an accused defendant is not entitled to a removal, under section 7147. State v. Joyner, 127 N. C. 541, 37 S. E. 201.

Costs of Prosecutions under Section.—Whether the criminal offenses created by the ordinances of towns and cities under this section are tried before the mayor, or before a Justice of the Peace, they are State prosecutions, in the name of the State, for or violation of the criminal law of the State, and are excepted from the provisions of § 104 (126 N. C. 1014, 35 S. E. 473), and the city can not be charged with the costs of such prosecutions. Board v. Henderson, 126 N. C. 689, 691, 36 S. E. 430. Section for Fighting No Bar to Prosecution for Assault.—A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of the town by fighting is not a bar to a prosecution by the State for an assault. State v. Taylor, 131 N. C. 725, 48 S. E. 5.
§ 14-5. Accessories before the fact; trial and punishment.

If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or he may be indicted and convicted of a substantive felony, and may be punished, howsoever indicted, as an accessory before the fact, or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. The offense of counseling, procuring or commanding, howsoever indicted, may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offense had been committed at the same place as the principal felony or where the principal felony is triable, although such offense may have been committed at any place within or without the limits of the state. In case the principal felony shall have been committed within the body of any county, and the offense of counseling, procuring or commanding shall have been committed within the body of another county, the last mentioned offense may be inquired of, tried, determined, and punished in either of such counties; Provided, that no person who shall be once duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense. (Rev. s. 3287; Code, s. 977; R. C., s. 34, s. 53; 1797, c. 485, s. 1; 1852, c. 58; C. S., 417.)

In General.—It is a well established principle, that where two or more persons agree, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, or in furtherance of the common purpose. State v. Simmons, 51 N. C. 21, 24.

The word accessory before the fact is a term of art. It is a substantive felony, where the principal is triable, although such offense may have been committed at any place within or without the limits of the state. In case the principal felony shall have been committed within the body of any county, and the offense of counseling, procuring or commanding shall have been committed within the body of another county, the last mentioned offense may be inquired of, tried, determined, and punished in either of such counties; Provided, that no person who shall be once duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense. (Rev., s. 3287; Code, s. 977; R. C., s. 34, s. 53; 1797, c. 485, s. 1; 1852, c. 58; C. S., 417.)

"Accessory before Fact" Is a Substantive Felony. — This section made the facts which formerly had been called "accessory before the fact" a substantive felony (whether in murder or any other felony). State v. Bryson, 173 N. C. 801, 807, 92 S. E. 678.

The conviction of Principals Unnecessary.—Under the provisions of this section it is not required that the principals be first convicted of the charge of murder to convict the accessories thereto, either before or after the fact, upon sufficient evidence. State v. Walton, 156 N. C. 485, 119 S. E. 886; State v. Jones, 101 N. C. 719, 722, 8 S. E. 147.

One indicted as accessory before the fact can not be convicted of murder. State v. Walton, 156 N. C. 485, 119 S. E. 886; State v. Jones, 101 N. C. 719, 722, 8 S. E. 147.

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One indicted as accessory before the fact can not be convicted of murder. State v. Walton, 156 N. C. 485, 119 S. E. 886; State v. Jones, 101 N. C. 719, 722, 8 S. E. 147.

Same—What Indictment Must Aver.—Where the principal felon is not tried, the process of the law, it is necessary to aver that in the indictment. State v. Ives, 35 N. C. 338, 339; State v. Groff, 5 N. C. 270.

Who Are Principals.—All who are present, eitheractually or constructively, at the place of a crime, and are either aiding, abetting, assisting, or advising its commission, or are present for such purpose, are principals in the crime.
submitted to the jury on an indictment drawn under this section. State v. Williams, 208 N. C. 707, 182 S. E. 131.


Cited in State v. Hampton, 210 N. C. 283, 136 S. E. 251;


§ 14-6. Punishment of accessories before the fact.—Any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary or rape shall be imprisoned for life in the state's prison. An accessory before the fact to the stealing of any horse, for not less than five nor more than twenty years, in the discretion of the court. Every accessory before the fact in any other felony shall be punished by imprisonment in the state prison or county jail for not more than ten years, or may be fined in the discretion of the court. (Rev., s. 3290; Code, s. 980; 1868-9, c. 31, s. 2; 1874-5, c. 212; C. S. 4176.)

Life Sentence for Accessory to Murder Valid.—Upon conviction of murder in the second degree, and sentence to twenty years in the State's Prison, upon an indictment for murder, when it appears from the evidence that the accused was only an accessory, the case will not be remanded to the Supreme Court for resentence, as the statute provides on sentence for life. State v. Bryson, 173 N. C. 803, 92 S. E. 698.

Sufficiency of Evidence to Go to Jury.—Evidence that defendant, for the purpose of freeing himself of competition in the illegal sale of intoxicating liquors, procured another to kill deceased by shooting him from ambush while lying in wait, is sufficient to be submitted to the jury in a prosecution as an accessory before the fact to the crime of murder, under this section. State v. Mosingo, 207 N. C. 247, 176 S. E. 582.


§ 14-7. Accessories after the fact; trial and punishment.—If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a felony, and may be indicted and convicted thereof, or, if the conviction of the principal felon has been previously convicted, or shall or shall not be amenable to justice, and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years, and may also be fined in the discretion of the court. The offense of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction of the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed without the limits of the state; and in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall become accessory shall have been committed within the body of any other county, the offense of such person guilty of a felony as aforesaid may be inquired of, tried, determined, and punished in either of said counties: Provided, that no person who shall be once duly tried for such felony shall be again indicted or tried for the same offense. (Rev., s. 3289; Code, s. 978; R. C., c. 34, s. 54; 1797, c. 485, s. 1; 1852, c. 55; C. S. 4177.)

In General.—See in connection with this section the annotations under section 14-5, many of which apply equally to this section.

An accessory after the fact is one who, after a felony has been committed, with knowledge that the felony has been committed, renders personal assistance to the felon in any manner to aid him to escape arrest or punishment knowing, at the time, that the person so aided has committed a felony. State v. Potter, 221 N. C. 153, 19 S. E. (2d) 257.

Receiver of Stolen Goods Not Accessory.—All felonious stealing being now reduced by section 14-70 to the grade of petit larceny, a receiver of stolen goods is not an accessory after the fact. State v. Tyler, 85 N. C. 569.

Husband of Accessory Not Competent Witness.—The husband of one charged as an accessory is not a competent witness in favor of or against him as charged as the principal felon. State v. Ludwick, 61 N. C. 401.

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

Art. 3. Rebellion.

§ 14-8. Rebellion against the state.—If any person shall incite, set on foot, assist or engage in a rebellion or insurrection against the government of North Carolina, or the laws thereof, or shall give aid or comfort thereto, every person so offending in any of the ways aforesaid shall be guilty of a felony, and shall be punished by imprisonment in the state's prison for not more than fifteen years and by a fine of not more than ten thousand dollars. (Rev., s. 3437; Code, s. 1106; 1868, c. 60, s. 2; 1861, c. 18; 1866, c. 64; Const., Art. IV, s. 5; C. S. 4178.)

§ 14-9. Conspiring to rebel against the state.—If two or more persons shall conspire together to overthrow or put down, or to destroy by force, the government of North Carolina, or to levy war against the government of the state, or to oppose by force the authority of such government, or by force or threats to intimidate, or to prevent, hinder or delay the execution of any law of the state, or by force or fraud to seize or take possession of any firearms or other property of the state, against the will or contrary to the authority of such state, every person so offending in any of the ways aforesaid shall be guilty of a felony and shall be imprisoned not more than ten years in the state's prison and be fined not exceeding five thousand dollars. (Rev., s. 3438; Code, s. 1107; 1868, c. 60, s. 1; C. S. 4179.)

In General.—It is a rule well established that all who engage in a conspiracy, as well as those who participate after it is formed, are equally liable, and the acts and declarations of each in furtherance of the common illegal design are admissible against all. State v. Jackson, 82 N. C. 565, 567.

§ 14-10. Secret political and military organizations forbidden.—If any person, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or resisting the laws, shall join or in any way connect or unite himself with any oath-bound secret political or military organization, society or association of whatsoever name or character; or shall form or organize or combine and agree with any other person or persons to form or organize any such organization; or as a member of any secret political or military party or organization shall use, or agree to use, any certain signs or grips or passwords, or any disguise of the person or voice, or any disguise whatsoever for the advancement of its object, and shall take or ad-
minister any extra-judicial oath or other secret, solemn pledge, or any like secret means; or if any two or more persons, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or circumventing the laws, shall secretly assemble, combine or agree together, and the more effectually to accomplish such purposes, or any of them, shall use any certain signs, or grips, or passwords, or any disguise of the person or voice, or other disguise whatsoever, or shall take or administer any extra-judicial oath or other secret, solemn pledge; or if any persons shall band together and assemble to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction; or if any person shall knowingly permit any of the acts and things herein forbidden to be had, done or performed on his premises, or on any premises under his control; or if any person being a member of any such secret political or military organization shall not at once abandon the same and separate himself entirely therefrom, every person so offending shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than twenty dollars, or be imprisoned, or both, at the discretion of the court. (Rev., s. 3439; Code, s. 1095; 1870-1, c. 133; 1868-9, c. 267; 1871-2, c. 143; C. S. 4180.)


Art. 4. Subversive Activities.

§ 14-11. Activities aimed at overthrow of government; use of public buildings.—It shall be unlawful for any person, by word of mouth or writing, willfully and deliberately to advocate, advise or teach a doctrine that the government of the United States, the state of North Carolina or any political subdivision thereof shall be overthrown or overturned by force or violence or by any other unlawful means. It shall be unlawful for any public building in the state, owned by the state of North Carolina, any political subdivision thereof, or by any department or agency of the state or any institution supported in whole or in part by state funds, to be used by any person for the purpose of advocating, advising or teaching a doctrine that the government of the United States, the state of North Carolina or any political subdivision thereof should be overthrown by force, violence or any other unlawful means. (1941, c. 37, s. 1.)

For comment on the enactment of this section, see 19 N. C. Law Rev. 466.

§ 14-12. Punishment for violations.—Any person or persons violating any of the provisions of this article shall, for the first offense, be guilty of a misdemeanor and be punished accordingly, and for the second offense shall be guilty of a felony and punished accordingly. (1941, c. 37, s. 2.)

Art. 5. Counterfeiting and Issuing Monetary Substitutes.

§ 14-13. Counterfeiting coin and uttering coin that is counterfeit.—If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting the resemblance or similitude or likeness of a Spanish milled dollar, or any coin of gold or silver which is in common use and received in the discharge of contracts by the citizens of the state; or shall pass, utter, publish or sell, or attempt to pass, utter, publish or sell, or bring into the state from any other place with intent to pass, utter, publish or sell as true, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud any person whatsoever, every person so offending shall be guilty of a felony, and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years. (Rev., s. 3422; Code, s. 1035; R. C., c. 34, s. 64; 1811, c. 814, s. 3; C. S. 4181.)

Cross References.—As to forgery, see §§ 14-19 et seq. As to counterfeiting trademarks, see §§ 20-8.

§ 14-14. Possessing tools for counterfeiting.—If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of a Spanish milled dollar, or other coin made of gold or silver which is in common use and received in discharge of contracts by the citizens of the state, and shall be duly convicted thereof, the person so offending shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years, or be fined not more than five hundred dollars. (Rev., s. 3423; Code, s. 1036; R. C., c. 34, s. 65: 1811, c. 814, s. 4; C. S. 4182.)

Indictment Sufficient.—An indictment charging defendant with having in his possession "one pair of dies, upon which were made the likeness, similitude, figure and resemblance of the sides of a lawful Spanish milled silver dollar, etc., for the purpose of making and counterfeiting money in the likeness and similitude of Spanish milled silver dollars," was held to charge, with sufficient certainty, the offense designated in this section. State v. Collins, 10 N. C. 191.

§ 14-15. Issuing substitutes for money without authority.—If any person or corporation, unless the same be expressly allowed by law, shall issue any bill, due bill, order, ticket, certificate of deposit, promissory note or obligation, or any other kind of security, whatever may be its form or name, with the intent that the same shall circulate or pass as the representative of, or as a substitute for, money, he shall forfeit and pay for each offense the sum of fifty dollars; and if the offender be a corporation, it shall in addition forfeit its charter. Every person or corporation offending against this section, or aiding or assisting therein, shall be guilty of a misdemeanor. (Rev., s. 1556; Code, s. 2493; 1858, c. 157; R. C., c. 36, s. 5; C. S. 4183.)

Local Modification.—Cumberland: 1933, c. 31; Currituck: 1933, c. 338.

Editor's Note.—In State v. Humphreys, 19 N. C. 555, the act of 1816, ch. 900, which was very similar to this section, is discussed. It is there held that the act is constitutional and that the intent in so issuing the notes, etc., is an essential ingredient of the offense.

§ 14-16. Receiving or passing unauthorized substitutes for money.—If any person or corporation shall pass or receive, as the representative of, or as the substitute for, money, any bill, check, certificate, promissory note, or other security of the kind mentioned in § 14-15, whether the same be issued within or without the state, such person or corporation, and the officers and agents of such corporation aiding therein, who shall offend
against this section shall for every such offense forfeit and pay five dollars, and shall be guilty of a misdemeanor. (Rev., s. 3712; Code, s. 2494; 1895, c. 127; R. C., c. 36, s. 6; C. S. 4184.)

Editor's Note.—In State v. Bank, 48 N. C. 450, it was held that this section making it an offense to “pass and receive for life under § 14-6. State v. Hudson, 218 N. C. 219, 10 S. E. (2d) 730.


Principal May Be Prosecuted under This Section and Ac-cessed under § 14-6.—Section 14-6 prescribing imprisonment for life upon a conviction as an accessory before the fact to the crime of murder was in force at the time this section, dividing murder into two degrees, does not give any new definition of murder, but the same remains as it was at common law before the enactment. State v. Delton, 178 N. C. 779, 101 S. E. 548.

Purpose.—This section intended to select out of all murders denounced those that were more heinous because committed with premeditation and deliberation, or in the perpetration or attempted perpetration of a felony, etc., as murder in the first degree, punishable with death, and leave other murders as murder in the second degree, punished by imprisonment. State v. Smith, 221 N. C. 278, 289, 20 S. E. (2d) 313.

Principal May Be Prosecuted under This Section and Acces-sed under § 14-6.—Section 14-6 prescribing imprisonment for life upon a conviction as an accessory before the fact to the crime of murder was in force at the time this section, enacted and accessible under this section for murder in the second degree, while the accessory before the fact receives life under § 14-6. State v. Mingus, 207 N. C. 247, 250, 176 S. E. 2d 477.

Malice—Definition.—Malice is that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. State v. Benson, 183 N. C. 755, 111 S. E. 869.

III. MURDER IN THE FIRST DEGREE.

Effect of Section Dividing Murder into Degrees. — This section, dividing murder into two degrees, does not give any new definition of murder, but the same remains as it was at common law before the enactment. State v. Delton, 178 N. C. 779, 101 S. E. 548.

Purpose.—This section intended to select out of all murders denounced those that were more heinous because committed with premeditation and deliberation, or in the perpetration or attempted perpetration of a felony, etc., as murder in the first degree, punishable with death, and leave other murders as murder in the second degree, punished by imprisonment. State v. Smith, 221 N. C. 278, 289, 20 S. E. (2d) 313.

Principal May Be Prosecuted under This Section and Ac-cessed under § 14-6.—Section 14-6 prescribing imprisonment for life upon a conviction as an accessory before the fact to the crime of murder was in force at the time this section, enacted and accessible under this section for murder in the second degree, while the accessory before the fact receives life under § 14-6. State v. Mingus, 207 N. C. 247, 250, 176 S. E. 2d 477.

Malice—Definition.—Malice is that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. State v. Benson, 183 N. C. 755, 111 S. E. 869.

Same.—Necessity.—Malice is always a necessary ingredient of murder. State v. Baldwin, 152 N. C. 522, 68 S. E. 148.

Same.—Exception.—But it is not necessary for murder that the state prove malice. State v. McDowell, 143 N. C. 563, 59 S. E. 690.

Same.—Implied.—For this reason, the unlawful killing of a human being with a deadly weapon implies malice. State v. Pasour, 183 N. C. 793, 111 S. E. 779; State v. Brinkley, 183 N. C. 720, 110 S. E. 780; State v. McDowell, 145 N. C. 563, 59 S. E. 690.

Same.—Misdemeanor.—At common law, the unlawful killing of a human being with a deadly weapon, nothing appearing, was murder, malice being presumed from the facts. State v. Ryhne, 124 N. C. 847, 33 S. E. 128. The common law rule has been followed. It is now assumed that a killing with a deadly weapon is unlawful and malicious. State v. Benson, 183 N. C. 793, 111 S. E. 869; State v. Walker, 193 N. C. 483, 137 S. E. 429.

If the accused previously procured a weapon for the purpose of using it, and does use it, the offense is ordinarily murder. State v. Johnson, 172 N. C. 929, 90 S. E. 426.

Provocation never disproves malice; it only removes the presumption of malice, which the law raises without proof. A malicious killing is murder, however gross the provocation. State v. Johnson, 23 N. C. 354.

Motive.—Necessity.—It is not necessary to a conviction of murder that the state prove motive. State v. Adams, 136 N. C. 617, 48 S. E. 589; State v. McDowell, 145 N. C. 563, 59 S. E. 690.

Same.—To Strengthen State's Case.—But the case of the state may be strengthened by the showing of a motive when the evidence is circumstantial. State v. Stratford, 149 N. C. 483, 62 S. E. 882; State v. Turner, 143 N. C. 641, 57 S. E. 382.

Same.—To Identify Prisoner or Establish Malice.—And it may be shown to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation, and premeditation. State v. Wilkins, 158 N. C. 603, 73 S. E. 292; State v. Adams, 138 N. C. 688, 50 S. E. 765.

Intent.—Necessity.—Before a conviction for murder can be had, an unlawful and intentional taking of another's life must be shown. Sometimes murder by poison is inferred by reason of the killing with a deadly weapon, or by circumstances which indicate a reckless indifference to human life, but it must always exist before a charge of murder can be sustained. State v. Wilkin, 146 N. C. 643, 65 S. E. 556.

Same.—Must Co-exist with Killing.—"The act of killing, and the guilty intent, must concur to constitute the offense." State v. Scotts, 50 N. C. 403, 42 S. E. 534.

Attempt to Kill.—"An attempt only, to, kill, with the most diabolical intent, may be moral, but can not be legal murder." State v. Scotts, 50 N. C. 403, 42 S. E. 534.


Quoted in State v. Hudson, 218 N. C. 219, 10 S. E. (2d) 730.


III. MURDER IN THE FIRST DEGREE.

Effect of Section Dividing Murder into Degrees.—By the act of 1833, chapter 85 (this section), the crime of murder has been divided into two degrees, first and second. The common law definition and description are still applicable to the crime in the second degree; but it takes more than this to constitute murder in the first degree—the killing must be wilful, deliberate and premeditated, and this must be shown by the State beyond a reasonable doubt before it is justified in asking a verdict of guilty of murder in the first degree. State v. Rhyn, 124 N. C. 847, 33 S. E. 128.

Definition.—Murder in the first degree is the unlawful killing of a human being with malice, with premeditation and deliberation. State v. Starnes, 220 N. C. 384, 110 S. E. (2d) 346.

Deliberation and Premeditation.—Premeditation.—Premedi-tation is the principal thought by the murderer, at some length of time, however short. State v. Benson, 183 N. C. 795, 111 S. E. 869. It is a prior determination to do the act. State v. Cameron, 166 N. C. 379, 81 S. E. 748; State v. Bowser, 214 N. C. 409, 194 S. E. 312.

Same.—Deliberation.—Deliberation means a preconceived intent to kill, executed in cold blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose, and it involves a violent passion suddenly aroused by some lawful or just cause or legal provocation. State v. Benson, 183 N. C. 795, 111 S. E. 869; State v. Bowser, 214 N. C. 409, 194 S. E. 312.

Deliberation means that the act is done in cold state of
blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant, or by another for the defendant, with 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 arising out of some lawful or justifiable cause, or by legal provocation. State v. Hawkins, 214 N. C. 335, 334, 199 S. E. 284; State v. Benson, 183 N. C. 795, 111 S. E. 809.

Necessity.—And before a conviction for murder in the first degree can be had, the state must show that the prisoner had formed, prior to the killing, with deliberation and premeditation, a purpose to kill the deceased. Terry v. State, 173 N. C. 797, 111 S. E. 846; State v. Benson, 181 N. C. 795, 111 S. E. 869. See also 5 N. C. Law Rev. 364.

Same.—Length of Time Immaterial.—The killing of a human being after the fixed purpose to kill has been formed, is sufficient for the conviction of murder in the first degree. State v. Walker, 173 N. C. 780, 92 S. E. 327. No particular period of time is necessary to constitute premeditation and deliberation for a conviction of murder in the first degree under this section. If the purpose to kill at all events has been deliberately formed, the interval which elapses before its execution is immaterial. State v. Holldein, 190 N. C. 721, 165 S. E. 342; State v. Cooper, 174 N. C. 814, 94 S. E. 416. And deliberation and premeditation need not be of any perceptible time. State v. Bynum, 175 N. C. 777, 95 S. E. 101; State v. Hammond, 216 N. C. 627, 11 S. E. (2d) 439; State v. Burney, 215 N. C. 338, 11 S. E. (2d) 24.

Same.—Sufficiency.—Weighing the purpose to kill long enough to form a fixed design, and the putting of such design into execution, matter how long deferred, constitutes premeditation and deliberation sufficient to sustain a conviction of murder in the first degree. State v. Dowdell, 218 N. C. 244, 21 S. E. (2d) 313.


Malice.—For a conviction of murder in the first degree the killing must be done with malice aforethought, express or implied. State v. McKay, 150 N. C. 813, 68 S. E. 105; State v. Satterfield, 207 N. C. 118, 176 S. E. 466; State v. Mozingo, 207 N. C. 24, 174 S. E. 411. A homicide committed by a person who had killed the person intended, and therefore an instruction to the jury either to convict the defendant of murder in the first degree, or to acquit him is not error. State v. Myers, 202 N. C. 351, 162 S. E. 764.

Evidence tending to show that the prisoner with another entered a store with intent to rob its cash drawer, and shot and killed the deceased is of an attempt to commit a felony and an attempt to sustain in a verdict of murder in the first degree, as defined by this section, under proper instructions from the court thereon upon conflicting evidence. State v. Stegall, 200 N. C. 18, 195 S. E. 56.

While murdering in the perpetration of a robbery from the person, it is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. State v. Alston, 215 N. C. 713, 3 S. E. (2d) 11. A homicide committed in the perpetration of an attempt to perpetrate a robbery is murder in the first degree, notwithstanding the absence of any fixed intent to kill or any previous purpose, design or plan. State v. Kelly, 216 N. C. 627, 7 S. E. (2d) 533.

All Conspirators Are Guilty Regardless of Who Actually Committed Crime.—Where a conspiracy is formed it is murder in the first degree to murder in the perpetration of the crime, each conspirator is guilty of murder in the first degree, under this section, and the state must show that each conspirator was present at the scene of the killing and participated in the attempt to perpetrate the robbery, each of them having been guilty of murder in the first degree. State v. Stefano, 200 N. C. 441, 174 S. E. 411; State v. Miller, 219 N. C. 154, 14 S. E. (2d) 522.

Each party to a conspiracy to burglarize or rob a home is guilty of murder in the first degree if any one of the conspirators commits murder in an attempt to perpetrate the burglary or robbery. State v. Bell, 205 N. C. 225, 171 S. E. 50.

IV. MURDER IN THE SECOND DEGREE.

Definition.—Murder in the second degree is the unlawful killing of a human being with malice, but without elements of premeditation and deliberation. State v. Benson, 183 N. C. 795, 111 S. E. 869; State v. Starnces, 220 N. C. 384, 17 S. E. (2d) 346.

By this section the crime of murder in the second degree is a new common law. State v. Smith, 221 N. C. 278, 20 S. E. (2d) 313.

Effect of Statute Dividing Murder into Degrees.—At common law, when the intentional killing by a deadly weapon is shown, the law presumes malice; the burden of reducing the offense to a lower grade by proof of matters of mitigation or excuse devolved upon the prisoner. The statute dividing murder into two degrees (under this statute) contains no reference to this rule, but the Supreme Court of N. C. in State v. Fuller, 114 N. C. 863, 19 S. E. 797, held that one result of the division of murder into two degrees was that proof of intentional killing with a deadly instrument raised a presumption only of murder in the second degree, and the burden was on the State to aggravate the offense to murder in the first degree, as it was on the prisoner, to show that death resulted from the act of the deceased, defendant would be guilty of murder in the first degree, is without error. State v. Burney, 215 N. C. 596, 3 S. E. (2d) 24.

Killing in Perpetration of a Robbery.—By a homicide committed in the perpetration of, or in attempt to perpetrate, a robbery will be deemed murder in the first degree. State v. Lane, 166 N. C. 333, 81 S. E. 620. See also State v. Glover, 208 N. C. 68, 17 S. E. 6; State v. Exum, 213 N. C. 16, 195 S. E. 92. Where all the evidence for the State tends to show that the defendants killed the deceased while attempting to rob him, the killings are murder in the first degree, and the burden of proof for the State is increased by the statute. State v. Lankford, 202 N. C. 780, 164 S. E. 242. When murder is committed by poisoning, killing is murder in the second degree. State v. Hicks, 125 N. C. 734, 34 S. E. 621.

The presumptions from the use of a deadly weapon in committing a homicide are that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree, and that the use of such homicide to constitute murder in the first degree the State must show be—
yon a reasonable doubt that it was done with premedita-
tion and deliberation. State v. Miller, 197 N. C. 445, 446,
149 S. E. 590.

The intentional killing of a human being with a deadly
weapon implies malice and, if nothing else appears, consti-
tutes murder in the second degree. State v. Hawkins, 214
N. C. 336, 334, 199 S. E. 284; State v. Payne, 213 N. C. 719,
197 S. E. 573; State v. Bright, 215 N. C. 537, 2 S. E. (2d)
546.

A killing with a deadly weapon raises the presumption
that the homicide was murder in the second degree, and if
the State seeks a conviction of murder in the first degree
it has the burden of proving beyond a reasonable doubt
that murder was committed with premeditation and deter-

Intent Formed Simultaneous with Act of Killing—Where
this intent to kill is formed simultaneously with the act
of killing, the homicide is not murder in the first degree.
State v. Dowden, 118 N. C. 1145, 24 S. E. 722; State v. Bar-
etti, 142 N. C. 565, 54 S. E. 856.

Form of Indictment.—Nothing contained in the act of 1893
requires any alteration or modification of the existing form
of indictment for murder. Therefore, it is not necessary
that an indictment for murder committed in the attempt
to perpetrate a robbery contain a specific allegation of
the attempted larceny, such allegation not having been
necessary in indictments prior to the said act of 1893.
State v. Covington, 117 N. C. 834, 23 S. E. 137.

Indictment Held to Be by Motion
for Bill of Particulars.—After the return of a verdict
of guilty of murder in the first degree, defendant moved
in arrest of judgment for that the indictment was alterna-
tive, and defendant's remedy, if he desired greater certainty,
was by motion for a bill of particulars under § 15-143. State v.
Puckett, 211 N. C. 600, 199 S. E. 17.

Evidence of Killing in Perpetration of Robbery.—Evidence
tending to show that the prisoner killed the deceased in the
perpetration or attempt to perpetrate a robbery, is expressly
made competent by this section, and may be considered by
the jury in determining the degree of crime, and whether
the accused committed the highest felony or one of lower

Evidence of Facts Succeeding Homicide.—Testimony of
facts and circumstances which occurred after the commis-
sion of a homicide which tends to show a preconceived plan
formed and carried out by the prisoner in detail, resulting
in his actual killing of the deceased by two pistol shots,
was error for the court to limit the jury to a verdict of guilty
of murder in the first degree, after the defendant stated that
he had done as he had intended, is competent upon the
question of deliberation and preméditation, under the evi-
dence in this case, to sustain a verdict of murder in the
first degree. State v. Westmoreland, 181 N. C. 590, 107
S. E. 438.

Beyond Reasonable Doubt.—The additional elements of
premeditation, necessary to constitute murder
in the first degree, are not presumed from a killing
with a deadly weapon. They must be established beyond
a reasonable doubt, and found by the jury, before a ver-
dict of murder in the first degree can be rendered against
the prisoner. State v. Hawkins, 214 N. C. 336, 334, 199
S. E. 284.

Determination of Degree of Murder.—Under this section,
distinguishing murder into two degrees, the jury, on convic-
tion, must determine in their verdict whether the crime is
murder in the first or second degree. State v. True, 133
N. C. 96, 34 S. E. 646; State v. Gadberry, 117 N. C. 811, 23
S. E. 480.

Charge—Willful Premeditation and Deliberation.—The law
is fixed by the statute, that the killing must be willful,
upon preméditation and with deliberation, and where there is no
evidence tending to prove this, the jury should be so in-
structed, and the question of guilt on the charge of murder
in the first degree ought not to be submitted to them. State v.
Rhiney, 124 N. C. 847, 33 S. E. 128.

Evidence of Unlawful Killing.—Where the prisoner is on trial for murder in the first degree, burglary and
rape, and there is evidence to support a verdict for each of
these offenses, an instruction is proper, and in keeping with
the statute, to inform the jury in arrest of judgment for that the
prisoner, by admission, confessed to the commission of a
deadly weapon, where the prisoner is charged with murder,
and the killing of the deceased by him has been admitted,
and the judge has correctly charged upon the crime of
manslaughter, that he charge upon the principles of an assault
with a deadly weapon, in order to rebut the presumption
that the prisoner is on trial for murder in the first degree,
and the verdict must be re

Sufficiency of Evidence for Submission to Jury.—Evidence
tending to show that the defendant on trial for a
murder was killed by the prisoner in the perpetration of a
robbery, it is not error for the court to limit the jury to a verdict of guilty
of murder in the first degree or not guilty under this sec-

Verdict.—For a conviction of murder in the first degree
under this section and section 15-172, the jury must find
specifically under the evidence that this degree of crime has
been committed by the defendant, and the verdict must be re-
submission to the jury of the question of defendant's guilt of murder in the first degree as stated in this section. State v. Ferrer, 205 N. C. 640, 172 S. E. 186.

Punishment Not Reviewable on Appeal.—The question of the imposition of a sentence on the prisoner convicted

§ 14-18. Punishment for manslaughter.—If any person shall commit the crime of manslaughter
shall be punished by imprisonment in the county jail or state prison for not less than
four months nor more than twenty years: Provided, however, that in cases of involuntary manslaughter,
the punishment shall be in the discretion of the court, and the defendant may be fined or imposed,
or both. (Rev. s. 3632; Code, s. 1055;
1879, c. 255; R. C., c. 34, s. 24; 4 Hen, VII, c. 13;
1816, c. 918; 1933, c. 249; C. S. 4201.)

Editor's Note.—Public Laws of 1933, c. 249, added the pro-
viso at the end of this section, relating to involuntary man-
slaughter.

As to Less Degrees of Same Crime.—While under the pro-
visions of section 15-170, the trial judge is required to charge
upon evidence on the less degrees of the same crime con-
cerning which the prisoner was being tried, it is not required
that the charge upon the crime of manslaughter, as defined as a

Punishment Not Reviewable on Appeal.—The question of the imposition of a sentence on the prisoner convicted of

[624]
manslaughter within the maximum and minimum allowed by this section, is within the discretion of the trial court and is not reviewable on appeal. State v. Fleming, 202 N. C. 512, 163 S. E. 452.

Section Does Not Constitute Involuntary Manslaughter a Misdemeanor.—The amendment to this section by ch. 249, Public Laws of 1913, which added a proviso that in cases of involuntary manslaughter, in which a justice of the peace has jurisdiction, the punishment cannot exceed that which a justice of the peace could impose, State v. Fritz, 133 N. C. 725, 45 S. E. 957.

Art. 7. Rape and Kindred Offenses.

§ 14-21. Punishment for rape.—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death. (Rev. s. 3637; Code, s. 1101; R. C., c. 34, s. 3; 18 Eliz., c. 1786-9; c. 167, s. 2; 1917, c. 29; S. C. 4204.)

Cross References.—As to conviction for assault when defendant not guilty of rape, see § 14-214. As to exclusion of bystanders during trial for rape, see § 15-166.

Editor’s Note.—At common law rape was a felony, but the offense was afterwards changed to a misdemeanor before the statute took effect, and hence its present existence as a felony is not considered it was part of the law before the statute became effective. State v. Fritz, 133 N. C. 723, 45 S. E. 958.

Rape under these and later statutes, was the “carnal knowledge of a female forcibly and against her will.” State v. Johnston, 76 N. C. 209, 210. This definition left out the elements of age altogether. But as the instances of children below the age of discretion increased, the legislature became anxious to create a new offense distinct from rape, but it was to make such carnal knowledge and abuse rape. The reason why the act does not call it rape in so many words is because of the seeming incongruity of calling an act rape when it is by consent, whereas the established meaning of rape is “against her will.” State v. Johnston, 76 N. C. 209, 210. So that now the definition of rape of a female over ten years of age is as it always has been, “carnal knowledge against her will.” State v. Dancy, 130 N. C. 608, 609. When Offense Complete.—Both at common law and under our statute the offense is complete, although no casualty results of State v. Fritz, 133 N. C. 725, 727, 45 S. E. 957.

Challenge to Fight with Fists and Hands.—Challenge to fight a fair fight with fists and hands, without the use of any deadly weapons, is not dueling within the statute. State v. Monds, 130 N. C. 697, 700, 41 S. E. 789.

Challenge to Fight Out of State.—Challenge to fight duel out of state is indictable under this section. State v. Farrier, 8 Eliz. 226.

Indictments.—An indictment for sending a challenge, in the form of a letter, to fight a duel, need not set out the words of the letter, nor the substance thereof. State v. Futch, 208 N. C. 457.

Punishment.—When a person is tried in the Superior Court for violation of the provisions of this section, but is convicted of a lesser offense, of which a justice of the peace has jurisdiction, the punishment cannot exceed that which a justice of the peace could impose. State v. Fritz, 133 N. C. 725, 45 S. E. 957.
§ 14-22

Punishment for assault with intent to commit rape.—Every person convicted of an assault with intent to commit a rape upon the body of any female shall be imprisoned in the state's prison not less than one nor more than fifteen years. (Rev., s. 3638; Code, s. 1102; 1868-9, c. 167, s. 3; R. C., c. 107, s. 44; 1823, c. 1229; 1917, c. 162, s. 1; C. S. 4205.)

Editor's Note.—The offense of "assault with intent to commit rape" is a separate and distinct crime in and by itself and is not an "attempt to commit rape," as it is, sometimes, falsely designated. There is no such criminal offense as an "attempt to commit rape." It is embraced and covered by the offense of "an assault with intent to commit rape." See State v. Hewett, 158 N. C. 627, 629, 74 S. E. 789.

In General.—This section should be construed as if it read as follows: if any person shall attempt to commit rape specified in the preceding section, that is to say, to carnally know and abuse a female under ten (now twelve) years of age against her will, or to carnally know and abuse a female under ten (now twelve) years of age, with or against her will, he shall be punished, etc. State v. Johnston, 76 N. C. 209, 211.

The offense defined by this section is an assault on a female with intent to commit rape, the "intent" to commit this offense being inclusive of an "attempt" to commit it. State v. Adams, 214 N. C. 501, 199 S. E. 716.

The act of 1860-'61, Ch. 30 was passed, providing that it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge of prosecutrix when she was under twelve years old, and buggery, to prove the actual emission of seed in order to constitute a carnal knowledge of prosecutrix when she was over twelve years of age by force and against her will, or to carnally know and abuse a female under ten (now twelve) years of age, with or against her will, she shall be punished, etc. State v. Johnston, 76 N. C. 209, 211.

The offense defined by this section is an assault on a female with intent to commit rape, the "intent" to commit this offense being inclusive of an "attempt" to commit it. State v. Adams, 214 N. C. 501, 199 S. E. 716.

With respect to the charge of assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the female intended to do so, at all events, notwithstanding any resistance on her part." State v. Jones, 222 N. C. 37, 38, 21 S. E. (2d) 812, quoting State v. Massey, 86 N. C. 658, 41 S. E. 478.

Age of Female.—This section in the act of 1868 followed immediately after the second section (14-21) of that act, and had direct reference to it, and was intended to include assaults upon females, whereas, the act of 1860-'61 was limited to males. It uses the words "any female," which embrace females of all ages. State v. Dancy, 83 N. C. 608, 610.

Who May Be Guilty of Offense.—At common law, rape was defined as having sexual connection, with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the female intended to do so, at all events, notwithstanding any resistance on her part, etc. State v. Jones, 222 N. C. 37, 38, 21 S. E. (2d) 812.

Same.—Husband upon Wife.—A husband who, by threats to kill in event of refusal, compels his wife to submit to, or aids and abets in an attempt to commit a rape becomes thereby a principal in the offense. State v. Jones, 83 N. C. 605.

Same.—Infant under 14.—An infant under the age of 14 years cannot be convicted of an assault with intent to commit rape. State v. Sam, 60 N. C. 293.

Withdrawal of Consent before Perpetration of Offense.—If the prosecutrix consented to have connection with the prisoner upon certain terms, which the defendant was not satisfied with, and attempted by force to carry out her consent, he is guilty of rape if he succeeds, and of an assault with intent to commit rape, if he does not succeed. State v. Long, 93 N. C. 542.

Effect of Subsequent Consent.—It seems that this offense is complete, if the defendant attempts to force the prosecutrix against her will, notwithstanding she afterwards consents. State v. Long, 93 N. C. 542.

Punishment.—Unlawfully to carnally know and abuse a female under the age of ten years (now twelve) constitutes a common law offense. There must be both an attempt and an actual penetration of the person. Whether the offense is complete is a matter for the jury to determine from the evidence in the case. (Rev., s. 3638; Code, s. 1105; 1860-1, c. 30; 1917, c. 29; C. S. 4206.)

§ 14-23.

Emission not necessary to constitute rape and buggery.—It shall not be necessary upon the trial of any indictment for the offenses of rape, carnally knowing and abusing any female child under twelve years old, and buggery, to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only. (Rev., s. 3638; Code, s. 1105; 1860-1, c. 30; 1917, c. 29; C. S. 4206.)
under this section, for carnally knowing a girl between the ages of 10 and 14 (now 12 and 16), is erroneous. The court held that the crime would be complete "if the jury should find that the defendant injured and abused her genital organs." State v. Pickens, 129 N. C. 637, 41 S. E. 789.

Aiding and Abetting.—One who accompanies in an automobile another who commits the offense of rape, in violation of this section, and with knowledge of this purpose, is guilty of aiding and abetting the commission of the offense, and punishable as a principal therein. State v. Hart, 186 N. C. 583, 190 S. E. 755.

Joiner of Offenses.—A charge of rape and that of carnally knowing a female person between the ages of twelve and under sixteen years of age, in violation of this section, is properly joined in one count of the indictment, if it is shown that they are related in character and grow out of the same transaction, and are properly left to the jury under the general idea of one guilt, without any requirement as to the part of the state to make an election. State v. Hall, 214 N. C. 609, 642, 200 S. E. 375.

Responsiveness of Verdict.—Defendant was charged in the first count with rape and in the second count with having carnal knowledge of a female child over twelve and under sixteen years of age. The solicitor announced he would not ask for a conviction of the capital offense of rape, but would charge the jury only with the violation of this section upon the first count, and charged that upon the second count they might find defendant guilty or not guilty. The jury convicted the defendant of a violation of section 14-25 upon the first count and of guilt of assault upon a female upon the second count, and the court thereupon instructed the jury again as to the verdicts it might render upon the respective counts, and upon the second count, instructed the jury that it had returned a verdict of guilty of an assault upon a female upon the second count and guilty upon the second count. Held: Even conceding that the first verdict of not guilty upon the first count precluded the jury from again considering that charge and rendered ineffective the second verdict of guilty of an assault upon a female, its first verdict upon the second count was not responsive to the indictment and was not a verdict permitted by law, and therefore the court erred in permitting the jury to reconsider its verdict upon the second count, and the verdict finally rendered thereon is consistent with law and the properly accepted by the court. State v. Wilson, 218 N. C. 556, 11 S. E. (2d) 567.

Evidence of Conversation.—Where the prosecutrix has testified upon the trial for the unlawfully carnally knowing or abusing an innocent female child over twelve and under sixteen years of age, her statement as to the conversations of the solicitor, to the effect that she had told her mother on the day of the occurrence, who was the only near relative present, is admissible for the purpose of corroborating her other testimony. State v. Winder, 183 N. C. 776, 111 S. E. 730.

Evidence of Age.—Prosecuting witness may give competent testimony as to her age. State v. Trippe, 222 N. C. 600, 24 S. E. (2d) 240.

Family Bible Entries Evidence of Child's Age.—Authenticated entries in family Bible constitute competent evidence of the age of child. State v. Hairston, 121 N. C. 579, 28 S. E. 492.

Expression of Opinion by Court.—In prosecution under this section, the court, in summarizing the contents of the solicitor's charges, that defendant insisted that the jury should not find beyond a reasonable doubt that in abducting the prosecutrix, he committed the offense of rape. The court held that the statement of the solicitor's charges did not constitute an expression of opinion on an essential element of the crime charged, prohibited by section 1-180, and the evidence not excluded by virtue of the charge so made, was not error, because the court instructed the jury that they must find that the prosecutrix was under sixteen years of age if they believed the uncontested testimony. State v. Whiting, 218 N. C. 619, 11 S. E. (2d) 505.

Evidence of Relations with Other Men.—In a prosecution under this section, it is not error to exclude evidence of improper relations between the prosecuting witness and any other man, months or years before the alleged crime of the defendant. State v. Hairston, 121 N. C. 579, 28 S. E. 492.

Evidence Sufficient for Jury.—Evidence that prosecutrix at the time alleged was an innocent, virtuous woman, under sixteen years of age, and that defendant is the father of her illegitimate child, which was born shortly after she arrived at the age of sixteen, is sufficient to be submitted.
to the jury in a prosecution under this section. State v. Wyont, 218 N. C. 505, 11 S. E. (2d) 573.

Penal of Guilty May Not Be Withdrawn. Upon the trial under section 14-26, of carnally knowing a female child over twelve and under sixteen years of age, the defendant may not enter a plea of guilty and thereafter withdraw the plea and then move for a new trial; and the court will be sustained in the absence of abuse of the court's discretion. State v. Porter, 188 N. C. 804, 125 S. E. 615.

Variance as to Time. It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches criminality on the part of the defendant. State v. Porter, 188 N. C. 804, 125 S. E. 615.

Twelve and under Sixteen Years of Age. The defendant may be punished for which no specific punishment is prescribed under section 14-27. State v. Griffin, 190 N. C. 131, 126 S. E. 417.

Cited in State v. Cain, 209 N. C. 275, 183 S. E. 300.

§ 14-27. Jurisdiction of court; offenders classed as delinquents.—All persons charged with a violation of § 14-26 under the age of sixteen years shall be brought before the juvenile court and such other courts as may hereafter exercise such jurisdiction, and shall be classed as delinquents and not as felons: Provided, that where the offenders agree to marry, the consent of the parent shall not be necessary: Provided further, that any male person convicted of the violation of § 14-26 who is under eighteen (18) years of age, shall be guilty of a misdemeanor only. (1923, c. 140, s. 2; C. S. 4209(a).)

Editor's Note.—This section is summarized and a brief history of the law given in 1 N. C. Law Rev. 286.

Art. 8. Assaults.

§ 14-28. Malicious castration.—If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable or render impotent any part or member of the person so offending, he shall suffer imprisonment in the state's prison for not less than five nor more than sixty years. (Rev., s. 3626; Code, s. 1000; R. C., c. 34, s. 47: 1754, c. 56: 1791, c. 339, ss. 2, 3; 1831, c. 40, s. 2; C. S. 4211.)

Cross Reference.—See annotations under § 14-30.

Proof of Malice Aforethought Not Necessary.—Proof, of the words "malice aforethought" or of a preconceived disposition not necessary to a conviction for the crime of maiming, is not necessary. State v. Girkim, 23 N. C. 121.

§ 14-30. Malicious maiming. — If any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any other person, with intent to murder, maim, or disfigure, the person so offending, his counselors, abettors and aiders, knowing of and privy to the offense, shall, for the first offense, be punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, and be fined, in the discretion of the court, and for the second offense shall be imprisoned in the state's prison not less than five nor more than sixty years. (Rev., s. 3626; Code, s. 1050; R. C., c. 34, s. 14; 1754, c. 56; C. S. 4209(a).)

Variance as to Time.—It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches criminality on the part of the defendant. State v. Porter, 188 N. C. 804, 125 S. E. 615.

First Blow or Sudden Affray.—The first blow, or a sudden affray, does not palliate the offense of maiming under the act of 1791; for if it did, the statute would be of little avail. State v. Crawford, 13 N. C. 425.

What Constitutes Maiming.—To constitute a maim, under this statute, an injury or an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the defendant, the loss of an eye is not included in the offense of mayhem, and though the infliction thereof without malice may neither be sustained as provided by section 14-29, nor under the common law, requiring that the offense should have been committed with malice, yet upon proper evidence a conviction may be had of an assault with a deadly weapon upon another by waylaying or

§ 14-29. Castration or other maiming without malice aforethought.—If any person shall, on purpose and unlawfully, but without malice aforethought, cut or slit the nose, bite or cut off the nose, or a lip or an ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be imprisoned in the county jail or state's prison not less than six months nor more than ten years, and fined, in the discretion of the court. (Rev., s. 3626; Code, s. 1000; R. C., c. 34, s. 47: 1754, c. 56: 1791, c. 339, ss. 2, 3; 1831, c. 40, s. 2; C. S. 4211.)

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Malicious intent to maim or disfigure may either be expressed or implied from circumstances. State v. Crawford, 13 N. C. 425.

Malicious Intent Express or Implied.—The malicious intent to maim or disfigure may either be expressed or implied from circumstances. State v. Crawford, 13 N. C. 425.

Proof of Grudges or Threatenings Not Necessary.—And proof of antecedent grudges, threatenings or an express disposition not necessary to the conviction of an assault with a deadly weapon, in this case. State v. Griffin, 190 N. C. 131, 126 S. E. 417.

Presumptions.—An intent to disfigure is prima facie to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the defendant that there was no such matter of right, and the sending of an injury shall be presumed to be done on purpose, without lawful authority, and without the pressure of necessity, that which the law forbids. State v. Crawford, 13 N. C. 425.

Malicious intent to maim or disfigure may either be expressed or implied from circumstances. State v. Crawford, 13 N. C. 425.

Malicious intent express or implied.—The malicious intent to maim or disfigure may either be expressed or implied from circumstances. State v. Crawford, 13 N. C. 425.

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First Blow or Sudden Affray.—The first blow, or a sudden affray, does not palliate the offense of maiming under the act of 1791; for if it did, the statute would be of little avail. State v. Crawford, 13 N. C. 425.

Same—Accident or Self-Defense.—When the act is proved, the law presumes that it was done on purpose. The burden is therefore upon defendant to show that it was done accidentally or in self-defense. State v. Evans, 2 N. C. 281, 282; State v. Skidmore, 87 N. C. 509.

Indictment—Necessary Allegations.—An indictment, for bitting off an ear, must state the offense to be done on purpose, as well as unlawfully. State v. Ormond, 18 N. C. 119.

Same—Unnecessary Allegations.—But it need not be alleged whether it was the right or left ear. State v. Green, 29 N. C. 39.

§ 14-31. Maliciously assaulting in a secret manner.—If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or
Assault with Deadly Weapon with Intent to Kill Resulting in Injury.—Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the state prison or he worked under the supervision of the state highway and public works commission for a period not less than four months nor more than ten years. (1919, c. 101; 1931, c. 143, s. 50; c. 4214.)

Cross Reference.—As to assault in this state resulting in injury in another state, see § 15-132.

Elements of Offense.—In order for a conviction of crime under the provisions of this section there must be a charge to the jury that "serious injury" included "anything that would naturally cause a breach of the peace," is held not to be reversible error. 28 S. E. 353, in an obscure opinion and in State v. Skidmore, 87 N. C. 509, in an opinion which overlooked the two cases first cited. 11 N. C. Law Rev. 230.

Evidence of Use of Deadly Weapon.—Where the evidence as to the use of the deadly weapon is in dispute, the charge of a deadly weapon with intent to kill, not resulting in death, as bearing on the existence of the intent and meaning of the statute, an instruction to the contrary is reversible error. 123 N. C. 588, 51 S. E. 569.

Sufficiency.—For sufficiency of evidence to prove the assault in this state resulting in injury in violation of the statute. State v. Hefner, 199 N. C. 778, 155 S. E. 879.


Evidence of Injunction.—With sufficient evidence of an assault with a deadly weapon with intent to kill, not resulting in death, as bearing on the existence of the intent and meaning of the statute, an instruction to the contrary is reversible error. 123 N. C. 588, 51 S. E. 569.


Evidence of Use of Deadly Weapon.—Where the evidence as to the use of the deadly weapon is in dispute, the charge of a deadly weapon with intent to kill, not resulting in death, as bearing on the existence of the intent and meaning of the statute, an instruction to the contrary is reversible error. 123 N. C. 588, 51 S. E. 569.

imprisonment in the state’s prison or be worked on the county for ten years. These three essential elements must be proved in order to invoke the statute (State v. Crisp, 188 N. C. 799, 800, 125 S. E. 543); and the burden is on the state to establish them all beyond a reasonable doubt, where the malicious intent being for the State to prove. State v. Gibson, 196 N. C. 393, 145 S. E. 772.

Guilty of Lesser Degree of Offense.—Where the defendants are tried for violating this section in using a deadly weapon with intent to kill, the court: Provided, that where no deadly weapon has been used and no serious damage done, the punishment is limited to a fine of $50, or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill, by fine or imprisonment, or both, in the discretion of the court, if the gun went off accidentally and kills, it is manslaughter. State v. Coble, 177 N. C. 588, 99 S. E. 670.

Conviction of Simple Assault.—An instruction directing verdict of guilty of at least simple assault is not erroneous when the undisputed evidence tends to show the assault was made with a deadly weapon. State v. Hefner, 199 N. C. 778, 155 S. E. 879.

State Must Prove Murderous Intent.—Upon a trial of one charged with using a deadly weapon in inflicting a serious injury not resulting in death, under this section, an instruction that the use of such weapon raises a presumption of felonious intent is reversible error, the fact of malicious intent being for the State to prove. State v. Gibbons, 196 N. C. 393, 145 S. E. 772.

§ 14-34. Punishment for assault.—In all cases of assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court, and not so limiting the extent of the punishment is referred to the discretion of the trial judge, and his sentence may not be changed in the court of Criminal Appeals. Provided, that in all cases of assault, assault and battery, and of matters in justification. ‘The trial court instructed the jury that under the indictment and evidence the appealing defendant might be convicted of assault with a deadly weapon or of a simple assault. The jury convicted defendant of simple assault, but in imposing judgment the court found as a fact that said simple assault inflicted serious injury, and imposed a sentence of four months on the roads. It was held that the verdict of simple assault was permissible and that the instruction of the trial court was proper. State v. Griggs, 197 N. C. 352, 148 So. 547.

Evidence Sufficient under Section.—Evidence that the defendant wakened the prosecutrix while she was asleep in her own room at night by placing his hand upon her forehead, sufficient to constitute assault and battery, etc., and a motion as of nonsuit thereon may not be granted, though such evidence is insufficient for a conviction of the intent to ravish her. State v. Hill, 181 N. C. 553, 158 S. E. 547.

Evidence of Threats.—As to excessive punishment, see State v. Driver, 78 N. C. 73, 77; State v. McNeill, 75 N. C. 15. Constitutionality—This section is not unconstitutional on the grounds that serves the public good, the State may constitutionally, or under a statute affirmative in terms, this statute, by correct interpretation affirmatively providing that in all cases of assault with or without the intention to kill, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court, and not so limiting the court’s discretion as to an assault upon a female, etc. State v. Crisp, 188 N. C. 593, 106 S. E. 763.

The constitutional inhibition as to the imposition of cruel and unusual punishments may only be invoked in cases of manifest and gross abuse of power by the trial judge acting within a judicial discretion given to him; and, in this case, a sentence of three months on the road, upon conviction for an assault upon a female, cannot be held as a matter of law, on appeal, to be unconstitutional as cruel or unusual. State v. Stokes, 181 N. C. 359, 106 S. E. 763.

Same—Question of Discrimination.—This section, is not an unwarranted discrimination against one assaulting a female under the terms of the statute, or a denial to him of the equal protection of the laws guaranteed him by the Constitution. State v. Stokes, 181 N. C. 359, 106 S. E. 763.

Punishment—Extent.—While the language of this section permits a period of imprisonment for thirty days to be imposed upon conviction of an assault to kill, by fine or imprisonment, or both, in the discretion of the court, it does not at all mean that the judge may change the character of the punishment prescribed by the law for such an offense, but that, within such limits, the extent of the punishment is referred to the discretion of the trial judge, and his sentence may not be changed.

Burden to Prove Age Below Eighteen. — The burden is upon the defendant, charged with an assault upon a woman, to show that he was under the age specified in order to except his case from the provision, and it is not necessary to establish the validity of the bill that it state that he was over the age, as an assault upon a woman is a crime without regard to the age of the person who commits it, and the age merely relates to the degree of punishment and is not an element or ingredient of the offense charged. State v. Smith, 157 N. C. 578, 72 S. E. 853.


§ 14-34. Punishing by pointing gun.—If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault, and upon conviction of the same shall be fined not less than three dollars nor more than five dollars, or imprisoned, or both, at the discretion of the court. (Rev., s. 3629; Code, s. 986.)

Accidental Discharge of Gun.—Manslaughter.—Where one points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills, it is manslaughter. State v. Coble, 177 N. C. 588, 99 S. E. 359.

When one causes the death of another by an unlawful act which amounts to an assault on the person, as pointing a gun under circumstances which would not excuse [630]
its discharge, he is guilty at least of manslaughter. State v. Stitt, 146 N. C. 643, 61 S. E. 566.

Same—Question of Guilt for Jury.—Where one pointed a gun at another and death ensued by its discharge evi-
dence was sufficient to submit to the jury the question of the prisoner's guilt or innocence of the crime of man-

Gun Need Not Be Loaded.—In an indictment for assault
with a deadly weapon an instruction that if the State “had satisfied the jury beyond a reasonable doubt that the de-
defendant had a pistol in his coat pocket and “with pistol and hand on the inside of his pocket, he pointed the pistol at the prosecutor, this would be an assault,” is not error. State v. Atkinson, 141 N. C. 734, 53 S. E. 228.

Pointing Pistol in Pocket. — An instruction that if the jury
were satisfied beyond a reasonable doubt that the de-
defendant was called upon to do so: Provided, however, that no
person, firm or corporation, or any individual, male or female, or its or their, agents, to
kidnap or cause to be kidnapped any human be-
ing, or to demand a ransom of any person, firm or corporation, male or female, to be paid on ac-
count of kidnapping, or to hold any human being for ransom. Provided, however, that this section shall not apply to any father or mother for taking into their custody their own child.

Any person, or their agent, violating or caus-
ing to be violated any provisions of this section shall be guilty of a felony, and upon conviction therefor, shall be punishable by imprisonment for life.

Any firm or corporation violating, or causing to be violated through their agent or agents, any of the provisions of this section, and upon being found guilty, shall be liable to the injured party sueing therefor, the sum of twenty-five thousand dollars ($25,000), and shall forfeit its or their charter and right to do business in the state of North Carolina. (1933, c. 542.)

Section Increases Maximum Punishment.—The effect of
this section, repealing § 4221 of the Consolidated Statutes of North Carolina, relating to the crime of kidnapping, is to increase, within the discretion of the court, the maxi-
mum punishment for the crime from twenty years to life, and not to make a life term mandatory upon conviction. The intent of this section, as satisfied by the use of the word "punishable" in prescribing the sen-

§ 14-40. Enticing minors out of the state for the
purpose of employment.—If any person shall em-
ploy and carry beyond the limits of this state any
minor, or shall induce any minor to go beyond
the limits of this state, for the purpose of employ-
ment without the consent in writing, duly authen-
ticated, of the parent, guardian or other person having authority over such minor, he shall be
 guilty of a misdemeanor, and upon conviction there-
of shall be fined not less than five hundred
and not more than one thousand dollars for each
offense. The fact of the employment and going out
of the state of the minor, or of the going out
of the state by the minor, at the solicitation of the
person for the purpose of employment, shall be
 prima facie evidence of knowledge that the per-
son employed or solicited to go beyond the limits
of the state is a minor. (Rev., s. 3630; 1891,
c. 45; C. S. 4292.)

Count Joined With One under Section 14-41.—An indict-
ment for abduction, containing two counts, one under this
section and the second under section 14-41, cannot be
quashed for misjoinder of two different offenses, as the
two counts are merely statements of the same transac-
tion to meet the different phases of proof. State v. Burnett,
142 N. C. 577, 578, 63 S. E. 72.

§ 14-41. Abduction of children.—If any one shall abduct or by any means induce any child under the age of fourteen years, who shall reside with its father, mother, uncle, aunt, brother or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, he shall be guilty of a felony, and on
conviction shall be fined or imprisoned in the
state's prison for a period not exceeding fifteen years. (Rev., s. 3358; Code, s. 973; 1879, c. 81; C. S. 4223.)

Definition.—Abduction under this section, is the taking
and carrying away of a child, ward, etc., either by fraud,
persuasion, or open violence. The consent of the child is no
defense. If there is no force or inducement and the depart-

Art. 10. Kidnapping and Abduction.

§ 14-89. Kidnapping.—It shall be unlawful for

[ 631 ]
Evidence of Influence of Defendant.—Upon the question of influence of the defendant over the wife of another whom he is being tried for abducting and eloping with, it is admissible to show the defendant's schemes and plans acquired, and the admission of testimony that the defendant had deserted his wife and dependent children, and also that the abducted woman had used her own money for expenses. State v. Hopper, 186 N. C. 405, 119 S. E. 769.

Testimony of Husband as to Chastity.—On a criminal trial for abducting and eloping with a married woman, it is competent for her husband to testify as to the chastity of his wife up to the time the defendant had invaded his home; such testimony may be sufficient to sustain a conviction. State v. Hopper, 186 N. C. 405, 119 S. E. 769; State v. O'Higgins, 178 N. C. 708, 199 S. E. 438.

Art. 11. Abortion and Kindred Offenses.

§ 14-44. Using drugs or instruments to destroy an unborn child.—If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of the mother, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than one year nor more than ten years, and be fined at the discretion of the court. (Rev., s. 3618; Code, s. 975; 1881, c. 351; s. 1; C. S. 4232.)

§ 14-45. Abortion.—If any person shall, without the queen's peace, carry away, cause, procure, or attempt to procure, any woman pregnant, or quick with child, to take any medicine, or drug or other substance whatever, shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of the mother, he shall be guilty of a felony, and be imprisoned in the state's prison for not less than one year nor more than ten years, and be fined at the discretion of the court. (Code, s. 4225; 1903, c. 362; C. S. 4226.)

§ 14-46. Abortion of married women.—If any person shall, without the queen's peace, carry away, cause, procure, or attempt to procure, any woman pregnant or quick with child, to take any medicine, or drug or other substance whatever, shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of the mother, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than one year nor more than ten years, and be fined at the discretion of the court. (Rev., s. 3618; C. S. 4225; 1903, c. 362; C. S. 4226.)

§ 14-47. Abortion or Procuring Abortion.—An abortion is a willful act performed by any person, having the intention to destroy a child which is in the womb of a woman and is not the manner by which it is accomplished. Parker v. Edwards, 222 N. C. 75, 78, 11 S. E. (2d) 176.
section 14-45, that the defendant had paid the physician one-half of the $300 fee he had charged for such services, uttered in the defendant’s presence, is held competent with other evidence in this case; and whether the defendant, under the circumstances, was so intoxicated that he did not understand, presented a question for the jury to determine as to whether the woman’s statement was made in the presence of the defendant, whether they were understood by him, whether he denied them or remained silent. State v. Martin, 182 N. C. 846, 109 S. E. 74.

Admissibility of Statement Made Four Months Prior to Abortion.—Upon the trial of a physician for procuring an abortion, testimony of a conversation between the physician and the woman as to an abortion about four months prior to the time of abortion is incompetent, and its admission in evidence is prejudicial to the defendant and constitutes reversible error. State v. Brown, 202 N. C. 221, 160 S. E. 749.

Evidence of Disease Facilitating Abortion Properly Excluded.—Evidence offered by the defendant tending to show that the deceased was suffering from a disease which facilitated the abortion was not relevant to the issue involving the defendant’s guilt as charged in the indictment. There was no error in the exclusion of such evidence. State v. Evans, 211 N. C. 458, 459, 190 S. E. 724.

Abortion of woman after anesthetic was not prejudicial. State v. Evans, 211 N. C. 458, 459, 190 S. E. 724.

Sufficiency of Evidence.—Indictment and evidence that the defendant advised the prosecutrix, who was then “pregnant or quick with child,” to take a certain drug, medicine, or substance with intent to destroy the child is sufficient for a conviction under this section. State v. Powell, 181 N. C. 515, 106 S. E. 133.

Testimony of the relation between the defendant and the woman, his paying half of the doctor’s fees, and his concern as to the result, is held sufficient to sustain the verdict of guilty, taken in connection with the other evidence in the case. State v. Martin, 182 N. C. 846, 109 S. E. 74.

Variance.—On the trial of an indictment charging the performance of an operation upon a woman “quick with child,” with intent thereby to destroy the child, where the proof tends to show the performance of an operation upon a pregnant woman, with no evidence that she was “quick with child,” there is a fatal variance and defendant’s motion for nonsuit should be allowed. State v. Forte, 222 N. C. 517, 23 S. E. (2d) 842.

Jaundice of Offense.—Where the defendant is tried under this section and section 14-45, for producing a miscarriage or abortion of a pregnant woman, the action will not be dismissed upon the evidence if it is sufficient for a conviction upon either count. State v. Martin, 182 N. C. 846, 109 S. E. 74.


§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.—If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and shall be imprisoned in the jail or state’s prison for not less than one year nor more than five years and shall be fined, at the discretion of the court. (Rev. s. 3619, Code, s. 976; 1881, c. 351, s. 2; C. S. 4287.)

Cross Reference.—See annotations under § 14-44. Generally.—This section relates to miscarriage of, or to injury or destruction of the woman. State v. Forte, 222 N. C. 537, 538, 21 S. E. (2d) 842.

§ 14-46. Concealing birth of child.—If any person shall, by secretly burying or otherwise disposing of the dead body of a new-born child, endeavor to conceal the birth of such child, such person shall be guilty of a felony, and punished by fine or imprisonment, or both, such imprisonment to be in the county jail or state’s prison, at the discretion of the court: Provided, that the imprisonment in the state’s prison shall in no case exceed a term of ten years: Provided further, that nothing in this section shall be construed to prevent the mother, who may be guilty, from discovering to the husband of her child, from being prosecuted and punished for the same according to the principles of the common law.

Any person aiding, counseling or abetting any woman in concealing the birth of her child shall be guilty of a misdemeanor. (Rev., s. 3623; Code, s. 1004; R. C. c. 34, s. 28; 1818, c. 985; 1883, c. 390; 21. Jac. I, c. 27. See 43 Geo. III, c. 58, s. 3; 9 Geo. IV, c. 31, s. 14; C. S. 4228.)

Editor’s Note.—The editor deems it advisable to note here some of the older cases construing this section as it stood after the amendment of act 1818, chap. 985, in view of the fact that these constructions may well be applied to the section as it now stands.

Evidence Insufficient for Directed Verdict. — Under the provisions of this section making it a felony for any person to cause the death of a new-born child by secretly burying or otherwise disposing of its dead body, it is reversible error for the trial judge to direct a verdict of guilty upon evidence tending to show that the defendant had buried the dead body of the infant in a state of decomposition and therefor buried it, and had informed the authorities thereof and directed them where he had buried it, it being required of the State to rebut the common-law presumption of innocence by establishing the defendant’s guilt beyond a reasonable doubt. State v. Arrowood, 187 N. C. 715, 122 S. E. 759.

Art. 12. Libel and Slander.

§ 14-47. Communicating libelous matter to newspapers.—If any person shall state, deliver or transmit by any means whatever, to the manager, editor, publisher or reporter of any newspaper or periodical for publication therein any false and libelous statement concerning any person or corporation, and thereby secure the publication of the same, he shall be guilty of a misdemeanor. (Rev., s. 3635; 1901, c. 557, ss. 2, 3; C. S. 4292.)

Cross Reference.—As to the truth of allegations in indictment for libel as a defense, see § 15-168. As to libel by a newspaper, see §§ 99-1 and 99-2. As to derogatory statements about building and loan associations, see § 54-44.

Responsibility of Newspaper Men.—"This statute punishes criminally the person who communicates false and libelous matter to newspapers, but that does not excuse the newspaper for publishing such libels, and the newspaper is responsible in damages for the injury done by the publication. Newspaper men (however) are not so apt to be prosecuted as to derogatory statements about building and loan associations, see § 54-44.

Cross Reference.—As to civil liability for charging innocent women with incontinency, see § 99-4 and annotation thereto.
§ 14-49. Essential Elements of Offense.—The innocence and virtue, then, of the woman who is subject of the attempt, lie at the very foundation of the offense, and constitute its most essential element. State v. McDaniel, 84 N. C. 803, 805; State v. Aldridge, 86 N. C. 680, 681; State v. Smith, 155 N. C. 473, 71 S. E. 305.

§ 14-50. Conspiracy declared a felony; punishment.—Any two or more persons shall conspire to willfully and maliciously injure or attempt to injure any person, or any building in actual use for residential or business purposes or customarily devoted to any such use or any contents thereof, by the use of nitro-glycerine, dynamite, gunpowder, or other high explosive, shall be guilty of a felony, and each conspirator shall be punished by imprisonment in the state prison for not less than two years and not more than fifteen years. (1923, c. 80, s. 2; C. S. 4231(a).)

Art. 13. Injuring Others by Use of High Explosives.

§ 14-49. Willful injury a felony; punishment.—Any person who shall willfully and maliciously injure or attempt to injure any person, or any building in actual use for residential or business purposes or customarily devoted to any such use or any contents thereof, by the use of nitro-glycerine, dynamite, gunpowder, or other high explosive, each and every one so conspiring shall be guilty of a felony, and on conviction shall be punished by imprisonment in the state prison for not less than five years and not more than thirty years. (1923, c. 80, s. 1; C. S. 4231(a).)

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.


§ 14-51. First and second degree burglary.—There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling-house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling-house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling-house or sleeping apartment not actually occupied by any one at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling-house or in any building not a dwelling-house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. (Rev., s. 3331; 1889, c. 434, s. 1; C. S. 4232.)

Cross References.—As to power of an individual to arrest a burglar, see § 15-40. As to accessories, see § 14-5 et seq. As to breaking into or entering jails with intent to kill or injure prisoners therein, see § 14-221.

In General.—Burglary, as defined at common law, was a capital offense, i. e., the breaking into and entering of the "mansion or dwelling-house of another in the night-time, with an intent to commit a felony therein," notwithstanding the intent was executed after the burglarious act or not. This has been changed by this section dividing the crime into two degrees, first and second, with certain designated differences between them, with different punishment prescribed for each. State v. Allen, 386 N. C. 302, 192 S. E. 304; State v. Morse, 215 N. C. 352, 2 S. E. (2d) 394.

The crime of burglary as defined at common law was composed of five distinct elements, which were: (1), the breaking; (2), the entering; (3), that the breaking and entry be into a mansion house; (4), that the breaking and entering were charged does not shift the burden of proof upon him to show he had not slandered an innocent woman. Her innocence is a question for the jury upon the evidence, and no presumption of her innocence should be allowed to weigh against the defendant. State v. McDaniel, 84 N. C. 803.
in the nighttime, and (5), that the breaking and entering were with the intent to commit a felony. State v. Whit, 49 N. C. 349, 350.

Curtilage.—The meaning of the term curtilage is a piece of skin, the hair of which is not, or not, that is commonly used with the dwelling house. State v. Twitty, 2 N. C. 102 the admission of the entering and taking, the only question is whether it was done at nighttime, and the jury should not be permitted to submit the jury on the question of defendant's guilt of burglary in the first degree. State v. Oakley, 216 N. C. 175, 11 S. E. 925.

Indictment Must Charge Intended Felony.—In order for an indictment to sustain a verdict of guilty of burglary in the first degree, it must not only charge the burglarious entry with the intent at the time, but must also charge the felony intended to be committed with sufficient definiteness, though it is not necessary that the actual commission of the intended felony be shown or proven. State v. Allen, 186 N. C. 302, 119 S. E. 534.

Same.—Proof of a Different Intent.—An averment in an indictment for burglary, that the breaking was with the intent to commit a felony, is insufficient to show that the entry was made with a purpose to commit a robbery. State v. Halford, 104 N. C. 874, 10 S. E. 534. The intent may be shown by circumstances. State v. McBryde, 97 N. C. 393, 1 S. E. 925.

Indictment Must Charge Occupancy.—The indictment charging the offense alleging that the dwelling-house was in the actual occupation of someone at the time of the commission of the crime, was not required at common law, under sec. 14-53, but now, under the provisions of this section omission of that averment makes the indictment good only as an indictment for burglary in the second degree. State v. Fleming, 107 N. C. 905, 968, 12 S. E. 131.

Burglary can not be committed in a tent or booth erected in a market or fair, although the owner lodges in it. See I Hawk Pl. Cr., Ch. 17, § 103; 1 Hale Pl. Cr. 559; Roscoe Cr. Ev., 300. State v. Jako, 60 N. C. 471.

Burglary in a Store with Sleeping Quarters.—The offense of burglary may be committed by breaking into a store if the store is used as a dwelling, and therefore makes it a dwelling. State v. Foster, 129 N. C. 704, 40 S. E. 288.

Value of Goods Stolen Immaterial.—A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling, or other infamous crime therein, is less than $20, is of no importance in determining whether the provision of § 14-72, dividing larceny into two degrees, by its terms having no application to burglary. State v. Richardson, 216 N. C. 304, 4 S. E. (2d) 852.

Charging Elements of First and Second Degree.—Where a burglarious breaking into a dwelling-house, has been charged in the bill of indictment, and the evidence tends only to establish the capital felony, an instruction to the jury that they might be found guilty of nonburglarious entry constitutes reversible error. State v. Chambers, 219 N. C. 442, 11 S. E. (2d) 280.


§ 14-52. CH. 14. CRIMINAL LAW
§ 14-53. Punishment for burglary.—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the state's prison for life, or for a term of years, in the discretion of the court. (Rev. s. 3330; Code, s. 994; 1889, c. 434, s. 2; 1870-1, c. 222; 1841, c. 215, s. 1; C. S. 4233.)

Cross References.—As to jury returning verdict for second degree burglary when first degree was charged in the indictment, see § 15-171 and annotation thereto. See also, annotation to § 14-51.

Editor's Note.—The 1941 amendment inserted the proviso.

Quoted in State v. Oakley, 210 N. C. 206, 186 S. E. 244; State v. Johnson, 218 N. C. 604, 12 S. E. (2d) 278.

Cited in State v. Lawrence, 199 N. C. 481, 191 S. E. 471.

§ 14-53. Breaking out of dwelling-house. Burglary.—If any person shall enter the dwelling-house of another with intent to commit any felony or other infamous crime therein, or being in such dwelling-house, shall commit any felony or other infamous crime therein, and shall, in either case, break out of such dwelling-house in the nighttime, such person shall be guilty of burglary. (Rev. s. 3333; Code, s. 995; R. C., c. 34, s. 8; 19 Anne, c. 7, s. 5; C. S. 4234.)

Indictment Must Charge Breaking Out.—One charged by indictment of breaking into a house cannot be convicted of breaking out, and a charge of the court to that effect is error. State v. McPherson, 70 N. C. 239.
§ 14-54. Breaking into or entering houses otherwise than burglariously.—If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling-house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, banking-house, counting-house or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years. (Rev., s. 3333; Code, s. 996; 1874-5, c. 166; 1879, c. 323; C. S. 4235.)

Intent Must Be Shown.—In order to convict under this section, it must be shown that the accused had the intent necessary to constitute a felony; and where the prosecution leaves no other course except acquittal. State v. Spear, 164 N. C. 452, 79 S. E. 869.

The case of State v. Hooker, 145 N. C. 581, 59 S. E. 866, is cited and it is said that the construction of the statute in that case, is that intent should only apply to a breaking into an uninhabited house, was obiter dictum as that point was not raised in the case. Clark, C. J., dissenting. Held that the conviction for a less offense should be sustained.—Ed. Note.

In State v. Crisp, 188 N. C. 799, 801, 125 S. E. 543, it is said that where the accused entered the same house a second time, with the purpose to commit a felony, it was nonsuited, viz: because the defendant thereupon expressly disapproved of the decision in the Spear case, brought forward as section 4235 [now G. S. 14-54] in the Consolidated Statutes.

"Unlawfully Breaking" Charges Intent.—An indictment which charges that defendant did break and enter (other than burglariously) the storeroom and house, ete., with the intent to commit a felony, is insufficient when charging "that defendant did break and enter (other than burglariously) the storeroom and house, ete., with intent to commit a felony, to wit: the breaking and entering was feloniously done, and not to all the clauses in the section; but this was expressly disapproved in State v. Spear, 164 N. C. 452, 79 S. E. 869. And further, it should be noted that this section has been restated in accordance with the decision in the Spear case, brought forward as section 4235.

Intent to Commit More Than One Offense.—An indictment for burglary and larceny, charging that defendant with intent to commit a felony or other infamous crime is not defective because it charges an intent to commit more than one offense. State v. Christmas, 101 N. C. 749, 8 S. E. 301.

Entry without Breaking.—It is evident that a nonburglarious entry by the prisoner, and when the owner has procured the act to be done by the prisoner in company with and at the instance of the one selected by the owner for the purpose, the entry is lawful, and no crime is shown to have been committed, whatever the intent of the prisoner may have been at the time. State v. Goodney, 157 N. C. 624, 73 S. E. 162.

Duty of Court to Submit to Jury Question of Guilt Hereunder Where Indictment Charges First Degree Burglary.—Where the evidence is sufficient to justify it upon a bill of indictment otherwise than burglariously, and it is further evidence of defendant's guilt of breaking and entering with intent to commit a felony in the first degree, it is the duty and mandatory upon the court to submit to the jury the question of whether or not the defendant is guilty of breaking and entering a house in question at the time and place mentioned in the indictment otherwise than burglariously, and it is error for the court to fail or refuse to do so. State v. Jordan, 218 N. C. 604, 12 S. E. (2d) 278.

Evidence Sufficient for Conviction.—Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of this section and defendant's demurrer to the State's evidence, or motion for dismissal thereon, is improperly overruled. State v. Blackwell, 182 N. C. 889, 159 S. E. 325. (Ed. Note.)

Evidence held sufficient to sustain conviction under this section. State v. Hargett, 196 N. C. 697, 146 S. E. 801.


§ 14-55. Preparation to commit burglary or other house-breakings.—If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling-house, or other building, with intent to commit a felony or other infamous crime therein; or shall be found having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of house-breaking; or shall be found in any such building, with intent to commit a felony or other infamous crime therein, such person shall be guilty of a felony and punished by fine or imprisonment in the state's prison, or both, in the discretion of the court. (Rev., s. 3334; Code, s. 997; 1907, c. 822; C. S. 4236.)

The offense of possessing implements of housebreaking
without lawful excuse, does not require the proof of any "intent" or "unlawful use." State v. Vick, 213 N. C. 235, 195 S. E. 779.

A sentence of not less than twenty-five nor more than thirty years upon a plea of guilty of possession of weapons and implements for house breaking, in violation of this section is within the discretion of the court conferred by the statute, and is not unlawful and will not break or enter into any railroad car containing goods, wares, freight or other thing of value, or shall unlawfully and willfully break or enter into any railroad car containing goods, wares, freight or other thing of value, such person shall be convicted and punished in the penitentiary in the discretion of the court for a term not exceeding five years. Any person found unlawfully in such car shall be presumed to have entered in violation of this section. (1907, c. 468; C. S. 4237.)


§ 14-57. Burglary with explosives.—Any person who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of nitro-glycerine, dynamite, gunpowder, or any other explosive, or acetylene torch, shall be deemed guilty of burglary with explosives. Any person convicted under this section shall be punished as for burglary in the second degree, as provided in § 14-55. (1921, c. 5; C. S. 4237(a).)


Art. 15. Arson and Other Burnings.

§ 14-58. Punishment for arson.—Any person convicted according to due course of law of the crime of arson shall suffer death: Provided, if the jury shall so recommend, the punishment shall be imprisonment for life. (Rev., s. 3335; Code, s. 984; R. C., c. 34, s. 2; 1870-1, c. 222; 1914, c. 215, s. 2; C. S. 4238.)

Cross References.—As to accomplices, see § 14-5 et seq. As to proof by insurance commissioner and prosecutor, see § 69-2.

Editor's Note.—At common law arson was defined by Lord Coke as "the malicious and voluntary burning of the house of another by night or by day." "House" was meant to designate dwelling house and did not apply to barns and other buildings. Some of the states have extended the term so as to apply it to all property, and the common-law idea of "an offense against the security of the habitation" has been extended to an "offense against property." With this extension of application and meaning has come a change in the penalty, and but few states punish the offense by death.

In this state all offenses against property other than the habitation are covered by statutes making the offense punishable by imprisonment. So the offense that carries the death penalty is one against the habitation only and one that will greatly endanger human life. The 1941 amendment added the provision for life imprisonment upon recommendation of the jury.

By the act of 1899 the punishment for arson was confined in the penitentiary, but by the act of 1871 a death penalty was provided. In State v. Hammond, 76 N. C. 33, the defendant was convicted and received the death sentence but judgment was arrested because the indictment did not specify which of the two acts it was found under. The failure to specify the date and the year of the crime rather than a question as to which of the statutes should apply as both of them provided punishment, one for offenses before April 4, 1871, the other for offenses after that date.

Wood Must Be Charred.—Where the statute requires that the building be "burned" an indictment charging "setting fire to" is not sufficient for there can be a setting fire without charring the wood, as required to constitute burning. But if the statute provides "setting fire to," the indictment charging "setting fire to and burning" is sufficient as the charge of burning is surplusage and not detrimental to the indictment. State v. Hall, 93 N. C. 571.


§ 14-59. Burning of certain public and other corporate buildings.—If any person shall willfully and maliciously burn the streethouse, or any of the public offices of the state, or any courthouse, jail, arsenal, clerk's office, register's office, or any house belonging to any county or incorporated company, the state or to any incorporated company whatever, in which are kept the archives, documents, or public papers of such county, town or corporation, he shall, on conviction, be imprisoned in the state's prison for not less than five nor more than ten years. (Rev., s. 3344; Code, s. 985, subsec. 3; R. C., c. 34, s. 7; 1830, c. 41, s. 1; 1868-9, c. 167, s. 5; C. S. 4239.)

Intent Necessary.—"If the prisoner put fire to the jail, not with an intent of destroying it, he is not guilty under the act of assembly. But if he put fire to the jail and burnt it with an intent to burn it down and destroy it, he is guilty, notwithstanding the fire went out, or was put out by others before the intention of the prisoner was completed by burning down the jail; and this is the law, although the main intention was to escape." State v. Mitchell, 27 N. C. 350, 355.

§ 14-60. Setting fire to schoolhouse.—If any person shall willfully set fire to any schoolhouse, or procure the same to be done, he shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the state's prison or the county jail, and may also be fined, in the discretion of the court. (Rev., s. 5345; 1901, c. 4, s. 28; 1919, c. 70; C. S. 4240.)

§ 14-61. Burning or attempting to burn certain bridges and buildings.—If any person, with intent to destroy the same, shall willfully and maliciously set fire to and burn any public bridge, or private toll-bridge, or the bridge of any incorporated company, or any fire-engine house, or any house belonging to any county or incorporated town, used for public purposes other than the keeping of archives, documents and public papers, or any house belonging to an incorporated company and used in the business of such company, or if any person shall willfully and maliciously attempt to burn any of such houses or bridges, or any of the houses or buildings mentioned in this article, the person offending shall be guilty of a felony and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years. (Rev., s. 3337; Code, s. 985, subsec. 4; R. C., c. 34, s. 30; 1825, c. 1278; C. S. 4241.)

City Market House.—A person charged with damaging a market house by fire must be tried under this section and not under a municipal ordinance as the general law must prevail over the ordinance, when they conflict. The municipal court would have jurisdiction only by express legislation conveying it. Washington v. Hammond, 76 N. C. 33.

§ 14-62. Setting fire to churches and certain other buildings.—If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any church, chapel or meeting-house, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or to any building or erec-

[637]
tion used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the other person, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than two nor more than forty years. (Rev., s. 3338; 1885, c. 66; 1903, c. 665, s. 2; 1874-5, c. 228; Code, s. 985, subsec. 6; 1927, c. 11, s. 1; C. S. 4924.)

I. In General.
II. Indictment.
III. Evidence.
IV. Question for Jury. Cross References.

As to buildings destroyed by a tenant, see § 42-11 and annotation thereto. As to burning crops in 'fields', see § 14-141. As to burning of gin-houses, tobacco houses, and stables, see § 14-64. As to setting fire to grass and brush lands and woodlands, see § 14-136.

I. IN GENERAL.

Editor's Note.—By the amendment Public Laws 1927, c. 11, the words "omitting to B." and in the possession of one G.? Verdict of not guilty on a count brought under this section does not necessarily carry a verdict of not guilty on a separate and distinct and each requiring proof of facts which the other does not. State v. Pierce, 268 N. C. 47, 179 S. E. 8.

Crime Fixed Herein Is Separate from That in § 14-66. —A verdict of not guilty on a count brought under this section does not carry conviction of guilt on a second count brought under § 14-66, the counts being separate and distinct and each requiring proof of facts which the other does not. State v. Pierce, 268 N. C. 47, 179 S. E. 8.

Barn Defined.—A building of hewn logs (twenty-six feet long by fifteen), divided by a partition of the same, upon one side, which were horses and upon the other corn, oats and wheat (threshed and unthreshed), also hay, fodder, etc., having sheds adjoining, under which were wagons and other farm utensils, is a "barn" within the meaning of this section. State v. Cherry, 63 N. C. 493. But a house seventeen feet long and twelve wide, setting on blocks in a stable yard, having two rooms in it—one quite small, furnished to the stock, and the other used for storing peas, oats, and other products of the farm—is not a barn within the meaning of the statute. State v. Laughlin, 53 N. C. 495.

II. INDICTMENT.

"Wantonly and Wilfully" Must Be Charged.—An indictment for burning a barn must aver that the burning was "wantonly and wilfully," and feloniously set fire to and burn a certain gin house, being a building "of" A. (Archb. Cr. Pl. [3d Am. Ed.] 262, and Ixiv.); and this is the better practice, proof of either the act is itself equivocal and becomes criminal only by reason of the intent." State v. Morgan, 136 N. C. 628, 629, 48 S. E. 670.

Wantonly and Wilfully' Must Be Charged.—An indictment for burning a barn must aver that the defendant "did unlawfully, wilfully and feloniously set fire to and burn a certain gin house, belonging to B. and in the possession of one G.? Verdict of guilty on a count brought under this section had been amended (Laws 1885, Chapter 66,) by striking out the words "unlawfully and maliciously" and inserting in lieu thereof "wantonly and willfully," and that the words used do not correspond with the language of the amended statute. The objection would be well taken if this indictment was sustainable only under this section. State v. Toome, 81 N. C. 555, cited and followed by State v. Green, 92 N. C. 779; State v. Thompson, 97 N. C. 496, 496, 1 S. E. 921.

III. Proof of Title Not Necessary.—"Ownership is alleged only to identify the property, and is sufficiently proved by showing possession. State v. Daniel, 121 N. C. 574, 577, 46 S. E. 255; State v. Thompson, 97 N. C. 496, 1 S. E. 921; State v. Jaynes, 78 N. C. 504, 507; State v. Gallor, 71 N. C. 88." State v. Sprouser, 150 N. C. 861, 5 S. E. 614; 94 S. E. 921.

4. "This section is copied from the English Statute of 7 and Geo. IV., c. 30; and under that it was sufficient to allege the burning simply of 'A. (Arbch. Cr. Pl. [3d Am. Ed.] 262, and Ixiv.)" and this is the better practice, proof of either the offense charged, the trial judge should withdraw the case from the jury. State v. Freeman, 131 N. C. 725, 42 S. E. 573.

Where the only evidence against a person accused of burning a barn is threats made by him, without any evidence connecting him with the execution of said threats, or that the offense charged, the chain gang should be excluded and the jury carefully cautioned not to regard it as it puts the character of the person in issue. State v. Barrett, 131 N. C. 665, 666, 66 S. E. 894. The proof of threats directed against the son and grandson, from their near relationship to the owner of a burned house, is relevant, though perhaps feeble, in showing general ill will to the family and a motive for the act. State v. Rash, 121 N. C. 720, 57 S. E. 691; State v. Daniel, 121 N. C. 720, 57 S. E. 691; State v. Daniel, 121 N. C. 720, 57 S. E. 691.

Same.—Toward Agent.—Ill will toward an agent of the owner of a burned house in favor of the owner is not a sufficient motive for either an attempt to burn a barn occupied and used by the witness, and to that end it was proper to show that bad feeling existed, and the reason for it, but that part of a reply of a witness in which he stated that defendant had been convicted of stealing and sent to the chain gang should be excluded and the jury carefully cautioned not to regard it as it puts the character of the defendant in issue. State v. Barrett, 131 N. C. 665, 666, 66 S. E. 894.

Jilted and disconsolate. — Where the only evidence against a person accused of burning a barn is threats made by him, without any evidence connecting him with the execution of said threats, or that the offense charged, the trial judge should withdraw the case from the jury. State v. Freeman, 131 N. C. 725, 42 S. E. 573.
be any evidence tending to prove the fact in issue the weight of it must be left to the jury, but if there be no evidence conducing to that conclusion the Judge should say so, and, in the language of the Act, that it is direct acquittal. In State v. Vinson, 63 N. C. 335, it is said: "But it is confessedly difficult to draw the line between evidence which is very slight, and that which, as having no bearing on the fact to be proved, is in relation to that offense, no evidence at all." The evidence must be more than sufficient to raise a suspicion or a conjecture. State v. Rhodes, 111 N. C. 647, 650, 15 S. E. 1038.

Where, in a prosecution under this section, the evidence fails to establish the felonious origin of the fire or the identity of the defendant as the one who committed the offense charged, or circumstances from which these facts might reasonably be inferred, it is insufficient to be submitted to the jury. State v. Wilson, 205 N. C. 376, 171 S. E. 338.

On trial for wilfully and wantonly burning a barn in violation of this section, evidence of the felonious origin of the building used as a dwelling-house, or the identity of the occupant of the same, or the circumstances from which these facts might reasonably be inferred, is sufficient to be submitted to the jury. State v. Wilson, 205 N. C. 376, 171 S. E. 338.

Intent.—It is prima facie presumed that a person intended the natural consequence of his act when he set fire to a building. But this is subject to rebuttal by evidence to the contrary. State v. Phifer, 90 N. C. 721. Abil. — The burden of proving an alibi does not rest on the prosecution, but on the defendant. State v. Nash, 202 N. C. 608, 161 S. E. 87.

In a prosecution under this section, evidence of the felonious origin of the fire and of the identity of the defendant as the culprit, which, as having no bearing on the fact to be proved, is in relation to that offense, no evidence at all. (Rev., s. 3941; 1863, c. 17; 1886-9, c. 167, s. 5; 1903, c. 665, s. 1; Code, s. 985, subsec. 2; C. S. 4241.)

Cross References.—As to burning crops in the field, see § 14-141. As to setting fire to churches and certain other buildings, see § 14-62. As to setting fire to grass and brush lands and woodlands, see §§ 14-136 and 14-137.

Indictment.—The new language in the indictment is not to be construed so as to make it necessary to specifically aver the fraudulent purpose. "Who, or by the authority of, or for the benefit of, counsel or procure the burning of," was added. (1921, c. 119; C. S. 4245(a).)

Necessity of Alleging "Wilful Burning."—In the case of State v. Torme, 81 N. C. 555, there was an indictment for unlawfully, maliciously and feloniously burning a ginhouse. The court was asked to charge the jury that the defendant could not resist the order of the corporation against loss or damage by fire, or not, with intent to injure or prejudice the insurer, creditor or the person owning the property, or any other person, whether the same be the property of such person or another, shall be guilty of a felony. (1921, c. 119; C. S. 4245(a)).

See the note to § 14-62. Evidence that defendant's car was driven away from defendant's house shortly before defendant's personal property therein was destroyed by fire was insufficient to charge a crime of incendiarism (Wilful Burning) as charged in the indictment. See the note to § 14-62. Evidence of constructive notice to defendant of an acute fire on the premises, that the fire, and that the occupants of the car were heard in the building, is held insufficient, in the absence of evidence that defendant was one of the occupants of the car, to resist defendant's motions for judgment as of non-suicide in a prosecution under this section, although there was ample evidence that the fire was of incendiaristic origin (Wilful Burning), and that the automobile, which had been destroyed by fire, had been insured by him. State v. Simms, 208 N. C. 459, 181 S. E. 209.

Indictment.—The new language in the indictment is not to be construed so as to make it necessary to specifically aver the fraudulent purpose. "Who, or by the authority of, or for the benefit of, counsel or procure the burning of," was added. (1921, c. 119; C. S. 4245(a).)

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erty of another, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison or county jail, and may also be fined, in the discretion of the court. (Rev., s. 3336; Code, s. 985, subsec. 7; 1876-7, c. 13; C. S. 4246.) See notes to section 14-64.

In General.—A conviction for burning a ginhouse can be had only if the necessary requirements of the law in regard to the investigation of incendiary fires are fulfilled. If any town or city officer shall fail, neglect or refuse to comply with the orders of the chief of the fire department, or of the insurance commissioner, he shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than fifty dollars for each day's neglect. (Rev., s. 3348; 1899, c. 58, s. 4; C. S. 4247.)

§ 14-69. Failure of officers to investigate incendiary fires.—If any town or city officer shall fail, neglect or refuse to comply with any of the requirements of the law in regard to the investigation of incendiary fires, he shall be guilty of a misdemeanor and may be fined not less than twenty-five nor more than two hundred dollars. (Rev., s. 3348; 1899, c. 58, s. 5; C. S. 4248.)

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Art. 16. Larceny.

§ 14-70. Distinction between grand and petit larceny abolished.—All distinctions between petit and grand larceny, where the same has had the benefit of clergy, are abolished; and the offense of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny and may be fined not less than ten nor more than fifty dollars.


Accessories Must Be Designated in Indictment.—A charge of stealing two barrels of turpentine is not supported by proof of the taking of that quantity from the box cut in the tree to receive and hold the descending sap. State v. Moore, 33 N. C. 70; State v. Bragg, 86 N. C. 658, 690.

One Act Two Offenses.—A person committing larceny from the person, upon two persons at the same time may be tried and convicted for both offenses. State v. Bynum, 117 N. C. 743, 749, B. E. 219; State v. Bynum, 117 N. C. 752, 23 E. 219.

Accessories Abolished.—There are no accessories to larceny. All that counsel and aid are guilty of the offense as principals. State v. Gaston, 70 N. C. 393.

Larceny and Malicious Mischief Distinguished.—An indictment for larceny at common law for stealing a cow is not supported by proof that the defendant shot the cow down and then cut off her ears. Such an act is not larceny, but malicious mischief. State v. Bynum, 117 N. C. 752, 23 E. 219, cited in note in 29 L. R. A., N. S., 40. See section 14-85.

Exclusive Jurisdiction in Superior Court.—"Under the general law all misdemeanors are punishable by fine and imprisonment at the discretion of the Superior Court, so by the Constitution the jurisdiction over such offenses appertains exclusively to the Superior Courts, unless some statute has limited the punishment to a fine not exceeding fifty dollars or imprisonment not exceeding one month. Art. IV, sec. 15. (Amended Const., Art. IV, sec. 25.) Washington v. Hammond, 76 N. C. 33, 35.”

§ 14-71. Receiving stolen goods.—If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, he shall be guilty of a misdemeanor, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not have been amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished, where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny. (Rev., s. 3507; Code, s. 1074; R. C., c. 34, s. 56; 1797, c. 485, s. 2; C. S. 4250.)

Included in Indictment for Larceny Charge.—An indictment for larceny if concluded at common law may include two counts, one for larceny, the other for receiving stolen goods. The two counts must conclude against the statute the two counts can not be joined, as the punishment for the two offences was made the same.

This section makes guilty knowledge one of the essential elements of the offense of receiving stolen goods. This knowledge may be actual, or it may be implied when the circumstances under which the goods were received are
It is necessary to establish either actual or implied knowledge on the part of the person charged of the facts that the goods were stolen, to constitute the offense of receiving stolen goods. Implied knowledge is when the person charged had knowledge of the facts that the goods had been stolen at the time he received them, and not whether a reasonably prudent man in the transaction of his business would have gained such knowledge under the circumstances.  

The inference or presumption arising from the recent possession of stolen property, without more, does not extend to a conviction under this section, and a charge which fails to specify the value of the property alleged to have been stolen is defective at law.  

Verdict Need Not Specify Value of Goods.—In a prosecution under this section where there was no evidence on the record tending to show that the property alleged to have been stolen was that of the owner named in the indictment, the defendant's motion for dismissal or non-suit should be allowed. State v. Pugh, 196 N. C. 725, 188 S. E. 649.

Accessories Abolished.—By abolishing the distinction between what is an offense and of what amount the value of the goods is defective, and one receiving stolen goods is treated and punished as principal. State v. Tyler, 85 N. C. 574, 63 S. E. 346.

Defective Verdict.—Where the verdict in an indictment under this section is "guilty of receiving stolen goods," it is defective as not being responsive to the charge or failing within the requirements of the statute to constitute the offense made in the indictment, and therefore a judgment may not be entered or a sentence imposed. State v. Barbee, 197 N. C. 248, 148 S. E. 249.

Same.—Failure to Charge as to Guilty Knowledge. — Where the evidence is conflicting as to whether the defendant knew at the time of receiving goods that they were stolen, and although the record shows that finding of such knowledge was necessary for conviction, the verdict of guilty without finding that the defendant possessed such knowledge at the time he received the goods is defective in the indictment, and the court should determine the value of the goods in its verdict.

Punishment.—Receiving stolen goods is only a misdemeanor under this section but it may be punished as larceny at the discretion of the court. State v. Brite, 73 N. C. 265.

An exception to a judgment of imprisonment in the state's prison for a term of three years, pronounced against a defendant upon a verdict of guilty of receiving stolen goods, knowing them to be stolen, was, in that the indictment did not specify the value of the property. State v. Reddick, 222 N. C. 539, 23 S. E. (2d) 509.


§ 14-72. Larceny of property, or the receiving of stolen goods, not exceeding fifty dollars in value.—The larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than fifty dollars, is hereby declared a misdemeanor, and the defendant shall be punished as the court shall deem appropriate.

If the larceny is from the person, or from the dwelling by breaking and entering, this section shall have no application: Provided, that this section shall not apply to horse stealing. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen. (Rev., s. 3506; 1895, c. 285; 1913, c. 118, s. 1; 1941, c. 178, s. 1; C. 4251.)

Editor's Note.—Prior to the amendment of 1913 there was no express provision in this section making it inapplicable to breaking and entering as a means of theft. The present provision provided that it should not apply if the larceny was from the person or from a house in the daytime. In the case of State v. Shuford, 152 N. C. 899, 67 S. E. 392, the defendant having been convicted of larceny, and was sentenced to three years imprisonment. It was contended by defendant that as this section provided for only one year punishment for larceny of property valued less than $20, defendant should not be sentenced for more than one year. The Court construed the section liberally and by the nature of the offence and in the light of section 14-73, providing for discretionary sentences for hardened criminals, decided that the legislature did not intend to give a longer sentence to daytime breakers than nighttime breakers, and the judgment of the lower court was sustained.

In the case of In re Holley, 154 N. C. 163, 69 S. E. 872, the question of punishment under this section again arose, and the court followed the rule laid down in State v. Shuford setting out additional grounds for the ruling; that this section only provided punishment for misdemeanors and that under section 14-2 and section 14-3 the punishment in all cases unless otherwise provided would be from 4 months to ten years. By the amendment of 1913 this section was made to cover all cases of such nature and remove any ground for contention as to how it should be construed in such cases. The 1941 amendment substituted "fifty dollars" for "twenty dollars."

Knowledge that the goods were stolen at the time of receiving them is an essential element of the offense of receiving stolen goods, and although it may be inferred from incriminating circumstances, a charge that such knowledge might be actual or implied, without specifying that it would have to exist at the time of the receiving, is erroneous. State v. Spankling, 211 N. C. 63, 188 S. E. 647.

Indictment for Larceny from the Person.—It is not necessary for the indictment to allege that the larceny was from the person for it to be shown. State v. Bynum, 117 N. C. 749, 23 S. E. 218.

Exclusive Jurisdiction in Superior Court.—The crime of larceny is a felony punishable in the state's Prison, and a recorder's court, not having jurisdiction thereof, may not make orders disposing of a juvenile "delinquent" under the statute providing for reclamation of such, whether the offense is committed therein or not. State v. Newell, 172 N. C. 933, 934, 87 S. E. 594.

The property is within the exclusive jurisdiction of the Superior Court, as punishment under this section is for 4 months to 5 years. State v. Brown, 150 N. C. 867, 64 S. E. 775.

Burglary.—A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling is less than $30 is no defense to the capital charge. This section dividing larceny into two degrees having no application to burglary. State v. Richardson, 216 N. C. 409, 11 S. E. (2d) 539.

§ 14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.—The superior courts shall have exclusive jurisdiction of the trial of all cases of the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of more than fifty dollars. (1913, c. 118, s. 2; 1941, c. 178, s. 2; C. S. 4522.)

Editor's Note.—The 1941 amendment substituted "fifty dollars" for "twenty dollars."

§ 14-74. Larceny by servants and other employees.—If any servant or other employee, to whom any money, goods or other chattels, or any of the articles, securities or choses in action mentioned in the following section, by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; or if any servant, being in the service of his master, without the consent of his master, shall embezzle such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or to defraud his master thereof, the servant so offending shall be fined or imprisoned in the state prison or county jail not less than four months nor more than ten years, at the discretion of the court: Provided, that nothing contained in this section shall extend to apprentices or servants within the age of sixteen years. (Rev., s. 3499; Code, s. 1065; R. C. c. 34, s. 18; 21 Hen. VIII, c. 7, ss. 1; 2; C. S. 4523.)

Cross Reference.—As to embezzlement, see 14-90 et seq.

Servant Defined. — In a strict sense all employees are servants of their superiors. Wherever an employee has the right to claim that the things committed to his care are articles owned by his master, he is a servant. State v. Higgins, 1 N. C. 119, 120, 3 S. E. 637. Servants of any degree and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods or property of any value, and the offender for every such offense shall suffer the same punishment and be subject to the same pains, penalties and disabilities as he should or might have suffered if he had feloniously stolen or taken by robbery, money, goods or other property of value. (Rev., s. 3498; Code, s. 1064; R. C. c. 34, s. 20; 1811, c. 814, s. 1; C. S. 4324.)

Cross Reference.—As to description of stolen money in indictment, see § 15-149.

Treasury Notes.—Treasury notes issued by the United States Treasury Department are covered by this statute as they are "public securities." Although a class of securities issued after the enactment of the statute they are subject to larceny the same as any other note issued after the enactment. State v. Thompson, 71 N. C. 146. While a "due-bill" is not a promissory note, and negotiable by endorsement, it is within the meaning of the words, "or other obligation," in this section. The larceny of a due-bill is indictable. State v. Campbell, 103 N. C. 344, 9 S. E. 410.

A pension check on the United States treasury comes under this section. State v. Bishop, 98 N. C. 773, 4 S. E. 357.

§ 14-75. Larceny of choses in action.—If any person, agent, or other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying away, or taking by robbery, shall be a felony of the same nature and degree and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods or property of any value, and the offender for every such offense shall suffer the same punishment and be subject to the same pains, penalties and disabilities as he should or might have suffered if he had feloniously stolen or taken by robbery, money, goods or other property of value. (Rev., s. 3498; Code, s. 1064; R. C. c. 34, s. 20; 1811, c. 814, s. 1; C. S. 4324.)

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A pension check on the United States treasury comes under this section. State v. Bishop, 98 N. C. 773, 4 S. E. 357.

Larceny of the Instrument and Paper Distinguished.—When a person is indicted for stealing a promissory note or any other chose in action, it is upon the state to prove the larceny of the instrument, and proof of larceny of a piece of paper is not sufficient. If the instrument has been paid before the alleged felonious taking, the indictment charging only larceny of a chose in action is not sufficient to convict. State v. Campbell, 103 N. C. 344, 9 S. E. 410.

§ 14-76. Larceny, mutilation, or destruction of public records and papers.—If any person shall steal, or for any fraudulent purpose shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatsoever, or of belonging to any court of record, or relating to any matter, civil or criminal, begun, pending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree or any original document whatsoever, of or belonging to any court or relating to any cause or matter begun, pending or terminated in any such court, every such offender shall be guilty of a misdemeanor; and in any indictment or such offense it shall

§ 14-75. Larceny of chose in action.—If any person shall feloniously steal, take and carry away, or take by robbery, any bank-note, check or other order for the payment of money issued by or drawn on any bank or other society or corporation within this state or within any of the United States, or any treasury warrant, dehenture, certificate of stock or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for
not be necessary to allege that the article, in respect to which the offense is committed, is the property of any person or that the same is of any value. If any person shall steal or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, any unlawfully and willfully obliterate, change, injuring or obliterating tax books, and the orai

it shall not be necessary to allege that the article, in respect to which the offense is committed, is the property of any person or that the same is of any value. If any person shall steal or feloniously take and carry away, or shall aid in taking and carrying off or being engaged in carrying away, any ginseng growing upon the property of the owner of the premises, or keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor. (Rev., s. 3511; Code, s. 1070; 2508; Code, s. 1070; 157 N. C. 602, 72 S. E. 994.

Nomenclature does not always determine the grade or class of a crime; a felony is a crime which is or may be punishable either by death or by imprisonment in the State prison and any other crime is a misdemeanor. Calling an offense a misdemeanor does not make it so when the punishment imposed makes it a felony and construed with § 14-3 the offense prescribed by this section is punishable by imprisonment in the penitentiary, and therefore a felony. State v. Harwood, 206 N. C. 87, 89, 173 S. E. 25.

State v. Wood, 175 Co. S, 4255, In General.—An indictment will lie under this section for changing, injuring or obliterating tax books, and the testimony of the register of deeds is competent to show the amount of the abstract made by him and sent to the auditor, the changed amount, and the acts of the deputy sheriff, as circuit clerk, show his guilt. State v. Gouge, 157 N. C. 602, 173 S. E. 285.

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To render such evidence competent, the indictment should be so worded as to show that the State is to show that the offense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, is insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. State v. Swinson, 196 N. C. 100, 144 S. E. 555.

§ 14-77. Larceny, concealment or destruction of wills.—If any person, either during the life of the testator or after his death, shall steal or, for any fraudulent purpose, shall destroy or conceal any will, codicil or other testamentary instrument, he shall be guilty of a misdemeanor. (Rev., s. 3510; Code, s. 1072; R. C., s. 34, s. 32; C. S. 4256.)

Cross Reference.—As to clerk's power to compel production of will when one in whose custody it is refused to produce it, see § 31-15.

Cross Reference.—As to clerk's power to compel production of will when one in whose custody it is refused to produce it, see § 31-15.

Cross Reference.—As to digging ginseng out of season on the lands of another, see § 14-322.

§ 14-78. Larceny of ginseng.—If any person shall take and carry away, or shall aid in taking or carrying away, or any ginseng growing upon the lands of another person, with intent to steal the same, he shall be guilty of a felony, and shall be imprisoned not less than two years nor more than five years, in the discretion of the court: Provided that such ginseng, at the time the same is taken, shall be in beds and the land upon which such beds are located shall be surrounded by a lawful fence. (Rev., s. 3502; 1905, c. 211; C. S. 4258.)

Cross Reference.—As to digging ginseng out of season on the lands of another, see § 14-322.

§ 14-80. Larceny of wood and other property from land.—If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor. (Rev., s. 3511; Code, s. 1070; 1866, c. 60; C. S. 4259.)

Cross Reference.—As to cutting, injuring, or removing another's timber, see § 14-135. As to larceny of branded timber, see §§ 80-21 and 80-22.

§ 14-78. Larceny of ungathered crops.—If any person shall steal or feloniously take and carry away, or any cotton, tobacco, potatoes, peanuts, pulse, fruit, vegetable or other product cultivated for food or market, growing, standing or remaining ungathered in any field or ground, he shall be guilty of larceny, and shall be punished accordingly. (Rev., s. 3503; Code, s. 1069; 1811, c. 816; R. C., c. 34, s. 21; 1868-9, c. 231; C. S. 4257.)

At Common Law.—"By the common law, larceny can not be committed of things which savor of the reality, and are at the time they are taken a part of the freehold, such as corn and the produce of land. 2 Russell Crimes, 136; State v. Wood, 157 N. C. 195, 123 S. E. 25.

§ 14-79. Larceny of wood and other property from land.—If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor. (Rev., s. 3511; Code, s. 1070; 1866, c. 60; C. S. 4259.)

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Cross Reference.—As to cutting, injuring, or removing another's timber, see § 14-135. As to larceny of branded timber, see §§ 80-21 and 80-22.

General.—Larceny in the third and fourth sections of 14-154 were enacted immediately after the Civil War to protect land owners from aimless wanderers who entered land without force, but often did great damage. It was not intended to prevent entry by persons who had a honest claim to the land, nor was it intended to apply when force was employed. State v. Crawford, 103 N. C. 353, 5 S. E. 409. It was intended to prevent the unlawful, and unlawful taking from the land of another property that was not brought within the scope of a prior statute subject to larceny. State v. Vosburg, 111 N. C. 718, 720, 16 S. E. 392.

The word "whatsoever" shows a clear intent of the Legislature to make it general in its application. The taking of a brass rail from around an engine that is stationary is larceny under this section. The rule in State v. Burt, 64 N. C. 619 in holding that taking a loose nugget of gold from a loose pile of stone is not larceny is not approved. It, although decided after this section was enacted, [ 643 ]
was probably decided under the common law as this section is not mentioned by the Court in any probability was not called to its attention. State v. Beck, 141 N. C. 625, 53 S. E. 843. There is no evidence of the Grand Jury or of the House of Congress, it is held that an indictment for trespass to personal property cannot be supported for the taking of rails from a fence as the taking is "one continuous act" and is trespass to the realty. State v. Burt, 119 N. C. 861, 26 S. E. 467.

In the case of State v. Boyce, 109 N. C. 739, 14 S. E. 98, it is held that a tenant of seven acres being a part of a tract of thirty five acres claimed by the landlord, when expressly prohibited from cutting timber on any part of the tract except the seven acres on which he is a tenant, may as the servant of a third person claiming adversely go on the other part of the tract and cut timber, and he will not be estopped to deny his landlord's title except as to the seven acres less than to him, nor will he be liable under this section if the person whose servant he has been can prove his title or bona fide claim. Davis, J., and Avery, J., dissent.

Purpose of Section.—This section was enacted to eliminate a defect in the common law rule and to extend it so as to make chattels real, such as growing trees, plants, minerals, metals and fences, connected in some way with the land to which they belong, and so express that every act was to prevent the willful and unlawful entry upon the land of another and the taking and carrying away of such articles as were not, at common law or by previous statute, property as was not, at common law, subject to larceny. State v. Moore, 33 N. C. 70, cited in note in 49 L. R. A., 11, N. S. 5, 11 S. E. 426, 48 S. E. 445.

Trespass upon land is an essential element of the offense hereby created. State v. Jackson, 218 N. C. 373, 11 S. E. (2d) 149.

Claim of Interest Must Be Founded.—An entry, without a survey and grant from the state is not sufficient to support a claim to the land, and is no defense to an indictment under this section. State v. Moore, 119 N. C. 739, 26 S. E. 455.

Tombstones.—Defendant was charged with feloniously stealing and carrying away one tombstone erected at the grave of a deceased person, being the goods and chattels of another person. The jury found that the offense charged was larceny, which is the wrongful and felonious taking and carrying away of personal property of another with intent to deprive the owner of the same. Held: Neither the indictment nor the theory of trial refer to trespass constituting an element of the statutory crime or larceny of chattels real, nor to the distinction of taking with and without fraudulent intent as set forth in this section, and there is a fatal variance between the indictment for common law larceny and the proof of the statutory larceny of a chattel real, and defendant's motion to nontest may not be granted. State v. Jackson, 218 N. C. 373, 11 S. E. (2d) 149.

Quære: As § 14-84, and cognate statutes relate expressly to tombstones, graveyards and graves, does this not exclude such property from the provisions of this section?

§ 14-81. Larceny of horses and mules.—If any person shall steal any horse, mare, gelding or mule, he shall suffer imprisonment at hard labor for not less than one nor more than twenty years, at the discretion of the court. A count under this section may be joined in a bill of indictment with a count under section 14-82. (Rev., s. 3505; Code, s. 1066; 1868, c. 37, s. 1; 1879, c. 234, s. 2; 1866-7, c. 62; 1917, c. 103, s. 2; C. S. 4260.)

Taking with Belief of Interest.—One taking a mule from the stable of another at night and without the consent of the owner is not guilty of larceny if he believed at the time when he took the mule that he had an interest in it. State v. Thompson, 95 N. C. 596.

Same—Question for a Jury.—One who takes a mule from the stable of another in a manner indicating felonious purpose but under a claim of interest should have the question of his act being under a bona fide claim submitted to the jury, and a charge that if the taking was not under a bona fide belief that he had a property or interest in the mule he would be guilty of larceny was not error. State v. Thompson, 95 N. C. 596.

§ 14-82. Taking horses or mules for temporary purposes.—If any person shall unlawfully take and carry away any horse, gelding, mare or mule, the property of another person, secretly and without the will of the owner of such property, with intent to deprive the owner of the temporary use of the same, or with the intent to use such property for a special or temporary purpose, the person so offending shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both fined and imprisoned, in the discretion of the court. (Rev., s. 3509; Code, s. 1067; 1879, c. 234, s. 1; 1913, c. 11; C. S. 4261.)

Indictment.—An indictment for stealing the temporary use of a horse in violation of this section is not defective because it charges the stealing of the temporary use of a horse. State v. Darden, 177 N. C. 699, 98 S. E. 467.

Employee Liable.—An occasional employee, who took the employer's mule at night and drove it off without the knowledge or consent of the employer, was guilty of a tortious conversion, and an act indictable under this section; and where the mule died in his possession he was liable for its value, at least in the absence of any evidence in support of his claim that the death was accidental. Clark v. Whitehurst, 171 N. C. 1, 86 S. E. 78.

§ 14-83: Repealed by Session Laws 1943, c. 543.

§ 14-84. Larceny of taxed dogs misdemeanor.—The larceny of any dog upon which the license tax provided in article two of the chapter entitled "Dogs has been paid shall be a misdemeanor. (1919, c. 116, s. 9; C. S. 4263.)

Cross Reference.—See also, §§ 67-15 and 67-27.

§ 14-85. Pursuing or injuring livestock with intent to steal.—If any person shall pursue, kill or wound any horse, mule, ass, jennet, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a felony, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending. (Rev., s. 3504; Code, s. 1068; 1866, c. 57; C. S. 4264.)

Sufficiency of Indictment.—An indictment under this section for injury to livestock, in which the animal alleged to have been injured is described as a "certain cattle beast," is sufficiently definite. State v. Credle, 91 N. C. 640.

§ 14-86. Destruction or taking of soft drink bottles.—It shall be unlawful for any person, firm or corporation, or any employee thereof, to maliciously take up, carry away, destroy or in any way dispose of bottles or other property belonging to
any bottler, bottling company, person, firm or corporation engaged in the business of bottling and/or distributing in bottles or other closed containers soda water, coca-cola, pepsi-cola, cheri-wine, chero-cola, grape soda, grape and other fruit juices or imitations thereof, carbonated or malted beverages and like preparations commonly known as soft drinks. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1937, c. 322, ss. 1, 2.)

Cross Reference.—As to pollution of soft drink bottles, see § 14-288.

Art. 17. Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.—Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another, from any place of business, residence or banking institution, or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years. (1929, c. 187, s. 1.)

Possession Necessary.—The purpose and intent of this section is to provide for more severe punishment for the commission of robbery with firearms, and other specified weapons, than is prescribed for common law robbery, and construing the title and context of the statute together to ascertain the legislative intent, it is held that possession of firearms or other of the specified weapons is necessary to constitute the offense of "robbery with firearms" under this section, and it is reversible error for the court to refuse to so instruct the jury in accordance with defendants' prayers for special instructions upon evidence tending to show that defendants sought to make their victim believe they had firearms, and threatened to use same, but that they actually carried no weapon. State v. Keller, 214 N. C. 447, 199 S. E. 839.

Where an indictment charged defendants with robbery with firearms from the companion of the person they were formerly charged with killing, the two offenses having been committed in the same time, and evidence of guilt of one of the offenses being substantially the same as the evidence of guilt of the other, the acquittal or conviction for one of them precludes a conviction for the other. State v. Dills, 210 N. C. 178, 185 S. E. 267, distinguishing State v. Clemmons, 207 N. C. 276, 176 S. E. 760.


Cited in State v. Murphy, 212 N. C. 494, 193 S. E. 709; State v. Proctor, 213 N. C. 221, 195 S. E. 816.

§ 14-88. Train robbery.—If any person shall enter upon any locomotive engine or car on any railroad in this state, and by threats, the exhibition of deadly weapons or the discharge of any pistol or gun, in or near any such engine or car, shall induce or compel any person on such engine or car to submit and deliver up, or allow to be taken therefrom, or from him, anything of value, he shall be guilty of train robbery, and on conviction thereof shall be punished by imprisonment in the state's prison for not less than ten years nor more than twenty years. (Rev., s. 3766; 1895, c. 204, s. 2; C. S. 4266.)

§ 14-89. Attempted train robbery.—If any person shall stop, or cause to be stopped, or impede, or cause to be impeded, or conspire with others for that purpose, any locomotive engine or car on any railroad in this state, by intimidation of those in charge thereof or by force, threats or otherwise, for the purpose of taking therefrom or causing to be delivered up to such person so forcing, threatening or intimidating, anything of value, to be appropriated to his own use, he shall be guilty of attempting train robbery, and, on conviction thereof, shall be punished by confinement in the state's prison for not less than two years nor more than twenty years. (Rev., s. 3766; 1895, c. 204, s. 1; C. S. 4267.)

Art. 18. Embezzlement.

§ 14-80. Embezzlement of property received by virtue of office or employment.—If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, or any officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and willfully misappropriate or convert to his own use, or shall take, make way with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misappropriate or convert to his own use, any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny. (Rev., s. 3406; Code, s. 1014; 21 Hen. VII, c. 7; 1871-2, c. 145, s. 2; 1889, c. 228; 1891, c. 188; 1897, c. 31; 1910, c. 97, s. 25; 1931, c. 158; 1939, c. 1; 1941, c. 31; C. S. 4288.)

Cross References.—As to larceny by servants or other employees, see § 18-174. As to embezzlement by a member of the state sinking fund commission, see § 14-254. As to embezzlement of funds of a bank by its officers, see § 53-129. As to embezzlement by a member of the state sinking fund commission, see § 14-254. As to description in indictment for embezzlement, see § 15-150.

Editor's Note.—The Act of 1931 amended this section so as to add the offenses of persons who may be guilty of embezzlement. Section 14-92 applies to embezzlement by trustees of public bodies and institutions. The addition was probably necessary because of the last fact that embezzlement is wholly a statutory crime. 9 N. C. Law Rev. 396.

The 1939 amendment inserted the word "trustee" in the third line the words "or any receiver, or any other fiduciary," and was enacted to meet the decision in State v. Whitehurst, 212 N. C. 300, 193 S. E. 657, 113 A. L. R. 740. See 17 N. C. Law Rev. 348.

The 1941 amendment makes this section applicable to bailiffs. For comment, see 19 N. C. Law Rev. 478.

Origin and Purpose.—Embezzlement was not a common-law offense. State v. Hill, 91 N. C. 501. It was first made a criminal offense in England by statute, 21 Henry VIII, ch. 7, to punish the appropriation by servants of the property of their masters in violation of the trust and confidence reposed on them. 1 McLain Cr. Law, § 611. It was enacted in consequence of frauds and deceits. It was enacted because money had been embezzled by a banker's clerk, who received money from a customer and appropriated it to his own use, could not be convicted of larceny on the ground that the money had never been in the employer's possession. Clark's Cr. Law, p. 398. State v. McDonald, 133 N. C. 680, 683, 48 S. E. 582.

Compared with Section 14-254.—The use of the word "ab-"stracts" in section 14-254 is the same as the use of the word "embezzlement" in this section. The latter applies to embezzlement and excepts offenders under sixteen years of age. It is not necessary under section 14-254 to allege that the defendant is more than sixteen years old. State v. Switzer, 157 N. C. 88, 121 S. E. 143.

Cannot Be Extended by Construction.—This section is a
The fact that ch. 31, Public Laws 1941, amended this section, by adding ‘bailee’ to the classes of persons specified constitutes a legislative declaration that a bailee was not included in the definition of classes of persons made by the statute. Id.

The mere converting or appropriating the property of another to his own use, or corruptly using or misappropriating the property of another for purposes other than that for which it is held, is sufficient to constitute the crime of embezzlement, fraudulent intent in the act of such conversion or appropriation being an essential element of the offense. State v. Cohoon, 206 N. C. 386, 174 S. E. 91. For this reason the necessary and sufficient elements of the offense of embezzlement and the State must prove such intent beyond a reasonable doubt; but direct proof is not necessary, if facts and circumstances are shown from which it may be reasonably inferred. State v. McLean, 209 N. C. 38, 182 S. E. 707.

Meaning of Fraudulent Intent.—Fraudulent intent within the meaning of this section is the intent to willfully or corruptly use or misappropriate the property of another for purposes other than that for which it is held, and evidence tending to show that defendant, without authorization, applied funds of his employer to his personal use, although defendant testified that he used the funds to pay a debt due him by his employer, is sufficient to be submitted to the jury on the question of fraudulent intent. State v. McLean, 209 N. C. 38, 182 S. E. 707; State v. Howard, 222 N. C. 291, 22 S. E. (2d) 917.

Conversion Not Necessary.—To embezzle is for an agent fraudulently to misappropriate the property of his principal; it is not necessary that the agent have possession or control, but it is to his own use, that is, expend the money for his own benefit. State v. Poult, 114 N. C. 842, 843, 19 S. E. 276.

Necessity of Demand for Payment.—In the absence of conversion, it is not necessary to support a prosecution under this section as it is not made a prerequisite to prosecution. State v. Blackley, 138 N. C. 620, 50 S. E. 310.

Property Alleged to Have Been Embezzled Must Be Property of the Prosecutor. — The property alleged to have been embezzled must be the property of the prosecutor. State v. Barton, 125 N. C. 702, 34 S. E. 533.

Goods Received under Special Directions.—Where goods consisted of a comparatively small quantity of the ordinary course of his employment, but in pursuance of special directions from the master to receive them, and the servant embezzle the same, he is indiscernible under this section. State v. Cotin, 89 N. C. 511.

Intent to Repay No Defense.—An intent to restore the property embezzled or a readiness and willingness at a latter date is not a defense to a prosecution under this section. State v. Stewart, 141 N. C. 841, 53 S. E. 856.

To Whom Section Applies. — A contractor is not an officer or agent or employee of the State, or other person having or holding in trust for the principal only, and accordingly receiv- ing the price, he intentionally and wrongfully converted the price, he intentionally and wrongfully converted the property to his use, it is sufficient to constitute the crime of embezzlement under this section and to sustain a verdict of guilty. State v. Eubanks, 194 N. C. 319, 139 S. E. 451.

Accusation of Embezzlement Actionable Per Se in Slander. — The offense of embezzlement is a felony, and a false accusation thereof is slander, actionable per se, and malice is presumed. Eimore v. Atlantic Coast Line R. Co., 189 N. C. 658, 127 S. E. 710.

It is unnecessary to determine whether an indictment could be sustained under other of the cognate statutes, §§ 14-91 to 14-99, where an indictment of a bank receiver for an embezzlement under this section, when the evidence tends only to show that the property charged to have been embezzled had been committed to the care of defendant, nor that any breach of confidence or duty thereunto had been committed by defendant. State v. Lanier, 89 N. C. 517, 88 N. C. 658. And it need not be alleged or shown in the indictment that defendant is neither an apprentice nor under the age of sixteen years, or that the latter date is not a defense to a prosecution under this section, when the evidence tends only to show that defendant is under age is on the defendant and the State v. Connelly, 104 N. C. 794, 10 S. E. 469.

The crime of embezzlement rests upon statute penalty, creating a new offense, and cannot be ex- tended by construction to persons not within the classes designated. State v. Eurell, 220 N. C. 519, 17 S. E. (2d) 62.

The word ‘property’ is sufficiently all inclusive to embrace money, goods, chattels, evidences of debt and things in action. State v. Ward, 222 N. C. 316, 22 S. E. (2d) 922.

The word ‘property’ constitutes a necessary element of the offense of embezzlement. To embezzle is charged in the indictment and the intent to embezzle or otherwise willfully and corruptly use or misappropriate the property of the principal or employer for purposes other than those for which the property is held, as in this case, to sustain a verdict of guilty, and be fined, except to the amount of ten thousand dollars, or imprisoned, except for a term of not less than twenty years, or both, at the discretion of the court. (Rev. s. 2407; Code, s. 1015; 1874-5, c. 52; C. S. 4260.)
§ 14-92. Embezzlement of funds by public officers and trustees.—If any officer, agent, or employee of any city, county, or incorporated town, or of any penal, charitable, religious or educational institution; or if any person having or holding any moneys or property in trust for any city, county, incorporated town, penal, charitable, religious or educational institution, shall embezzle or otherwise willfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of a felony, and shall be fined and imprisoned in the state's prison in the discretion of the court. If any clerk or deputy clerk of the superior court, any sheriff, treasurer, register of deeds or other public officer of any county or town of the state shall embezzle or wrongfully convert to his own use, or corruptly use or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony. The provisions of this section shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their successors in office or other persons lawfully entitled to receive the same all such moneys, funds and the securities or property aforesaid. The punishment shall be imprisonment in the state's prison or county jail, or fine in the discretion of the court. (Rev., s. 3408; Code, s. 1016; 1891, c. 241; 1876-7, c. 47; C. S. 4270.)

Compared with Section 14-231.—Under section 14-231 failure by an officer to pay over money coming into his hands is a misdemeanor. That section is very broad and seems to cover every case of failure by an officer to pay to the proper person funds coming into his hands. By this section the offence is declared a felony. An officer indicted for failure to pay to proper persons funds coming into his hands should be allowed the privilege of having the facts submitted to the jury. (Cited in State v. Conolly, 104 N. C. 794, 49 S. E. 469.)

Meaning of "Wilfully and Corruptly."—In a charge upon the trial of county officials for the misapplication of county funds under the provisions of this section, the definition "wilfully and corruptly" meant with "bad faith and without regard to the rights of others and in the interest of such parties for whom the funds were held" is not erroneous under the circumstances of this case. State v. Shipman, 102 N. C. 518, 103 S. E. 657.

 Applies Only to Public Funds.—This section does not embrace the unlawful appropriation of the property of private individuals. State v. Connelly, 104 N. C. 794, 49 S. E. 469.

Clerks of Courts.—In the case of State v. Connelly, 104 N. C. 794, 49 S. E. 469, it was held that this section was not applicable to clerks of the Superior Courts but by an amendment at the next session of the Legislature it was expressly made applicable to clerks of Superior Courts. State v. Windley, 178 N. C. 670, 672, 100 S. E. 116.


§ 14-93. Embezzlement by treasurers of charitable and religious organizations.—If any treasurer or other financial officer of any benevolent or religious society, congregation shall lend any of the moneys coming into his hands to any other person or association without the consent of the institution, association or congregation to whom such moneys belong; or, if he shall fail to account for such moneys when called on, he shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the discretion of the court. (Rev., s. 3409; Code, s. 1017; 1879, c. 105; C. S. 4271.)

Two Offenses Created.—Under this section two offenses are created which apply to certain officers of benevolent or religious institutions. One offense is the lending their moneys without consent; the other is the failure to account for such moneys. State v. Dunn, 138 N. C. 672, 50 S. E. 772. Association for Members Solely.—An association organized for the benefit of its members solely is not a benevolent or religious association, and an indictment under this section cannot be sustained against an officer who misappropriates funds of the association. State v. Dunn, 134 N. C. 663, 46 S. E. 549.


§ 14-94. Embezzlement by officers of railroad companies.—If any president, secretary, treasurer, director, engineer, agent or other officer of any railroad company shall embezzle any moneys, bonds or other valuable funds or securities, with which such president, secretary, treasurer, director, engineer, agent or other officer shall be charged by virtue of his office or agency, or shall in any way, directly or indirectly, apply or appropriate the same for the use or benefit of himself or any other person, state or corporation, other than the company of which he is president, secretary, treasurer, director, engineer, agent or other officer, for every such offense the person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of any county through which the railroad of such company shall pass, shall be imprisoned in the state's prison not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars. (Rev., s. 3403; Code, s. 1018; 1870-1, c. 103, s. 1; C. S. 4272.)

§ 14-95. Conspiring with officers of railroad companies to embezzle.—If any person shall agree, combine, collude or conspire with the president, secretary, treasurer, director, engineer or agent of any railroad company to commit any offense specified in § 14-94, such person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of a county through which the railroad of any company against which such offense may be perpetrated passes, shall be imprisoned in the state's prison for not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars. (Rev., s. 3404; Code, s. 1019; 1870-1, c. 103, s. 2; C. S. 4273.)


§ 14-96. Embezzlement by insurance agents and brokers.—If any insurance agent or broker who acts in negotiating a contract of insurance by an insurance company, association or fraternal order of which he is an officer or employee, or any insurance company, association or society, fraudulently doing business in this state, embezzles or fraudulently converts to his own use, or, with intent to use or embezzle, takes, secretes or otherwise disposes of, or fraudulently withholds, appropriates, lends, invests or otherwise uses or applies any money or substitute for money received by him as such agent or broker, contrary to the instructions or without the consent of the company for or on account of which the same was received by him, he shall be deemed guilty of larceny. (Rev., s. 3489; 1889, c. 54, s. 103; 1911, c. 196, s. 8; C. S. 4274.)

§ 14-97. Appropriation of partnership funds by partner to personal use.—Any person engaged [467]
in a partnership business in the state of North Carolina who shall, without the knowledge and consent of his copartner or copartners, take funds belonging to the partnership business and appropriate the same to his own personal use with the fraudulent intent of depriving his co-partners of the use thereof, shall be guilty of a misdemeanor. Any person or persons violating the provisions of this section, upon conviction, shall be punished as is now done in cases of misdemeanor.

(1921, c. 129; C. S. 4974(a).)

Fraudulent intent is an essential element of this crime and must be proved by the State, and in a prosecution under this section an instruction that the jury should return a verdict of guilty if they found beyond a reasonable doubt the facts to show that the defendant intended to cheat the other person is error, the verdict of guilty if they found beyond a reasonable doubt the facts to show that the defendant intended to cheat another person is error.

State v. Rawls, 202 N. C. 977, 162 S. E. 899.

§ 14-98. Embezzlement by surviving partner.—If any surviving partner shall willfully and intentionally convert any of the property, money or effects belonging to the partnership to his own use, and refuse to account for the same on settlement, he shall be guilty of a felony, and upon conviction shall be punished by fine or imprisonment in the state’s prison in the discretion of the court. (Rev., s. 3405; 1901, c. 640, s. 9; C. S. 4275.)

§ 14-99. Embezzlement of taxes by officers.—If any officer appropriates to his own use the state, county, school, city or town taxes, he shall be guilty of embezzlement, and may be punished by fine or imprisonment in the state’s prison not exceeding five years, at the discretion of the court. (Rev., s. 3410; Code, s. 3705; 1853, c. 138, s. 49; C. S. 4276.)

Whether Felony or Misdemeanor.—As this section is silent as to whether or not the offense set out is a felony or a misdemeanor it will be construed as a misdemeanor as an offense will never be made a felony by construction of any doubtful or ambiguous words in the statute. State v. Hill, 91 N. C. 561. But see section 14-1, as that seems to change the construction as given in this case and make all offenses punishable by imprisonment felonies.—Ed. Note. Inference of Fraudulent Intent.—While the intent to commit fraud or steal by means of any forged or false token, or other false pretense whatso-

§ 14-100. Obtaining property by false pretenses and other false pretenses.—If any person shall knowingly and designedly, by means of any forged or counterfeited paper, in writing or in print, or by any false token, or other false pretense whatsoever, obtain from any person or corporation within the state any money, goods, property or other thing of value, or any bank-note, check or order for the payment of money, issued by, or drawn on, any bank or other society or corporation within this state or any of the United States, or any treasury warrant, treasury check, order for the payment of stock or public security, or any order, bill of exchange, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation of the same, such person shall be guilty of a felony, and shall be imprisoned in the state’s prison not less than four months nor more than ten years, or fined, in the discretion of the court: Provided, that if, on the trial of any one indicted for such crime, it shall be proved that he obtained the property in such manner as to amount to larceny, he shall not, by reason thereof, be entitled to be acquitted of the felony; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny upon the same facts: Provided further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud. (Rev., s. 3432; Code, s. 10253; R. C., c. 34, s. 67; 1811, c. 814, s. 2; 33 Hen. VIII, c. 1, ss. 1, 2; 30 Geo. II, c. 24, s. 1; C. S. 4277.)

Cross Reference.—As to alleging intent in the indictment, see § 14-151.

Origin of Section. — This section was derived from the English Statutes, 33 Hen VIII, and 30 George II. State v. Yarboro, 194 N. C. 498, 140 S. E. 216.

Elements of the Crime.—To constitute the crime of false pretense, a mistake, a pretense, a false pretense, a mere promise of opinion is not sufficient. It must be a (1) representation of a subsisting fact, whether in writing or in words or in acts; (2) which is calculated to deceive and intended to deceive, and (3) which does in fact deceive (4) by which one man obtains value from another without compensation. State v. Simpson, 10 N. C. 621; State v. Roberts, 151 N. C. 593, 601, 62 S. E. 747; State v. Yarboro, 194 N. C. 498, 140 S. E. 216; State v. Howley, 220 N. C. 113, 16 S. E. (2d) 705.

The constituent elements of the offense of false pretense are: (1) that the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it was done with intent to defraud the party to whom it was made. State v. Carlson, 171 N. C. 818, 89 S. E. 30; State v. Johnson, 195 N. C. 506, 507, 142 S. E. 453.

Same—Subsisting Fact.—It is settled that a promise is not a pretense. No matter what the form, or however false the promise to do something in the future, it will not come within the statute. There must be an existing subsisting fact. State v. Phifer, 65 N. C. 321, 324; State v. Knott, 124 N. C. 814, 32 S. E. 796.

Same—Whether in Writing or Words.—It was held formerly that some false writing or token was necessary to constitute the offense. See State v. Simpson, 10 N. C. 620. This case was overruled in State v. Phifer, 65 N. C. 321, 324, where it is held that a naked lie meeting the other require-

Same—Intent to Deceive.—The intent to cheat and defraud the prosecutor is an essential ingredient in the crime of false pretense. State v. Blue, 84 N. C. 807; State v. Oakley, 103 N. C. 408, 9 S. E. 575. In the absence of such definite finding, the uniform practice is to grant a new trial. State v. McClung, 151 N. C. 730, 731, 66 S. E. 568.

Same—Actual Deceit.—Another of the constituent elements is that the party to whom the false representation was made was deceived by it. State v. Whedbee, 152 N. C. 770, 67 S. E. 60. In other words, he is so deceived it matters not whether he parted with goods or money or not, or for a charitable purpose. State v. Matthews, 91 N. C. 635.

Caveat Emptor.—The doctrine of caveat emptor, "let the buyer beware," does not apply to actual fraud or obtaining property by false representation. By this doctrine the pur-
Passing Counterfeit Money.—Where a person buys goods from another and the change given back by the seller is counterfeit an indictment under this section cannot be had, for there is no false representation or misstatement, nor intent to defraud before the defendant received the money. State v. Allred, 84 N. C. 749.

Representation to Agent of Owner of Goods.—It is not necessary that the representations made to his agent be true, if the owner of the goods directly, but it is sufficient if they were made to his agent. State v. Taylor, 131 N. C. 711, 42 S. E. 537.

Corporations LIABLE.—"In State v. Rowland Lumber Co., 153 N. C. 610, 612, 69 S. E. 58, it was said: 'The first ground, that corporations cannot be convicted of an offense where the intent is an ingredient, is no longer tenable. They are as liable in such cases as individuals. They are liable for libel, assaults and battery, etc. Corporate existence can be shown, though not charged in the bill. State v. Shaw, 92 N. C. 768.' This is fully sustained by all the late authorities. State v. Salisbury Ice etc., Co., 166 N. C. 366, 367, 81 S. E. 737.

The Indictment.—The indictment must allege all of the essential elements of the offense. State v. Claudius, 164 N. C. 521, 526, 80 S. E. 261.

The indictment must show a causal connection between the false representation and the parting with the property. State v. Whedbee, 152 N. C. 770, 774, 67 S. E. 60) but "no particular form of words is necessary; an allegation that "by means of the false pretense" or "rellying on the false pretense," or the like, is sufficient, where it is apparent that the offense was the natural result of the false representation alleged. 19 Cyc. 430." State v. Claudius, 164 N. C. 521, 525, 80 S. E. 261.

The charge to the persons intended to be cheated is surplusage and immaterial and all that is necessary is a charge of intent. State v. Ridge, 125 N. C. 655, 658, 34 S. E. 439; State v. Salisbury Ice etc., Co., 166 N. C. 366, 367, 81 S. E. 737.


Necessity of Averring Property Obtained.—The indictment must describe the thing alleged to have been thereby obtained with reasonable certainty, and by the same name usually employed to describe it; and where the indictment charges obtaining money by a false pretense, and the State's evidence tends only to show that the defendant had obtained money in that manner, the averment that the property is money is sufficient, but no averment of the value of the property obtained is necessary. State v. Gillepsie, 80 N. C. 356. And where the allegation is that money was obtained and the proof is that property was obtained but the defendant made no exception, there is no ground for reversal. State v. Ashford, 120 N. C. 588, 26 S. E. 915. Nonsuit is the proper method of raising the question of variance. State v. Gibson, 169 N. C. 318, 85 S. E. 7. No averment of the value of the property obtained is necessary. State v. Gillepsie, 80 N. C. 356. And where the allegation is that money was obtained and the proof is that property was obtained but the defendant made no exception, there is no ground for reversal. State v. Ashford, 120 N. C. 588, 26 S. E. 915. Nonsuit is the proper method of raising the question of variance. State v. Gibson, 169 N. C. 318, 85 S. E. 7.


§ 14-101. Obtaining signatures or property by false pretenses.—If any person, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the false making of which is necessary that the false representations be made to the prosecutor had ample opportunity to inspect them and had been urged to do so by the defendant. State v. Corey, 199 N. C. 499, 223 S. E. 923.

Passing Counterfeit Money.—Where a person buys goods from another and the change given back by the seller is counterfeit an indictment under this section cannot be had, for there is no false representation or misstatement, nor intent to defraud before the defendant received the money. State v. Allred, 84 N. C. 749.

Representation to Agent of Owner of Goods.—It is not necessary that the representations made to his agent be true, if the owner of the goods directly, but it is sufficient if they were made to his agent. State v. Taylor, 131 N. C. 711, 42 S. E. 537.

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§ 14-103. Obtaining certificate of registration of animals by false representation.—If any person shall, by any false representation or pretense, with intent to defraud or cheat, obtain from any club, association, society or company for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal in the herd register of any such association, society or company, or a transfer of any such registration, upon conviction thereof he shall be punished by imprisonment for a term not exceeding three months, or a fine not exceeding one hundred dollars, or by both such fine and imprisonment. (Rev., s. 3308; 1891, c. 94, s. 1; C. S. 4280.)

§ 14-104. Obtaining advances under promise to work and pay for same.—If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise, by any description from any other person, corporation upon and by color of any promise or agreement that the person making the same will begin any work or labor of any description for such person or corporation from whom the advances are obtained, and the person making the promise or agreement shall willfully fail, without a lawful excuse, to commence or complete such work according to contract, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3433; 1889, c. 444; 1891, c. 106; 1905, c. 411; C. S. 4281.)

Cross Reference.—As to tenant or cropper willfully abandoning landlord after advances have been made, see § 14-358.

Editor's Note.—The 1905 amendment, which made failure to perform services after being paid therefor presumptive evidence of fraudulent intent, has been held to contravene the constitutions both of North Carolina and of the United States. State v. Griffin, 154 N. C. 611, 70 S. E. 292. A similar provision in an Alabama statute was held to be unconstitutional by the United States Supreme Court in Bailey v. Alabama, 219 U. S. 219, 31 S. Ct. 106, 55 L. Ed. 191.

Constitutional.—The gist of the offence of procuring advances "with intent to cheat and defraud" is not the obtaining the advances, and afterwards refusing to perform the labor, but in the fraudulent intent at the time of obtaining the advances, and making the promise. State v. Bailey, 164 N. C. 484, 14 S. E. 968. This case was decided before the 1905 amendment discussed above.

Intent Must Be Shown.—To convict under this section it is necessary to show the fraudulent intent on the part of the promisor; and merely the facts of obtaining the advances, the promise to do the work, and a breach of that promise, are insufficient to sustain a conviction. State v. Griffin, 154 N. C. 611, 70 S. E. 292; State v. Islay, 164 N. C. 491, 79 S. E. 118.

No Day of Grace.—Where, upon a promise to begin work on the following Monday, the prosecutor made advances to the defendant, and the latter failed, without proper excuse, to begin work at the time stipulated, and was arrested on complaint of prosecutor on Tuesday; Held, to be a failure to begin work within the meaning of the statute. State v. Norman, 110 N. C. 484, 14 S. E. 968.

§ 14-105. Obtaining advances under written promise to pay therefor out of designated property.—If any person shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation, upon any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel or personal property, which property, or the proceeds of which the owner in such representation thereby agrees to apply to the discharge of the debt so created, and the owner shall fail to apply such produce or other property, or the proceeds thereof, in accordance with such agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property or the time such representation was made. (Rev., s. 3434; Code, s. 1087; 1879, cc. 185, 186; 1905, c. 104; C. S. 4282.)

Constitutional.—It is not the failure to pay the debt which is made indictable, but the failure to apply certain property, which, in writing, has been pledged for its payment, and advances made on the faith of such pledge; on this ground it is held guilty if the jury find that the advances were made in bad faith, but the fraud in disposing of or withholding property which the owner has in writing agreed should be applied in payment of advances made on the faith of such pledge is not the subject of this section. State v. Whidbee, 124 N. C. 796, 32 S. E. 318.

Indictment Should Charge Exact Terms.—The indictment should charge in the exact terms of the statute, and on failure to do so it is held not the statute is not violated, the defendant is not made indictable, but the fraud in disposing of or withholding property which the owner has in writing agreed should be applied in payment of advances made on the faith of such pledge is not the subject of this section. State v. Whidbee, 124 N. C. 796, 797, 32 S. E. 318.

Compared with Section 14-114.—This section is on the same footing as section 14-114 for disposing of mortgage advances. It is not the failure of the promise to pay the mortgage advances which is made indictable, but the fraud in disposing of or withholding property which the owner has in writing agreed should be applied in payment of advances made on the faith of such pledge. State v. Norman, 110 N. C. 484, 14 S. E. 968.

§ 14-106. Obtaining property in return for worthless check, draft or order.—Every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, person, firm or corporation, not indebted to the drawer, or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars or imprisoned not exceeding three months. (Rev., s. 3435; 1889, cc. 185, 186; 1905, c. 411; C. S. 4281.)

Local Modification.—New Hanover: Pub. Loc. 1927, c. 636. Cross Reference.—As to false warehouse receipts, see § 27-54 et seq.

It is a misdemeanor for any person knowingly to utter a worthless check in this state and such act involves moral turpitude under this section if done with intent to defraud. Oats v. Wachovia Bank, etc., Co., 259 N. C. 14, 160 S. E. 828.

Intent to Cheat or Defraud.—In order to convict a defendant under the provisions of this section for obtaining property in return for a worthless check, the indictment must sufficiently charge an intent to cheat or defraud or that the defendant obtained a thing of value. State v. Horton, 199 N. C. 771, 155 S. E. 866.

Sighting in Notice of Complaint.—On the trial under indictment for violating this section, the evidence tended to show that the check in question was signed in the name of a certain company by the defendant, and was conflict- ing to that effect under the deponent's admission in the cause. It was held, that the question as to whether the defendant was a member of the company when he drew the check in question was necessarily decisive of his guilt, and an instruction to find him guilty should find from the evidence he was not a partner, was [650]

Same—Burden of Proof.—The burden of proving the guilt of defendant in violating this section, the worthless check statute, as of 1947, is on the State, and raises the question as to the defendant's good faith for the jury to determine. State v. Anderson, 194 N. C. 377, 139 S. E. 701.

§ 14-107. Worthless checks.—It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as above said, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor. [If the amount due on such check is not over fifty dollars, the punishment: shall not exceed a fine of fifty dollars or imprisonment for thirty days.]

The word "credit", as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft. The part of this section in brackets shall only apply to Pitt county, Robeson county, Iredell county, Martin county, Lee county, Rutherford county, Bladen county, Columbus county, Alamance county, Caswell county, Pasquotank county, Sampson county, Alleghany county, Lenoir county, Randolph county, Gaston county, Hoke county, Madison county, Burke county, Transylvania county, Rockingham county, Halifax county, Hertford county, Richmond county, Chatham county, Pamlico county, Wake county, Haywood county, Granville county, Davidson county, Anson county, Carteret county, Davie county, Forsyth county, Greene county, Jackson county, Henderson county, Stokes county, Onslow county, Macon county, Currituck county, Chowan county, Vance county, Edgecombe county, Northampton county, Stanly county, Cabarrus county, Mitchell county, Vance county, Avery county, Alamance county, Franklin county, Yadkin county, Caldwell county, Gates county, Ashe county, Washington county, Nash county, Johnston county, Duplin county, Wayne county, Guilford county, Rowan county, Bertie county, Moore county, Harnett county, Columbus county, Watauga county, Lincoln county, Caswell county, Orange county, Buncombe county, Wilkes county, Hyde county, Swain county, Clay county, Graham county, Cherokee county, Scotland county, Union county, and Surry county. (1925, c. 14; 1927, c. 69; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 363, 458; 1939, c. 346.)

Local Modification.—For an act amending an Act that was never passed by the legislature, and applying only to Durham County, see Ch. 351, 1913 N. C. Laws.

Cross Reference.—See annotation to § 14-106.

Editor's Note.—The part of this section appearing in brackets in the second paragraph, and some of the counties to which applicable, were added by the Act of 1929. The Acts of 1931, 1933 and 1939 added other counties. As pointed out in Article 3 in N. C. Law Rev. 141, the giving of worthless checks was first regulated in this state by the Acts of 1907, 1909 and 1911. As pointed out in the article, they are partly quoted and the elements of the crime analyzed in the article. It was pointed out that although the provision expressly states that the check or draft in question has been signed by him in the name of a certain person, there is evidence tending to show that other checks similarly signed had been paid, with further evidence that defendant's authority to sign such checks had been revoked, the burden of proving defendant's guilt is on the State, and raises the question as to the defendant's good faith for the jury to determine. See State v. Freeman, 172 N. C. 925, 90 S. E. 507, and repeated in the Law Review Article. It was also pointed out that the indictment must have charged both "insufficient funds" and "insufficient credits" to charge a violation. The question of the constitutionality of this act was raised both in the article previously cited and in 5 N. C. Law Rev. 75, where the position was taken that the law was violative of the constitution, Art. I, section 16, as permitting the imprisonment for debt. In 1925 the legislature passed a new bad check law which left out the element of intent to defraud, etc., so that under it the giving of a check with insufficient funds was a crime. The elements of the crime under that law are outlined by Mr. Justice Adams in State v. Edwards, 190 N. C. 322, 130 S. E. 10, and repeated in the Law Review Article. It was also pointed out that the indictment must have charged both "insufficient funds" and "insufficient credits" to charge a violation. The question of the constitutionality of this act was raised both in the article previously cited and in 5 N. C. Law Rev. 75, where the position was taken that the law was violative of the constitution, Art. I, section 16, as permitting the imprisonment for debt.

Subsequently the legislature at the 1927 session repealed the act and passed the present section which cures the defect pointed out in the Law Review, and it has been upheld by the supreme court. See State v. Yarboro, 194 N. C. 498, 140 S. E. 216.

It would seem that this section does not require that the check be given for present value. The essence of the crime seems to be the giving of a check for the payment of money or its equivalent knowing that there are insufficient funds or insufficient credits with which to pay the same. The punishment is for a pre-existing debt or for present value. See State v. Yarboro, 194 N. C. 498, 504, 140 S. E. 216.

It is also apparent that this section does not require an actual intent to cheat or defraud the payee. The element of intent is presumed, no doubt, from the knowledge of lack of funds.

The prior laws contain a provision allowing the drawer 10 days within which to make the check good; the present law contains no such provision.

Under the prior laws which made intent to cheat or defraud an element of the crime, the uttering of the check was insufficient to cast the burden upon the defense of disproving the element. This section contains no such provision and the burden of proving the knowledge of lack of funds is upon the state, it would seem.

For a general note on the subject, see XIV Va. Law Rev. 134; as to applicability of Virginia Statute to post-dated checks, see XIV Va. Law Rev. 145.

Public Detriment.—The gravamen of the offense proscribed by this section is the putting into circulation worthless commercial paper to the public detriment, and not that the individual payee. State v. Levy, 230 N. C. 612, 18 S. E. (2d) 355.

Postdated Check.—A postdated check given for a past due account and so accepted is not a representation importing a moral liability, and unless the overt act shows the intent and meaning of the "bad check law," making it a misdemeanor for a person to issue and deliver to another any check on any bank or depository for the payment of money equivalent to giving a worthless check with insufficient funds on deposit or credit with the bank or depository for its payment. State v. Crawford, 198 N. C. 522, 152 S. E. 904.

Indictment—Necessity of Charging All Elements.—In order to charge a statutory offense (the giving of a bad check), the indictment should set forth all the essential requisites prescribed by the statute. It is not sufficient to charge the defendant's authority to sign such checks had been revoked, the burden of proving defendant's guilt is on the State, and raises the question as to the defendant's good faith for the jury to determine. See State v. Edwards, 190 N. C. 322, 130 S. E. 10.

Issuance as Fraud.—The issuance of a check on a bank in payment of a debt, the non-payment of which of this check is a false representation of giving facts that the maker has on deposit sufficient funds for its payment at the bank, upon its presentation, or that he has made the necessary arrangements with the bank therefor, in effect a fraud; if such check does not have sufficient funds on deposit or credit with the bank or depository for its payment. State v. Cookie, 198 N. C. 498, 140 S. E. 216. See dissenting opinion.

Facing Variance and Allegation and Probate.—An indictment charging the defendant with obtaining money on a day named by the issuance of a worthless check in violation of our statute, and evidence that it was given for the hire of an automobile, ten days later, are fatal variance, and will not support a conviction. State v. Corpening, 191 N. C. 751, 140 S. E. 216. See dissenting opinion.

[ 651 ]
executive officer, and that the corporation did not have sufficient funds or credit for its payment. There is a fatal variance between allegation and proof, and defendant's motion to dismiss should have been allowed. State v. Dowless, 217 N. C. 313, 10 S. E. (2d) 18.

Waiver of Right to Trial by Jury.—Where the defendant in a criminal action enters the plea of "not guilty," the requirement of our State Constitution, Art. I, § 13, of trial by jury may not be waived by the accused nor another method substituted by agreement, and where a defendant is indicted for violating the statute commonly known as the "bad check law," an agreement between the State and the accused that the judge may find the facts under a plea of "not guilty," will be disregarded on appeal and the case remained to be tried according to law. State v. Crawford, 197 N. C. 813, 169 S. E. 729.


Sentence.—Upon defendant's conviction upon two warrants charging the issuance of worthless checks, a sentence of two years imprisonment on the first warrant and one year imprisonment on the second, the sentences to run consecutively, cannot be held excessive, cruel or unusual since the sentences were within the limits prescribed by this section. State v. Levy, 220 N. C. 812, 18 S. E. (2d) 355.


§ 14-108. Obtaining property or services from slot machines, etc., by false coins or tokens.

Any person who shall own, operate, or cause to be operated, or attempt to cause to be operated any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, by means of a slug or any false, counterfeit, mutilated, sweated or foreign coin, or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, or who shall take, obtain or receive from or in connection with any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, any goods, wares, merchandise, gas, electricity, or any service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle lawful coin of the United States of America to the amount required therefor by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, shall be guilty of a misdemeanor, punishable by a fine or imprisonment, or in the discretion of the court, by both. (1927, c. 68, s. 2.)

Evidence Insufficient for Conviction.—In order to convict under the provisions of this section, it is necessary for the State to show the fraudulent intent of the one who has failed or refused to pay for his lodging or food at an inn, boarding house, etc., or the like intent as to his surreptitiously leaving with his baggage without having paid his bill; and evidence tending only to show his inability to pay, under the circumstances, but his arrangement with the keeper of the inn or boarding house to pay in a certain way and within a fixed period after leaving, and his payment in part, and that his will remains sub rosa, that he, thereafter took away his baggage without his knowledge or participation therein, and in the separation following he received no benefit therefrom, is insufficient for a conviction of the statutory offense. State v. Barbee, 187 N. C. 703, 122 S. E. 733.

Evidence Sufficient to Convict. — There is evidence that one having received accommodation at a hotel left with his baggage without notice to the proprietor, and without having paid his bill, it is sufficient to convict under this section, the question of intent being for the jury. State v. Hill, 166 N. C. 298, 81 S. E. 468.

§ 14-111. Fraudulently obtaining credit at hospitals and sanatoriums.—Any person who obtains accommodation at any public or private hospital or sanatorium without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an inn, boarding-house or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at an inn, boarding-house or lodging-house, absconds and surreptitiously removes his baggage therefrom without paying for his food, accommodation or lodging, shall be guilty of a misdemeanor, and shall upon conviction be fined or imprisoned at the discretion of the court. (1907, c. 816; C. S. 4284.)

Local Modificatinn.—Pitt: 1929, c. 103; Martin, Wake, Chatham: 1930; Madison, Duplin: 1931; Gloucester, Brunswick: 1933, c. 531; Lee: 1937, c. 168; Rockingham: 1939, c. 53.

Cross Reference.—As to liens on baggage, see § 44-30 et seq.

Constitutionality. — The misdemeanor prescribed by this section expressly applies, when the contract has been made with a fraudulent intent, and this intent also exists in surreptitiously absconding and removing baggage without having paid the bill, and this statute is not inhibited by Article I, section 16, of the State Constitution, as to imprisonment for the mere nonpayment of a debt, either in a civil action or by indictment. State v. Barbee, 187 N. C. 703, 122 S. E. 733.

Boarding House Defined.—One who has not been licensed to keep a boarding house, and who does not hold his place out as such, but who has received a boarder in his home, for pay, is not the keeper of a boarding house. State v. McKae, 170 N. C. 712, 86 S. E. 1009.

§ 14-112. Obtaining merchandise on approval.—Any person, with intent to cheat and defraud, shall solicit and obtain from any merchant any article of value, or the use or enjoyment of any telephone or telegraph facilities or any goods, wares, merchandise, gas, electric current, article of value, or the use or enjoyment of any telephone or telegraph facilities or any musical instrument, phonograph or any other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, 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Article of merchandise on approval, and shall thereafter, upon demand, refuse or fail to return the same to such merchant in an unused and undamaged condition, or to pay for the same, such person so offending shall be guilty of a misdemeanor. Evidence that a person has solicited a merchant to deliver to him any article of merchandise for examination or approval and has obtained the same upon such solicitation, and thereafter, upon demand, has refused or failed to return the same to such merchant in an unused and undamaged condition, or to pay for the same, shall constitute prima facie evidence of the intent of such person to cheat and defraud, within the meaning of this section: Provided, this section shall not apply to merchandise sold upon a written contract which is signed by the purchaser. (1911, c. 4863; 1914, c. 242; C. S. 4285.)

Editor’s Note.—The 1941 amendment substituted the word “dishonorable” for the words “wearing apparel” formerly appearing in this section. It also added the proviso at the end of the section.

§ 14-113. Obtaining money by false representation of physical defect.—It shall be unlawful for any person to falsely represent himself or herself in any manner whatsoever as blind, deaf, dumb, or crippled or otherwise physically defective for the purpose of obtaining money or other thing of value or of making sales of any character of personal property. Any person so falsely representing himself or herself as blind, deaf, dumb, crippled or otherwise physically defective, and securing aid or assistance on account of such representation, shall be deemed guilty of a misdemeanor. (C. S. 4286.)

Cross References.—As to regulation of beggars, see § 108-81 et seq. As to fraudulently obtaining old age assistance, see § 108-42.

Art. 20. Frauds.

§ 14-114. Fraudulent disposal of mortgaged personal property.—If any person, after executing a chattel mortgage, deed of trust or other lien for a lawful purpose, shall make any disposition of any personal property embraced in such mortgage, deed of trust or lien, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit such deed was made, shall be guilty of a misdemeanor.

Result of Sale Must Injure.—If the property included in the mortgage (other than that disposed of), was abundantly sufficient and available to pay the indebtedness, there could be no prejudicial result as is contemplated by the statute. State v. Manning, 107 N. C. 910, 912, 12 S. E. 248. The actual sale of mortgaged crops raises a presumption of fraudulent intent. State v. Surles, 117 N. C. 270, 23 S. E. 124; State v. Holmes, 120 N. C. 573, 26 S. E. 692.

Justice Jurisdiction.—Under the original acts justices of the peace have exclusive jurisdiction of the offense of fraudulently disposing of personal property embraced in a chattel mortgage. State v. Jones, 85 N. C. 657.

Infant’s Liability.—An indictment under this section for disposing of crops under mortgage cannot be sustained, where it appears that the defendant is an infant. The alleged disposition was a disaffirmance of the contract and renders it void. State v. Howard, 88 N. C. 651.

Indictment Must Charge Maker, Buyer or Assistant.—If the indictment does not charge the defendant as the maker, buyer or assistant, or one who aid or abet either the maker or purchaser in the unlawful acts, the indictment is insufficient. State v. Jeffries, 117 N. C. 720, 721, 23 S. E. 324.

Prior Lien, as Defense.—It is competent for the defendant, in an indictment for unlawfully disposing of mortgaged property—a crop of tobacco—to show that he, in good faith, applied the proceeds of the sale to the payment of his landlord’s lien. State v. Ellington, 98 N. C. 749, 4 S. E. 534.

Evidence of Other Sales Inadmissible.—On a trial of one charged with unlawfully disposing of an article of personal property covered by a chattel mortgage, with intent to defeat the right of the mortgagee, evidence of other sales after the right to such foreclosure had accrued, and that the mortgagee failed to produce, deliver or surrender the same to the mortgagee for that purpose, shall be prima facie evidence of the fact of the disposition or sale of such property, by the grantor, with the intent to hinder, delay or defeat the rights of the person to whom said chattel mortgage, deed of trust or lien was made. (Rev. s. 3435; Code, s. 1094; 1887, c. 14; 1873-4, c. 31; 1874-5, c. 215; 1883, c. 61; C. S. 4297.)

Cross Reference.—As to fraudulent conveyances, see § 39-15 et seq.

Three Classes of Offenders.—The statute is directed against three classes of offenders: (1) The maker of the lien who shall dispose of the property with the unlawful intent; (2) those who buy with a knowledge of the lien, and (3) those who aid or abet either the maker or purchaser in the unlawful acts. State v. Woods, 104 N. C. 908, 10 S. E. 555.

Intent Necessary.—Under this section the forbidden act must, in order to be indictable, be accomplished with a specific intent, and the courts cannot disregard this clearly expressed purpose of the Legislature. State v. Manning, 107 N. C. 910, 911, 12 S. E. 248.

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§ 14-115. Secrecing property to hinder enforcement of lien.—Any person removing, exchanging or secreting any personal property on which a lien exists, with intent to prevent or hinder the enforcement of the lien, shall be guilty of a misdemeanor. (Rev., s. 3436; 1887, c. 14; C. S. 4288.)

Local Modification.—Pitt, 1941, c. 284.

§ 14-116. Fraudulent entry of horses at fairs.—If any person shall knowingly enter or cause to be entered in competition for any purse, prize, premium, stake or sweepstake offered or given by any agricultural or other society, association or person within this state, any horse, mare, gelding, colt or foal under an assumed name or out of its proper class, he shall be punished by a fine not less than one hundred nor more than one thousand dollars, or by imprisonment in the state's prison for not less than one nor more than five years, or by both fine and imprisonment, at the discretion of the court. (Rev., s. 3429; 1893, c. 387; C. S. 4289.)

§ 14-117. Fraudulent and deceptive advertising.—It shall be unlawful for any person, firm, corporation or association, with intent to sell or in anywise to dispose of merchandise, securities, service or any other thing offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, to make public, disseminate, circulate or place before the public on the public or other publication, or in the form of a book, notice, handbill, poster, bill circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service or any other thing so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading: Provided, that such advertising shall be done willfully and with intent to mislead. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1915, c. 218; C. S. 4290.)

Cross References.—As to making misleading and false representations as to fertilizer, see § 106-43. As to the use of private marks or labels to defraud, see § 63-12. As to the misbranding of sacks, see § 80-14.


§ 14-118. Blackmailing.—If any person shall knowingly send or deliver any letter or writing demanding of any other person, with menaces and without any reasonable or probable cause, any chattel, money or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or by imprisonment in the state's prison, with the intent to extort or gain from such person any chattel, money or valuable security, every such offender shall be guilty of a misdemeanor. (Rev., s. 3428; Code, s. 989; R. C., c. 34, s. 110; C. S. 4291.)

Indictment.—Where the offence charged was the sending of a letter, under this section, and the letter was set out in the indictment, from which it is deducible by necessary implication that the defence threatened to indict the prosecutor for an offence punishable by imprisonment in the penitentiary, with a view and intent to extort money a criminal offence is sufficiently charged. State v. Harper, 94 N. C. 996.

Circumstantial Evidence. — Letters demanding a sum of money from the prosecutor, the first requiring that he drop the amount of the road at a certain place, the second, at a certain time and at a certain signal, followed by the burning of the prosecutor's barn on his failing to comply; and the second one referring to this fact and making the same demand, and the prosecution of the defendant at the place at the time appointed, as he appeared after the signals were given, though circumstantial evidence, is adjudged sufficient under an indictment for blackmailing to sustain a conviction. State v. Frady, 172 N. C. 978, 90 S. E. 862.


§ 14-119. Forgery of bank-notes, checks and other securities.—If any person shall falsely make, forge or counterfeit, or cause or procure the same to be done, or willingly aid or assist therein, any bill or note in imitation of, or purporting to be, a bill or note of any incorporated bank in this state, or in any of the United States, or in any of the territories of the United States; or any order or check on any such bank or corporation, or on the cashier thereof; or any of the securities purporting to be issued by or on behalf of the state, or by or on behalf of any corporation, with intent to injure or defraud any person, bank or corporation, or the state, the person so offending shall be guilty of a felony and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years, or by a fine in the discretion of the court. (Rev., s. 3419; Code, s. 1030; R. C., c. 34, s. 60; 1819, c. 994, s. 1; C. S. 4293.)

Cross Reference.—As to alleging intent in the indictment, see § 15-151.

Elements of Offense.—To constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing alleged to be forged, or that any act be done other than the fraudulent making, or altering of the instrument. State v. Hall, 108 N. C. 148, 11 S. E. 830. Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or. Evidence of Former Acts.—Upon an indictment for uttering or.
months nor more than ten years. (Rev., s. 3427; Code, s. 1031; R. C., c. 34, s. 61; 1819, c. 994, s. 2; 1909, c. 666; C. S. 4294.)

Cross Reference.—As to payment of a forged check, see § 53-52.

Delivering to Agent.—"It is putting spurious paper into circulation, and not defrauding the individual who takes it, that constitutes forgery."

In State v. Harris, 27 N. C. 213, it was held, that delivering a forged note to an agent that he might dispose of it in buying goods, was a passing within the act. Palmer's case, R. and R. 72." State v. Harris, 27 N. C. 213.


§ 14-121. Selling of certain forged securities.—If any person shall sell, by delivery, indorsement or otherwise, to any other person, any judgment, promissory note, bill of exchange, or other express contract. 3 Greenleaf Ev., 1031; 0R> C.,.c. 34, s. 613 1819, c, 994, °s. 14-121.

§ 14-122. Forgery of deeds, wills and certain other instruments.—If any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to the forging or making of, or shall show forth in evidence, knowing the same to be forged, any deed, lease, bill of sale, note, obligation, bond, promissory note, bill of exchange, promissory note, endorsement or other instrument, shall wittingly and falsely forge or make, or shall show forth in evidence, knowing the same to be forged, any deed, lease, bill of sale, note, obligation, bond, promissory note, bill of exchange, promissory note, endorsement or other instrument. State v. Lane, 80 N. C. 407.

Lost Instruments.—If the forged instrument is lost it is not necessary to set it out in the indictment, and the substance of the forged instrument is all that need be charged, though in such case it would be better practice to aver the loss. State v. Peterson, 129 N. C. 556, 40 S. E. 9.

Misspelled Signature.—An indictment lies for forgery of an instrument if it is apparent from the face of the instrument as a "railroad pass" merely, is insufficient. The circumstances showing authority of the company to honor it, must be set out in the indictment. State v. Weaver, 94 N. C. 836, cited in note in 24 L. R. A. 43.

Instrument Partly Printed and Partly in Writing.—An indictment for forgery of a "certain instrument in writing" is supported by proof of the forgery of an instrument partly printed and partly in writing. State v. Ridge, 125 N. C. 655, 34 S. E. 439.

"Railroad Pass" Insufficiency of Description.—A description of the forged instrument as a "railroad pass" merely, is insufficient. The circumstances showing authority of the company to honor it, must be set out in the indictment. State v. Weaver, 94 N. C. 836, cited in note in 24 L. R. A. 43.

Cited in dissenting opinion State v. Jarvis, 129 N. C. 698, 40 S. E. 220.

§ 14-123. Forgery of names to petitions and uttering forged petitions.—If any person shall willfully sign, or cause to be signed, or willfully assent to the signing of the name of any person without his consent, or of any deceased or fictitious person, to any petition or recommendation with the intent of procuring any commutation of sentence, pardon or reprieve of any person convicted of any crime or offense, or for the purpose of procuring such pardon, reprieve or commutation to be revoked or stayed by any public officer, or with the intent of procuring the same from any person whatsoever, either for himself or another, by any appointment to office, or to any position of honor or trust, or with the intent to influence the official action of any public officer in the management, conduct or decision of any matter affecting the public, he shall be guilty of a felony, and shall be fined not exceeding one thousand dollars, or imprisoned in the county jail or state's prison not exceeding five years, or both, at the discretion of the court; and if any person shall willfully use any such paper for any of the purposes or intents above recited,
knowing that any part of the signatures to such petition or recommendation has been signed there- 
to without the consent of the alleged signers, or 
that names of any dead or fictitious persons are 
signed thereto, he shall be guilty of a felony, and 
shall be punished in like manner. (Rev. s. 3426; 
Code, s. 1034; 1883, c. 275; C. S. 4297.)

§ 14-124. Forging certificate of corporate stock 
and uttering forged certificates.—If any officer 
or agent of a corporation shall, falsely and with 
a fraudulent purpose, make, with the intent that 
the same shall be issued and delivered to any other 
person, or any officer or as holder or bearer thereof, 
any certificate or other writing, whereby it is 
certified or declared that such person, holder or 
bearer is entitled to or has an interest in the stock 
of such corporation, when in fact such person, 
holder or bearer is not so entitled, or is not en-
titled to the amount of stock in such certificate or 
writing specified; or if any officer or agent of 
such corporation, or other person, knowing such certifi-
cate or other writing to be false or untrue, shall 
transfer, assign or deliver the same to another 
person, for the sake of gain, or with the intent to 
defraud the corporation, or any member thereof, 
or such person to whom the same shall be trans-
ferred, assigned or delivered, the person so offend-
ning shall be imprisoned in the county jail or state's 
prison not less than four months nor more than ten 
years. (Rev., s. 3421; Code, s. 1032; R. C., c. 
34, s. 62; C. S. 4298.)

§ 14-125. Forgery of bank-notes and other in-
struments by connecting genuine parts.— If any 
person shall fraudulently connect together different 
parts of two or more bank-notes, or other genuine 
instruments, in such a manner as to produce an-
other note or instrument, with intent to pass all 
the instrument so produced a forged 

SUBCHAPTER VI. CRIMINAL TRESPASS.

Art. 22. Trespasses to Land and Fixtures.

§ 14-126. Forcible entry and detainer.—No one 
shall make entry into any lands and tenements, or 
term for years, but in case where entry is given 
by law; and in such case, not with strong hand 
or with multitude of people, but only in a peace-
ful manner; and if any man do the 

Cross Reference.—As to trespass after being forbidden, see 
§ 14-134. 

Force.—Actual force or appearances tending to inspire a 
just apprehension of violence is necessary to constitute the 
offense. 12 Am & Eng Enc. (2 Ed.) 737. A forcible entry is 
not proved by evidence of a mere trespass; there must be 
proof of such force, or at least such show of force, as is 
calculated to prevent resistance. State v. Leary, 136 N. C. 
578, 48 S. E. 570; State v. Davenport, 156 N. C. 596, 72 S. E. 
7. So riding into the yard of a house occupied by a woman 
and remaining there cursing her constitutes force. State v. 
Davenport, supra. But where a person, in the absence of 
the prosecutor, merely unlocked and took off the lock put 
on by the prosecutor and put his own lock on, without 
breaking anything or doing any violence, and committed no 
violence upon the return of the prosecutor, he is not guilty 
of forcible entry and detainer. State v. Leary, supra.

Excuse.—Title Not Invalid.—The offense of forcible tres-
pass under this section, does not involve title to the prem-
ises, but is directed against the possession, and when 
the possession is in the prosecuting witness, and the 
entry is made in such a manner with such show of force, 
after being prohibited by the prosecuting witness, as 
tends to produce the same result; it is sufficient, in the 
bear witness for conviction. State v. Earp, 196 N. C. 164, 144 S. E. 23.

Extent of Liability of Title Holder.—The court quoting 
from Reeder v. Purdy, 41 Ill. 279, says: "The reasoning upon 
which we rested our conclusion that forcible entry and 
detainer is, therefore, unlawful. If unlawful, it is a tres-
pass, and an action for the trespass must necessarily lie. . . . Although the occupant may maintain trespass against the 
owner for a forcible entry, yet he can only recover 
such damages as have directly accrued to him from, inju-
diges done to his person or property through the wrongful 
invasion of his possession, and such exemplary damages as 
the jury may (under proper instructions) think proper to 
give. But a person having no title to the premises clearly 
can not recover damages for any injury done to them by 
him who has the title. "Mosseller v. Deaver, 106 N. C. 
494, 497, 11 S. E. 329.

Actual Possession Necessary.—The essential element of the 
offense of forcible entry, that the lands, etc., must be in the 
possession of him whose possession is charged to have been 
interfered with. To constitute actual possession there must be 
an actual exercise of authority and control over the land, 
either in person or by the family or servants of the 
possessor; and such exercise of authority and control 
must be personally present on the premises. State v. Bryant, 
103 N. C. 456, 9 S. E. 1. This element must be charged in the 
indictment. It is a sufficient compliance with this rule to 
charge that the owner was then and there in peaceable 

Right of Tenant of Sufferance.—Where the possession 
of the prosecutor in forcibly entry and detainer is only by suffer-

§ 14-127. Malicious injury to real property.—If any 
person shall maliciously commit any damage, 
[688]
injury or spoil upon any real property whatsoever, either of a public or private nature, for which no punishment is provided by any existing law, every person, so offending shall be guilty of a misdemeanor; Provided, that nothing herein shall extend to any case where the party trespassing or doing the injury acted under a fair and reasonable belief that he had a right to do the act complained of, nor to any trespass, not being willful and malicious, committed in hunting, fishing or the pursuit of game. When the owner, or one of the owners, of an estate in possession shall complain of the injury before a justice of the peace of the county in which the offense is charged to have been committed before the regular term of the superior court next after the commission of the offense, and shall fail to state in his complaint that the damage exceeds ten dollars, the punishment, upon conviction of the offense, shall not exceed a fine of fifty dollars or imprisonment for thirty days. (Rev., s. 3677; Code, s. 1081; R. C., c. 34, s. 111; 1872-4, c. 176, s. 5; C. S. 4:01.)

§ 14-128. Injury to trees, woods, crops, etc., near highway; depositing trash near highway.—Any person, not being on his own lands, or without the consent of the owner thereof, who shall, within one hundred yards of any State highways of North Carolina or within a like distance of any other public road or highway, willfully commit any damage, injury, or spoliation to or upon any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being thereon, or who cuts, breaks, injures, or removes any tree, plant, or flower within such limits, or shall deposit any trash, debris, garbage, or litter within such limits, shall be guilty of a misdemeanor, and upon conviction fined not exceeding fifty dollars ($50) or imprisoned not exceeding thirty days: Provided, however, that this section shall not apply to the police, officers, agents, and employees of the State Highway and Public Works Commission or county road authorities while in the discharge of their duties. (Ex. Sess. 1924, c. 51.)

Editor's Note.—It was said in 3 N. C. Law Rev. 25 that it is hoped that this section may prevent the laying waste of gardens, flowers, etc., by tourists who are not in the habit of regarding another's property rights and who usually leave trash and garbage at every place they stop to eat.

§ 14-129. Taking, etc., of certain wild plants from land of another.—No person, firm or corporation shall dig up, pull up or take from the land of another or from any public domain, the whole or any part of any trailing arbutus, American holly, white pine, red cedar, hemlock or other coniferous trees, or any flowering dogwood, or mountain laurel, rhododendron, or any ground pine, or any Christmas greens, or any Judas tree, or any leucothea, or any azalea, without having in his possession a permit to dig up, pull up or take such plants, signed by the owner of such land, or by his duly authorized agent. Any person convicted of violating the provisions of this section shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each offense. The provisions of this section shall not apply to the counties of Avery, Cabarrus, Carteret, Catawba, Cherokee, Chowan, Cumberland, Currituck, Dare, Duplin, Durham, Edgecombe, Franklin, Gaston, Granville, Hertford, McDowell, Mitchell, Pamlico, Pender, Person, Richmond, Rockingham, Rowan, Swain and Warren. (1941, c. 253.)

§ 14-130. Trespass on public lands.—If any person shall erect a building on any public lands before the same shall have been sold or granted by the state, or on any lands belonging to the state board of education before the same shall have been sold and conveyed by them, or cultivate or remove timber from any of such lands, he shall be guilty of a misdemeanor. Moreover, the state board of education can recover from any person cutting timber on its land three times the value of the timber which is cut. When any person shall be in possession of any part of such land, it shall be the duty of the sheriff of the county in which the land is situated, and he is hereby required, to give notice in writing to such person, commanding him to depart therefrom forthwith; and if the person in possession, upon being so notified, shall not, within two weeks after the time of notice, remove therefrom, the sheriff is required to remove him immediately, and if necessary, he shall summon the power of the county to assist him in so doing. (Rev., s. 3746; Code, s. 1121; R. C., c. 34, s. 42: 1823, c. 1190; 1842, c. 36, s. 4; 1909, c. 891; C. S. 4:02.)


§ 14-131. Trespass on land under option by the federal government.—On lands under option which have formally or informally been offered to and accepted by the North Carolina department of conservation and development by the acquiring federal agency and tentatively accepted by said department for administration as state forests, state parks, state game refuges or other public purposes, it shall be unlawful to cut, dig, break, injure or remove any timber, lumber, firewood, trees, shrubs or other plants; or any fence, house, barn or other structure; or to pursue, trap, hunt or kill any bird or other wild animals or take fish from streams or lakes within the boundaries of such areas without the written consent of the local official of the United States having charge of the acquisition of such lands.

Any person, firm or corporation convicted of the violation of this section shall be guilty of a misdemeanor and shall be subject to a fine of not more than fifty dollars or to imprisonment for not to exceed thirty days, or to both such fine and imprisonment.

The department of conservation and development through its legally appointed foresters, fish and game wardens is hereby authorized and empowered to assist the county law enforcement officers in the enforcement of this section. (1935, c. 317.)

§ 14-132. Disorderly conduct in and injuries to public buildings.—If any person shall make any rude or riotous noise or be guilty of any disorderly conduct in or near any of the public buildings of the state, or of any county or municipality, or shall write or scribble on, mark, deface, besmear, or injure the walls of any of the public buildings of the state or of any county or municipality, or any statue or monument, or shall do or commit any nuisance in or near any public building of the state or of any county or municipality, he shall be
§ 14-133

guilty of a misdemeanor. The keeper of the cap-

§ 14-134. Erecting artificial islands and lumps in public waters.—If any person shall erect artificial

§ 14-135. Cutting, injuring, or removing an-

Entry by Husband on Wife's Property.—A husband is not

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CH. 14. CRIMINAL LAW

Entry as Guest of Tenant.—One forbidden by the landlord

Cross Reference.—As to forcible trespass, see § 14-126.

License to Enter Must Be Negatived in Indictment.—In

Entry by Former Tenant to Gather Crops.—For a convic-

Warrant May Be Amended.—The Superior Court has

§ 14-135

Entry of a pardon, on being afterwards forbidden to enter, shall be guilty of a misdemeanor, and on con-

affidavit before a justice of the peace of the county

one or more servants, without fire-

An indictment in which it is charged that the defendant
did unlawfully enter upon the premises of some

varnish in the daytime (Sunday excepted), between

Entry under Claim of Right.—One who enters upon the

Warrant with Affidavit Attached.—A warrant for tres-

§ 14-135. Cutting, injuring, or removing an-

Land Sought To Be Condemned.—An indictment for wilful
trespass, under this section will lie against an em-

Entry of a pardon, on being afterwards forbidden to enter, shall be guilty of a misdemeanor, and on con-

Cross Reference.—As to forcible trespass, see § 14-126.

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Warrant with Affidavit Attached.—A warrant for tres-

§ 14-135. Cutting, injuring, or removing an-

Local Modification.—Burke, Caldwell, Cherokee, McDowell,
§ 14-136. Setting fire to grass and brush lands and woodland.-If any person shall intentionally set fire to any grass land, brush land or woodland, except it be his own property, or in that case without first giving notice to all persons having or in charge of lands adjoining the land intended to be fired, and without also taking care to watch such fire while burning and to extinguish it before it shall reach any lands near to or adjoining the lands so fired, he shall for every such offense be guilty of a misdemeanor and shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for a period not of less than sixty days nor more than four months for the first offense, and for a second or any subsequent similar offense shall be imprisoned not less than four months nor more than one year. If willful or malicious intent to damage the property of another shall be shown, said person shall be guilty of a felony, and shall, upon conviction, be punished by imprisonment in the state prison for not less than one nor more than five years. This section shall not prevent an action by the owner of any property from such fires. For the purposes of this section, the term "woodland" is to be taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated. Any person who shall furnish to the state evidence sufficient for the conviction of a violation of this statute shall receive the sum of fifty dollars, to be taxed as part of the court costs. (Rev., s. 3346; Code, ss. 52, 53; R. C., c. 16, ss. 1, 2; 1777, c. 123, ss. 1, 2; 1915, c. 243, ss. 8, 11; 1919, c. 318; 1925, c. 61, s. 1; 1943, c. 661; C. S. 4309.)

Local Modification.—Graham: Pub. Loc. 1913, c. 301; Onslow: 1929, c. 185, 1939, c. 160.

By amendment of this section, Public Laws 1925 c. 61 sec. 1, the punishment was changed from "a fine not less than ten dollars or more than fifty dollars, or imprisonment not exceeding thirty days" to "a fine not less than fifty dollars nor more than five hundred dollars, or imprisonment not less than sixty days nor more than four months for the first offense, and for subsequent similar offenses imprisonment from four months to one year."

The 1943 amendment inserted the second sentence. This section formerly provided only for setting fire to woodland, and one who let fire escape while burning other lands was not liable, under this section. Averitt v. Murrell, 49 N. C. 322, but was only liable for negligence. Cato v. Toler, 160 N. C. 194, 75 S. E. 929. In the case of Hall v. Crawford, 50 N. C. 3 it was held that an "old field which had turned out without any fence around it and which had grown up in broom sedge and pine brushes" came within the provisions of this statute. This case was stated out in Achenback v. Johnston, 84 N. C. 264, as stretching the doctrine of liability too far. There it was held that a field grown up in grass and used as a pasture was not woodland. By Public Laws 1917 this section was made applicable to setting fire to grassland and bushland as well as woodland, so the prior constructions so strictly made in regard to firing woodland are not applicable, as this section now seems to cover burning of any lands.

Care No Defense.—If one firing woods fails to give the statutory notice to adjoining owners and damages ensue, the defendant on no matter what defense may have been shown. Lamb v. Sloan, 94 N. C. 534.

Waiver of Notice Bars Damages.—A waiver of notice is a sufficient answer to an action for damages caused to woodland by fire. In case of a fire in shrubbery, 52 S. E. 795, v. Toler, 54 S. E. 795, v. Sloan, 94 N. C. 534. Waiver when made by a tenant in common while in possession is also a sufficient defense. See Stanland v. Rousk, 160 N. C. 566, 84 S. E. 845.

§ 14-137. Wilfully or negligently setting fire to woods and fields.—If any person, firm or corporation shall wilfully or negligently set fire on, or cause to be set on, any woods, lands or fields, whatsoever, every such offender, upon conviction, shall be fined or imprisoned in the discretion of the court. This section applies only to those counties under the protection of the state forest service in its work of forest fire control. It shall not apply in the case of a landowner firing, or causing to be fired, his own open, non-wooded lands, or fields in connection with farm or building operations at the time and in the manner as provided by law: Provided, he shall have confined the fire and paid his own expense to said open lands or fields. (1907, c. 4, ss. 4, 5; 1925, c. 61, s. 2; 1941, c. 258; C. S. 4310.)

Editor's Note.—Prior to the 1941 amendment this section applied only to certain named counties.

Evidence that the county in which defendant negligently or wilfully started forest fires was in charge of the state forest service and that this section was applicable to the county, defendant having offered no evidence to the contrary, was sufficient to show a violation of the section. Snow v. Patterson, 157 N. C. 17, 179 S. E. 142. (23) 142.


§ 14-138. Setting fire to woodland and grass lands with campfires.—Any waggoner, hunter, camper or other person who shall kindle a campfire or shall authorize another to kindle such fire, unless all combustible material for the space of ten feet surrounding the place where such fire is kindled has been removed, or shall leave a campfire without fully extinguishing it, or who shall accidentally or negligently by the use of any torch, gun, match or other instrumentality, or in any manner whatever, start any fire upon any grass land, brush land or woodland without fully extinguishing the same, shall be guilty of a misde-
meanor, and upon conviction shall be punished by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment not exceeding thirty days. For the purposes of this section the term “woodland” is to be taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated. (Rev., s. 3347; Code, s. 54; 1885, c. 126; 1913, c. 8; 1915, c. 243, ss. 9, 11; C. S. 4311.)

Local Modification.—Graham: Pub. Loc. 1933, c. 301.

§ 14-139. Starting fires within five hundred feet of areas under protection of state forest service.
—It shall be unlawful for any person, firm or corporation to start or cause to be started any fire or ignite any material in any of the areas of woodlands under the protection of the state forest service or within five hundred feet of any such protected area, between the first day of February and the first day of June, inclusive or between the first day of October and the thirtieth day of November, inclusive, in any year, without first obtaining from the state forester or one of his duly authorized agents a permit to set out fire or ignite any material in such above mentioned protected areas; no charge shall be made for the granting of said permits. This section shall not apply to any fires started or caused to be started within five hundred feet of a dwelling house. Any person, firm or corporation violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty (50) dollars, or imprisoned for a period of not more than thirty (30) days. (1937, c. 207; 1939, c. 120.)

Editor's Note.—The 1939 amendment changed the dates mentioned in this section, and the last sentence as to punishment.

§ 14-140. Certain fires to be guarded by watchman.—All persons, firms or corporations who shall burn any tar kiln or pit of charcoal, or set fire to or burn any brush, grass or other material, whereby any property may be endangered or destroyed, shall keep and maintain a careful and competent watchman in charge of such kiln, pit, brush or other material while burning. Any person, firm or corporation violating the provisions of this section shall be punishable by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment for not exceeding thirty days. Fire escaping from such kiln, pit, brush or other material while burning shall be prima facie evidence of neglect of these provisions. (1915, c. 245, s. 10; C. S. 4312.)

Local Modification.—Graham: Pub. Loc. 1933, c. 301.

§ 14-141. Burning or otherwise destroying crops in the field.—If any person shall willfully burn or destroy any other person's corn, cotton, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shocks or other provender in a stack, hill, rick or pen, or secured in any other way out of doors, or grass or sedge standing on the land, he shall be guilty of a felony, and shall be punished by imprisonment in the county jail or state's prison for not less than four months nor more than five years. (Rev., s. 3339; 1885, c. 42; 1874-5, c. 133; Code, s. 985, subsec. 2; C. S. 4315.)

Cross References.—As to arson, see §§ 14-38 et seq.

Out of Doors Defined.—One who burns cotton in a railroad car cannot be convicted under this section as the cotton is not out of doors. State v. Avery, 109 N. C. 798, 13 S. E. 931. Clark, J., dissents on the ground that it is merely secured out of doors and comes within the application of this statute.

Formerly Misdemeanor.—The burning provided in this section was at one time a misdemeanor. State v. Huskins, 126 N. C. 1070, 35 S. E. 638.

Indictment.—An indictment should charge a statutory crime in the words of the statute. Therefore an indictment charging setting fire to a lot of fodder without charging the burning, is defective. State v. Hall, 93 N. C. 571.

It is not necessary under this section to aver in the indictment that the stack burned was “out of doors.” State v. Huskins, 126 N. C. 1070, 35 S. E. 638.

§ 14-142. Injuries to dams and water channels of mills and factories.—If any person shall cut away, destroy or otherwise injure any dam, or part thereof, or shall obstruct or damage any race, canal or other water channel erected, opened, used or constructed for the purpose of furnishing water for the operation of any mill, factory or machine works, or for the escape of water therefrom, he shall, upon conviction, be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3678; Code, s. 1087; 1866, c. 48; C. S. 4315.)

Obstruction Below Dam or Channel.—This section applies only to obstructions and damages to the dam or channel and an indictment cannot be had for obstructions below the dam or channel. State v. Tomlinson, 77 N. C. 528.

Cited in State v. Tuttle, 115 N. C. 784, 20 S. E. 725.

§ 14-143. Taking unlawful possession of another's house.—If any person shall enter upon the lands of another and take possession of any house or other building thereon, without permission of the owner or his agent and without a bona fide claim of right or title so to enter and take possession, and shall fail or refuse to vacate such premises within ten days after being notified personally in writing to do so, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. (Rev., s. 3685; 1893, c. 347; C. S. 4316.)


Editor's Note.—See notes to section 14-134.

§ 14-144. Injuring houses, churches, fences and walls.—If any person shall, by any other means than burning or attempting to burn, unlawfully and willfully demolish, destroy, deface, injure or damage any of the houses or other buildings mentioned in this chapter in the article entitled Arson and Other Burnings; or shall unlawfully and willfully burn, demolish, pull down, destroy, deface, damage or injure any church, unincorporated house, outhouse or other house or building not mentioned in such article; or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field or pasture, or about any church or graveyard, or about any factory or other house in which machinery is used, every person so offending shall be guilty of a misdemeanor. (Rev., s. 3673; Code, s. 1062; R. C. c. 34, s. 103; C. S. 4317.)

I. HOUSES.

II. FENCES AROUND FARMS.

Cross References.
See also, § 14-159. As to willful destruction by a tenant, see §§ 42-11. As to willful destruction of a fence which does not enclose something, see §§ 68-4. As to injury to stock law fences, see §§ 68-36.

I. HOUSES.

Trespass Necessary Part of Offense.—It is held, to con-
in the prosecutor, the defendant cannot excuse himself by showing title to the land upon which the fence is erected.


Question of Title Cannot Be Raised.—Where a party has neither possession of nor a right of possession to land, he cannot, upon an indictment for unlawfully removing a fence, thereby or otherwise act as its owner, and bring upon himself the consequences of being the owner thereof, thus raising a question as to a right of property, nor is it any defense to him that he did the act to bring on a civil suit in order to try the title. State v. Graham, 53 N. C. 397.

Agency No Defence.—Under an indictment for tearing down a fence the defendant cannot avoid liability by showing that he acted as agent for another. State v. Campbell, 133 N. C. 640, 45 S. E. 344.

Destroying Fence When Line Is in Dispute.—Although a defendant cannot plead his title as a defense to an indictment for destroying fences, etc., on the land in possession of another, he can plead his title if the land is not in the possession of the prosecutor. In case of a disputed line if the prosecutor erects a fence on land in possession of the defendant, the defendant is not liable under this section for pulling it down. State v. Fender, 125 N. C. 649, 34 S. E. 448; State v. Watson, 86 N. C. 636. Nor is a quasi tenant occupying by the consent of the owner subject to prosecution under this section for removing a fence. State v. Martin, 173 N. C. 808, 92 S. E. 597.

Right to Reclaim Fence.—Although rails of which a fence around an enclosure is made were taken from the land of another, no right to go on the land and remove the fence can be found in this statute, because it is taken as the fence is a part of the realty, and such a trespass comes within the meaning of the section. State v. Mcminn, 81 N. C. 585, 588. State v. Allen, 35 N. C. 36.

“Other Houses.”—It is manifest that the words “other house or building,” embrace a jail, a jail-house or building. State v. Rynan, 39 N. C. 531, 533.

Dynamiting a Crib.—An indictment will lie under this section for injury to a crib by an explosion of dynamite. See State v. Martin, 173 N. C. 808, 92 S. E. 597.

II. FENCES AROUND FIELDS.

Cultivated Field Defined.—“Where a piece or tract of land has been cleared, tilled, cultivated, and is proposed to be cultivated and is kept and used for cultivation according to the ordinary course of husbandry, although nothing may be growing within the enclosure at the time of the trespass, it is cultivated for the purposes within the description of the section that the fence surrounded a pasture, the words “pasture” and “cultivated field” are not synonymous and are distinguished in the statute by a disjunctive, and on the same ground, which charge that the defendant is out of the field within the meaning of the statute is erroneous. State v. Connott, 199 N. C. 634, 155 S. E. 451.

Fence on Land No Defense.—The defendant cannot excuse himself by showing title to the land upon which the fence is erected.


Question of Title Cannot Be Raised.—Where a party has neither possession of nor a right of possession to land, he cannot, upon an indictment for unlawfully removing a fence, thereby or otherwise act as its owner, and bring upon himself the consequences of being the owner thereof, thus raising a question as to a right of property, nor is it any defense to him that he did the act to bring on a civil suit in order to try the title. State v. Graham, 53 N. C. 397.

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§ 14-147. Removing, altering or defacing landmarks.—If any person, firm or corporation shall knowingly remove, alter or deface any landmark in anywise whatsoever, or shall knowingly cause such removal, alteration or defacement to be done, such person, firm or corporation shall be guilty of a misdemeanor. Section 14-147 shall not apply to landmarks, such as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels, nor to such persons, firms or corporations as own the fee simple in the lands on both sides of the lines designated by the landmarks removed, altered or defaced. Nor shall this section apply to those adjoining landowners who may by agreement remove, alter or deface landmarks in which they alone are interested.(Rev., s. 1063; 1858-8, c. 17; 1915, c. 348; C. S. 4319.)

Removal of Stakes.—As between the parties stakes are evidence of a definite location of land, as also is the planting of a stone, and a removal of such stakes comes within the meaning of this section. State v. Jenkins, 164 N. C. 527, 529; 80 S. E. 215.

Indictment Must Aver.—An indictment charging that one A. B. with force and arms, etc., willfully and unlawfully did alter, deface and remove a corner stone, the property of C., against the form of the statute, is good without a negative averment of the matter contained in the provision of the act creating the offense. State v. Bryant, 111 N. C. 691, 36 S. E. 335.

§ 14-148. Removing or defacing monuments and tombstones.—If any person shall, unlawfully and on purpose, remove from its place any monument of marble, stone, brass, wood or other material, erected for the purpose of designating the spot where any dead body is interred, or for the purpose of preserving and perpetuating the memory, name, fame, birth, age or death of any person, whether situated in or out of the common burying ground, or shall unlawfully and on purpose break or deface such monument, or alter the letters, marks or inscription thereof, he shall be guilty of a misdemeanor. (Rev., s. 3680; Code, s. 1088; R. C., c. 34, s. 102; 1840, c. 6; C. S. 4520.)

Cross References.—As to removal after abandonment, see § 65-15. As to abandonment of a cemetery by a municipality see §§ 14-148, 14-149 and removal of monuments and graves, see § 160-200, paragraph 37.

Intent.—The intent to open a grave and remove the dead body is sufficient criminal intent, and proof of the intent to disturb the grave is conclusive. State v. McLean, 121 N. C. 589, 28 S. E. 140.

Persons Liable.—The mayor or other town officers counseling their subordinates to remove bodies are liable under this section although they were honestly mistaken as to the scope of their official power. State v. McLean, 121 N. C. 589, 28 S. E. 140.

When Lot Is Not Paid for.—The fact that the lot has not been paid for will not excuse the disturbance of a body only for the purpose of moving it to a pauper section. State v. McLean, 121 N. C. 589, 28 S. E. 140.

§ 14-150. Disturbing graves.—If any person shall, without due process of law, or the consent of the surviving husband or wife or the next of kin of the deceased, and of the person having the control of such grave, open any grave for the purpose of taking therefrom any dead body, or any part thereof buried therein, or anything interred therewith, he shall be guilty of a felony, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3672; 1885, c. 90; C. S. 4323.)

Cross References.—As to removal after abandonment, see § 65-15. As to abandonment of a cemetery by a municipality see §§ 14-148, 14-149 and removal of monuments and graves, see § 160-200, paragraph 37.

Intent.—The intent to open a grave and remove the dead body is sufficient criminal intent, and proof of the intent to disturb the grave is conclusive. State v. McLean, 121 N. C. 589, 28 S. E. 140.

Persons Liable.—The mayor or other town officers counseling their subordinates to remove bodies are liable under this section although they were honestly mistaken as to the scope of their official power. State v. McLean, 121 N. C. 589, 28 S. E. 140.

When Lot Is Not Paid for.—The fact that the lot has not been paid for will not excuse the disturbance of a body only for the purpose of moving it to a pauper section. State v. McLean, 121 N. C. 589, 28 S. E. 140.

§ 14-151. Interfering with gas, electric and steam appliances.—If any person shall willfully, with intent to injure or defraud, commit any of the acts set forth in the following subsections, he shall be guilty of a misdemeanor:

1. Connect a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for conducting or supplying illuminating gas, fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or burner, lamp or motor where the same is or can be burned or used without passing through the meter or other instrument provided for registering the quantity consumed; or,

2. Obstruct, alter, injure or prevent the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or burner, lamp or motor, or by a consumer or other person other than an employee of the company owning any gas or electric meter, who willfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any meter so detached or disconnected; or,

3. In any manner whatever change, extend or alter any service or other pipe, wire or attachment of any kind, connecting with or through which natural or artificial gas or electricity is furnished from the gas mains or pipes of any person, without first procuring from said person written permission to make such change, extension or alterations; or,
§ 14-152. Injuring fixtures and other property of gas companies; civil liability.—If any person shall willfully, wantonly or maliciously remove, obstruct, injure or destroy any part of the plant, machinery, fixtures, structures or buildings, or anything appertaining to the works of any gas company, or shall use, tamper or interfere with the same, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days for such offense. Such person shall also forfeit and pay to the company so injured, to be sued and recovered in a civil action, double the amount of the damages sustained by any such injured party.

§ 14-153. Tampering with engines and boilers.—If any person shall willfully, wantonly or maliciously remove, obstruct, injure or destroy any part of any engine or boiler, or meddle or tamper with such boiler or engine, or any other machinery in connection with any boiler or engine, causing loss, damage, danger or delay to the owner in the prosecution of his work, he shall be guilty of a misdemeanor.

§ 14-154. Injuring wires and other fixtures of telephone, telegraph and electric-power companies.—If any person shall willfully injure, destroy or pull down any telegraph, telephone or electric-power-transmission pole, wire, insulator or any other fixture or apparatus attached to a telegraph, telephone or electric-power-transmission line, he shall be guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court.

§ 14-155. Making unauthorized connections with telephone and telegraph wires.—It shall be unlawful for any person to tap or make any connection with any wire or apparatus of any telephone or telegraph company operating in this state, except such connection as may be authorized by the person or corporation operating such wire or apparatus. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars or imprisoned not more than ten days for each offense. Each day's continuance of such unlawful connection shall be a separate offense.

§ 14-156. Injuring fixtures and other property of electric-power companies.—It shall be unlawful for any person willfully and wantonly, and without the consent of the owner, to take down, remove, injure, obstruct, disable or destroy any line erected or constructed for the transmission of electrical current, or any poles, towers, wires, conduits, cables, insulators or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner to interrupt the transmission of electrical current over and along any such line, or to take down, remove, injure or destroy any house, shop, building or other structure or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current, or to wantonly or willfully cause injury to any of the property mentioned in this section by means of fire. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned not longer than one year, or both fined and imprisoned, in the discretion of the court.

§ 14-157. Felling trees on telephone and electric-power wires.—If any person shall negligently and carelessly cut or fell any tree, or any limb or branch thereof, in such a manner as to cause the same to fall upon and across any telephone, electric light or electric-power-transmission wire, from which any injury to such wire shall be occasioned, he shall be guilty of a misdemeanor, and shall also be liable to penalty of fifty dollars for each and every offense.

§ 14-158. Interfering with telephone lines.—If any person shall unnecessarily disconnect the wire or in any other way render any telephone line, or any part of such line, unfit for use in transmitting messages, or shall unnecessarily cut, tear down, destroy or in any way render unfit for the transmission of messages any part of the wire of a tel-
§ 14-159. Injuring buildings or fences; taking possession of house without consent.—If any person shall deface, injure or damage any house, uninhabited house or other building belonging to another; or deface, damage, pull down, injure, remove or destroy any fence or wall enclosing, in whole or in part, the premises belonging to another; or shall move into, take possession of and/or occupy any house, uninhabited house or other building situated on the premises belonging to another, without having first obtained authority so to do and consent of the owner or agent thereof, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (1929, c. 192, s. 1.)

Cross References.—See also, § 14-144. As to willful destruction by a tenant, see § 42-11.

Art. 23. Trespasses to Personal Property.

§ 14-160. Malicious injury to personal property. —If any person shall wantonly and willfully injure the personal property of another, he shall be guilty of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the court. (Rev., s. 3676; Code, s. 1082; 1855, c. 53; 1876-7, c. 18; C. S. 4331.)

Cross Reference.—As to definition of personal property, see § 12-3, paragraph 6.

Things That Are Personality.—A promissory note or due bill of exchange, a written instrument of debt is personal property within the meaning of this section and section 12-2, par. 6. State v. Sneed, 121 N. C. 614, 28 S. E. 355.

An electric street car is personalty and not a fixture. State v. Sneed, 121 N. C. 614, 28 S. E. 355.

Malice Not Necessary.—It is not necessary to allege or prove any malice to the owner of personal property on the part of one who wantonly and willfully injures it nor is it material whether the property was destroyed or not. State v. Sneed, 121 N. C. 614, 28 S. E. 355.

"Wantonly and Willfully" Necessary.—An indictment for injury to personal property, under this section, which charged that the act was "wantonly and willfully" done, was not defective because it did not aver the act to have been unlawfully performed. Lawful acts are not done wantonly and willfully if they are performed with the consent of the injured person. State v. Martin, 107 N. C. 904, 12 S. E. 194.

But an indictment cannot be sustained under this section if there is neither an allegation or finding that the injury was "willfully and wantonly" done. The words "unlawfully and on purpose" will not supply their place. State v. Tweedy, 115 N. C. 704, 20 S. E. 183.

Malicious Mischief at Common Law.—This section was not intended to supersede the common law as to malicious mischief and must be charged at common law if it is not necessary under this section. State v. Martin, 141 N. C. 832, 51 S. E. 874.

No Accessories.—As there are no accessories in misdemeanor the offense under this section may be committed jointly by several persons, one doing the act the others aiding and abetting or participating. State v. Martin, 141 N. C. 832, 51 S. E. 874.

Destroying Whisky.—The mere possession of whisky gives no title; and a revenue officer who seizes a barrel concealed on private premises, and in good faith destroys it, is not guilty of a misdemeanor under this section. North Carolina v. Vanderford, 35 Fed. 282.

Constitutionality Under This Section in Place of Section 14-165.—Where there is an erroneous conviction under this section, when the indictment should have been drawn under section 14-165, et seq., the prisoner should be discharged with permission to the solicitor to send another bill, if so advised. State v. Reed, 196 N. C. 357, 145 S. E. 691.

§ 14-161. Malicious removal of packing from railway coaches and other rolling stock.—If any person shall willfully and maliciously take or remove the waste or packing from the journal box of any locomotive, engine, tender, carriage, coach, caboose or truck used or operated upon any railroad whether on the same track, or electricity, he shall upon conviction thereof be fined or imprisoned in the jail or state's prison, in the discretion of the court. (Rev., s. 3759; 1905, c. 335; C. S. 4332.)

§ 14-162. Removing boats or their fixtures and appliances.—If any person shall take away from any landing or other place where the same shall be, or shall loose, unmoor, or turn adrift from the same any boat, canoe, pettioaugua, dras, or dolly, sails or tackle belonging to or in the lawful custody of any person; or if any person shall direct the same to be done without the consent of the owner, or the person having the custody or possession of such property, he shall forfeit and pay to such owner, or person having the custody and possession as aforesaid, the sum of two dollars, and shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, in the discretion of the court. The owner may also have his action for such injury. The penalties aforesaid shall not extend to any person who shall press any such property by public authority. (Rev., s. 3544; Code, s. 2988; 1889, c. 378; R. C., c. 14, ss. 1, 3; C. S. 4334.)

§ 14-163. Injuring livestock not inclosed by lawful fence.—If any person shall willfully and unlawfully kill or abuse any horse, mule, hog, sheep or other cattle, the property of another, in any enclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor, and fined or imprisoned, at the discretion of the court. (Rev., s. 3313; Code, s. 1008; 1868-9, c. 253; C. S. 4334.)

At Common Law.—Wounding of cattle maliciously is not an indictable offense at common law. State v. Manuel, 72 N. C. 201.

Purpose of Section.—The obvious purpose of the statute is to prohibit and prevent every person from unlawfully and willfully killing and abusing live-stock of another, that may get into and trespass upon inclosures not surrounded and protected by a lawful fence. This is the mischief to be suppressed. State v. Godfrey, 97 N. C. 507, 508, 1 S. E. 779.

Offence May Be Completed Elsewhere.—In order to complete the offense of injury to live-stock, it is not necessary that the offense be consummated within the inclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor, and fined or imprisoned, at the discretion of the court. State v. Reed, 196 N. C. 357, 145 S. E. 691.

Cattle Defined.—The word "cattle" has a restricted sense which applies only to the bovine species, and also a broader meaning which includes all domestic animals. That it is used in this section in the latter and broader sense is apparent from the context, "horse, mule, hog, sheep or other cattle." State v. Godfrey, 119 N. C. 525, 21 S. E. 799.

Injuries in Enclosed Fields.—A person is not liable under this section for injuring stock within his own field which is closed and under cultivation. State v. Waters, 51 N. C. 276.

Indictment Must Charge.—An indictment for injuring stock under this section must charge that the cattle abused
or killed were property of some one, the abusing or killing must be charged to have been willfully and unlawfully done while the animal was in an enclosure not surrounded by a lawful fence. State v. Deal, 92 N. C. 802; State v. Simpson, 73 N. C. 269.

An indictment charging an offense under this section but not setting out who owned the enclosure, although not encouraged because of its looseness, is sufficient. State v. Allen, 69 N. C. 23; State v. Painter, 70 N. C. 70.

“The Field” Is Too General.—An indictment which simply charges the injury, etc., to have been committed on stock in “the field” is not certain to that extent required in such pleading. State v. Staton, 66 N. C. 690.

§ 14-164. Taking away or injuring exhibits at fairs.—If any person, without the license of the owner, or any agricultural or other society, shall unlawfully carry away, remove, destroy, mark, deface or injure anything, animate or inanimate, while on exhibition on the grounds of any such society, or going to or returning from the same, he shall be guilty of a misdemeanor. It shall be sufficient in any indictment for any such offense, or for the larceny of any such thing, animate or inanimate as aforesaid, to charge that the thing so carried away, destroyed, marred, injured or feloniously stolen is the property of the society to which the said thing shall be forwarded for exhibition. (Rev., s. 3668; Code, s. 2796; 1870-1, c. 184, s. 4; C. S. 4535.)

Cross Reference.—As to fraudulent entries at fairs, see section 14-116.


§ 14-165. Malicious or wilful injury to hired personal property.—Any person who shall rent or hire from any person, firm or corporation, any horse, mule or like animal, or any buggy, wagon, truck, automobile, or other like vehicle, for temporary use, who shall maliciously or wilfully injure or damage the same in any way using or driving the same in violation of any statute of the State of North Carolina, or who shall permit any other person so to do, shall be guilty of a misdemeanor and subject to punishment as hereinafter provided. (1927, c. 61, s. 1.)

Cross Reference.—See annotation under § 14-160.

§ 14-166. Sub-letting of hired property.—Any person who shall rent or hire, for temporary use, any horse, mule, or other like animal, or any buggy, wagon, truck, automobile, or other like vehicle, who shall, without the permission of the person, firm or corporation from whom such property is rented or hired, sub-let or rent the same to any other person, firm or corporation, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 2.)

§ 14-167. Failure to return hired property.—Any person who shall rent or hire, for temporary use, any horse, mule or other like animal, or any buggy, wagon, truck, automobile, or other vehicle, and who shall wilfully fail to return the same to the possession of the person, firm or corporation from whom such property has been rented or hired at the expiration of the time for which such property has been rented or hired, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 3.)

§ 14-168. Hiring with intent to defraud.—Any person who shall, with intent to cheat and defraud the owner thereof of the rental price therefor, hire or rent for temporary use any horse or mule or any other like animal, or any buggy, wagon, truck, automobile or other like vehicle, or who shall obtain the possession of the same by false and fraudulent statements made with intent to deceive, which are calculated to deceive, and which do deceive, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 4.)

§ 14-169. Violation made misdemeanor.—Any person violating the provisions of this article shall be guilty of a misdemeanor and punished at the discretion of the court. (1927, c. 61, s. 5; 1939, c. 355, s. 1.)

Editor's Note.—Prior to the 1929 amendment, this section provided for a maximum fine of fifty dollars and a maximum jail sentence of thirty days. The amendatory act provided that prosecutions instituted and crimes committed before its ratification on February 20, 1929, should be determined by the statute as it was before the amendment.

Art. 25. Regulating the Leasing of Storage Batteries.

§ 14-170. “Rental battery” defined; identification of rental storage batteries.—As used in this article the words “rental battery” are defined as an electric storage battery loaned, rented or furnished for temporary use by any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries. All such persons, firms or corporations may mark any such rental batteries belonging to them with the word “rental,” or any other word of similar meaning, printed or stamped upon or attached to such battery together with such words as shall identify such batteries as the property of the person, firm or corporation so marking the same. It shall be unlawful for any person, firm or corporation to so mark any such batteries which are not the property of such person, firm or corporation. (1933, c. 185, s. 1.)

§ 14-171. Defacing word “rental” prohibited. — It is unlawful for any person, firm or corporation to remove, deface, alter or destroy the word “rental” on any rental battery or any other word, mark or character printed, painted or stamped upon or attached to any rental battery to identify the same as belonging to or being the property of any person, firm or corporation. (1933, c. 185, s. 2.)

§ 14-172. Sale, etc., of rental battery prohibited. — It is unlawful for any person, firm or corporation other than the owner thereof to sell, dispose of, deliver, rent or give to any other person, firm or corporation any rental battery marked by the owner as provided by section 14-170. (1933, c. 185, s. 3.)

§ 14-173. Repairing another’s rental battery prohibited. — It is unlawful for any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries to recharge or repair any rental battery not owned by such person, firm or corporation marked by the owner as provided by section 14-170. (1933, c. 185, s. 4.)

§ 14-174. Time limit on possession of rental battery without written consent.—It is unlawful for any person, firm or corporation to retain in
his, their or its possession for a longer period than ten (10) days, without the written consent of the owner, any rental battery marked as such by the owner as provided by section 14-170. Demand must be made on any person who so retains before a prosecution can be instituted: Provided, however, that proof of a registered letter having been sent to the person so offending at his last known address shall be accepted as conclusive evidence of such demand. (1933, c. 185, s. 5.)

§ 14-175. Violation made misdemeanor.—Any person, firm or corporation, and the officers, agents, employees, and members of any firm or corporation violating any of the provisions of sections 14-170—14-174 shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not exceeding fifty dollars or be imprisoned for a term of not exceeding thirty days in the discretion of the court. (1933, c. 185, s. 6.)

§ 14-176. Rebuilding storage batteries out of old parts and sale of, regulated.—Any person, firm or corporation who assembles or rebuilds an electric storage battery for use on automobiles, in whole or in part, out of second-hand or used material such as containers, separators, plates, groups or other battery parts, and sells same or offers same for sale in the state of North Carolina without the word "rebuilt" placed in the side of the container, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine not exceeding two hundred and fifty dollars or imprisoned for a term not exceeding six months or both. (1933, c. 535.)

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.


§ 14-177. Crime against nature.—If any person shall commit the abominable and detestable crime against nature, with mankind or beast, he shall be imprisoned in the state's prison not less than five nor more than sixty years. (Rev., s. 3351; Code, s. 1061; 1879, c. 16, s. 6; 5 Eliz., c. 17; 25 Hen. VIII, c. 6; C. S. 4336.)

Scope of Section.—This section includes all kindred acts of bestial character whereby degraded and perverted sexual desires are sought to be gratified. State v. Griffin, 175 N. C. 767, 769, 94 S. E. 478. It includes unnatural intercourse between male and male. State v. Penner, 166 N. C. 267, 80 S. E. 238.

Conviction for Attempt.—Upon the trial of an indictment for the crime against nature the prisoner may be convicted of the crime charged therein, or of an attempt to commit a less degree of the same crime. State v. Savage, 161 N. C. 245, 246, 76 S. E. 238.


§ 14-178. Incest between certain near relatives. —In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood, the parties shall be guilty of a felony, and shall be punished for every such offense by imprisonment in the state prison for a term not exceeding fifteen years, in the discretion of the court. (Rev., s. 3351; Code, s. 1060; 1879, c. 16, s. 1; 1911, c. 16; C. S. 4337.)
not such as to bring her within the intent and meaning of this section as an innocent and virtuous woman. State v. Johnson, 182 N. C. 883, 190 S. E. 786. See State v. Crowell, 116 N. C. 1052, 21 S. E. 502; State v. Ferguson, 107 N. C. 841, 12 S. E. 574.

Permitting familiarities not amounting to incontinence may be considered by the jury in determining whether the promise of marriage was at that time an innocent and virtuous woman. State v. Lang, 171 N. C. 778, 87 S. E. 957. An adulteress may reform and become innocent and virtuous; the statute protects her just as much as if she had never fallen. State v. Johnson, 182 N. C. 883, 190 S. E. 786.

The offense of seduction, section 15-1 exempting certain offenses, includes deceit, from the two years statute of limitation, applies to the offense of seduction under promise of marriage. State v. McKay, 202 N. C. 470, 163 S. E. 586.

Promise of Marriage Must Be Unconditional. In order for conviction under this section, the promise of marriage must be absolute and unconditional, and the promise at the time to marry the woman in the event "anything should happen to her," is insufficient for a conviction under the statute. State v. Shailer, 201 N. C. 53, 159 S. E. 362.

Testimony of Woman Must Be Corroborated as to Each Element.—The statute provides that the unsupported testimony of the woman shall not be sufficient to convict. This法leny has been construed to mean that the promise of marriage must be supported by independent facts and circumstances as to each element of the offense. State v. Crow, 189 N. C. 548, 220 S. E. 107; See also, State v. Maness, 192 N. C. 708, 115 S. E. 777. See State v. Crowell, 116 N. C. 1052, 21 S. E. 502; State v. Bond, 212 N. C. 244, 193 S. E. 24.

For cases setting out facts held either sufficient or insufficient to establish the promise of marriage, see State v. Crow, 189 N. C. 548, 220 S. E. 107; State v. Raynor, 145 N. C. 472, 59 S. E. 171; State v. Malonee, 154 N. C. 200, 69 S. E. 786; State v. Face, 159 N. C. 462, 74 S. E. 1018; State v. Brackett, 218 N. C. 569, 11 S. E. (2d) 9.

The weight and credibility of the evidence supporting that of the woman, upon the trial of seduction, under this section, is for the jury, if it comes within the requirement of being evidence, however slight it may be. State v. Doss, 188 N. C. 214, 124 S. E. 156.

Supporting Evidence Need Not Be Direct.—It is not required that the "supporting evidence" of the promise of marriage coincident with the testimony of the woman, at the time the promise was made, since it is not required that the "supporting evidence" be direct, admirical proof being sufficient. State v. Smith, 217 N. C. 591, 9 S. E. (2d) 9.

The proviso that "the unsupported testimony of the woman shall not be sufficient to convict" is fully met where the testimony of prosecutrix is corroborated by other evidence of the promise of marriage. State v. Crowell, 116 N. C. 1052, 21 S. E. 502; State v. Ferguson, 107 N. C. 841, 12 S. E. 574.

Effect of Marriage upon Consent Judgment.—Where, in a prosecution for seduction a consent judgment is entered requiring the defendant to pay a certain sum to the prosecutrix, the consent was not supported by independent facts and circumstances, the case is reversed. State v. Mckay, 202 N. C. 470, 163 S. E. 586.

Insufficiency of Evidence to Show Promise of Marriage.—In prosecution for seduction, the only evidence in support of the testimony of prosecutrix on the essential element of promise of marriage was the testimony of a witness that the defendant had told the witness that she and defendant were going to be married, and the fourth week before that she had seen prosecutrix and defendant together over a certain period. No other witness testified that prosecutrix and defendant had been together. This is not sufficient to constitute proof of the promise of marriage by facts and circumstances independent of the testimony of prosecutrix, and defendant's motion to nonsuit should have been granted. State v. Crowell, 116 N. C. 1052, 1053, 21 S. E. 502.

Burden of Proof on State.—In order to convict the burden of proof is upon the State to show beyond a reasonable doubt that the seduction was accomplished under and by means of the promise of marriage, and that the prosecutrix was at that time an innocent and virtuous woman. It must affirmatively appear that the inducing promise preceded the intercourse and that the promise was absolute and not conditional. State v. Weidman, 128 N. C. 368, 32 S. E. 326, holding evidence insufficient to establish that seduction was induced by previous unconditional promise of marriage.

Punishment.—This section, providing that one convicted of seduction under promise of marriage "shall be fined or imprisoned," at the discretion of the court, does not authorize the imposition of both fine and imprisonment. State v. Crowell, 116 N. C. 1052, 1053, 21 S. E. 502.

Defendant's contention that he was subjected to cruel and unusual punishment in that the trial court sentenced him to the maximum prison term is without merit in view of the offense of seduction of which he was convicted, and in addition dictated a letter to the parole commissioner in which all attempts at clemency be extended defendant and also directed the solicitor to file a motion against defendant for failure to support his illegitimate child, is untenable, since the letter to the parole commissioner and the instructions to the solicitor are not parts of the sentence imposed. State v. Brackett, 218 N. C. 269, 11 S. E. (2d) 146.

Cited in State v. Wade, 197 N. C. 571, 150 S. E. 32.

§ 14-181. Miscegenation.—All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited, and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or state's prison for not less than four months nor more than ten years, and may also be fined, in the discretion of the court. (Rev. s. 3308; Code, s. 1084; Const. Art. XIV, § 6, c. 58, s. 7; 1834, c. 24; 1838-9, c. 24; C. S. 4340.)

Editor's Note.—Under the act of 1838-9, ch. 24, declaring void all marriages between white persons and free negroes and persons of color, all marriages between white persons and freedmen of all colors, or to persons of negro descent to the third degree, and any violation thereof was punishable as a felony, is cited in State v. Puitt, 94 N. C. 709, 1834, c. 24; 1838-9, c. 24; C. S. 4340.)

Domicile in This State.—A marriage solemnized in a State whose laws permit such marriage between a negro and a white person domiciled in this State, and who leave it for the purpose of evading this law and with intent to return, is not valid in this State. State v. Kennedy, 76 N. C. 251; State v. Ross, 76 N. C. 249. A marriage solemnized in a State whose laws permit such marriage between a negro and a white person domiciled in such State is valid in this State if it was on or before the effective date of this statute and the parties were legal residents of the State at the time of the marriage, and the marriage was consummated in this State. See State v. Puitt, 94 N. C. 709, 718, and cases there cited.

Domicile in This State.—A marriage solemnized in a State whose laws permit such marriage between a negro and a white person domiciled in this State, and who leave it for the purpose of evading this law and with intent to return, is not valid in this State. State v. Kennedy, 76 N. C. 251; State v. Puitt, 94 N. C. 709.

Domicile in Another State.—A marriage solemnized in a State whose laws permit such marriage between a negro and a white person domiciled in such State is valid in this State if it was on or before the effective date of this statute and the parties were legal residents of the State at the time of the marriage, and the marriage was consummated in this State. See State v. Puitt, 94 N. C. 709.

Evidence.—It was not error to admit evidence that the wife was reputed to be of mixed blood within the prohibited degrees, or to permit the witness to state his opinion on that point, although he was not an expert. It was also competent corroboration of other evidence tending to show that the tint of blood to show that the wife usually associated with colored people. Hopkins v. Bowers, 111 N. C. 175, 12 S. E. 574. See also, State v. Maness, 192 N. C. 708, 115 S. E. 777. "The unsupported testimony of the woman shall not be sufficient to convict" is fully met where the testimony of the prosecutrix was corroborated in respect to her innocence and virtue by the evidence of her good character and reputation, and that the inducing promise preceded the intercourse and that the promise was absolute and not conditional. State v. Crowell, 116 N. C. 1052, 1053, 21 S. E. 502.
§ 14-183

clergyman, minister of the gospel or justice of the peace, shall knowingly marry any such person of color to a white person, that person so offending shall be guilty of a misdemeanor. (Rev., s. 3370; Code, s. 1085; R. C., c. 34, s. 80; 1830, c. 4, s. 2; C. S. 4341.)

§ 14-183. Bigamy.—If any person, being married, shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail, for any term not less than four months nor more than ten years. Any such offense may be tried with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction. (Rev., s. 988; R. C., c. 34, s. 15; 1790, c. 323; 1809, c. 783; 1829, c. 9; 1913, c. 26. See 9 Geo. IV, c. 21, s. 22; C. S. 4342.)

Editor's Note.—At common law, the second marriage was voided and from the earliest history of England polygamy has been treated as an offense against society. It is considered as a crime against the marital relation, as well as against the state and the community and likewise crimes by the laws of all civilized and Christian countries. Mr. Chief Justice Waite said: "From that day (the date of the enactment of the bigamy statute in Virginia, 12 Hen. 4, 207) to this we think it may safely be said there has never been a time in any state of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity." Reynolds v. United States, 98 U. S. 389, 25 L. Ed. 244.

Offense against Society.—At common law and under this section bigamy is an offense against society rather than against the lawful spouse of the offender. State v. Williams, 230 N. C. 445, 17 S. E. (2d) 769, reversed on other grounds in Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 189.

Conviction of a First Marriage.—While at common law bigamy was not an indictable offense, and even as late as the enactment of 1885, it was only a misdemeanor, it is now a felony under this statute. State v. Burns, 90 N. C. 707.

Notice of First Marriage.—That the first marriage was celebrated without procurement of a license, while subjecting the parties to punishment, will not invalidate the marriage so that bigamy cannot be predicated thereon. State v. Robbins, 128 N. C. 29, 55 S. E. 653.

In a trial for bigamy, an instruction that defendant could not be convicted unless the jury was satisfied beyond a reasonable doubt that the defendant was committing bigamy, and that the first marriage was a "duly appointed, qualified, and acting justice of the peace," was properly refused, it being sufficient if such justice was a de facto officer. State v. Davis, 109 N. C. 780, 14 S. E. 55.

The evidence showing that there were a number of eye-witnesses to the marriage, and a certified copy of the license with return endorsed being produced, it was not error to charge the jury that it would be presumed the ceremony was valid. State v. Davis, 109 N. C. 780, 14 S. E. 55.

Belief That First Wife Is Dead.—A belief by the defendant that his first wife is dead or his ignorance of her being alive, she having been away for less than seven years, is no defense on a trial for bigamy. State v. Goulden, 134 N. C. 743, 47 S. E. 450.

Absence of Wife.—"The burden is on the defendant to show as a matter of defense that his wife had absented herself from the State of North Carolina for a period of seven years prior to the first marriage, and that he was ignorant all that time that she was living." State v. Goulden, 134 N. C. 743, 47 S. E. 450.

Admissions as to Prior Marriage.—In a prosecution for bigamy, an admission of a prior marriage is evidence of the marriage of the first wife. State v. Goulden, 134 N. C. 743, 47 S. E. 450.

Where a defendant charged with bigamy, upon the pre- liminary examination before a Justice of the Peace, was being cautioned that his statements could be used against him, stated that he had been married to his former wife while a slave in South Carolina, had children by her and was subsequently married in North Carolina to his present wife, such admissions were competent to go to the jury, on his trial in the superior court, as to his guilt. State v. Moon, 120 N. C. 591, 26 S. E. 969.

Trespassory of First Wife.—In an indictment for bigamy, the first wife of the defendant is a competent witness to prove the marriage. State v. Melton, 120 N. C. 591, 26 S. E. 969.

The record book of marriage for the county or the original marriage license signed by the Justice solemnizing the marriage is admissible to prove a marriage. State v. Melton, 120 N. C. 591, 26 S. E. 969.

Second Marriage out of State.—It was held formerly that the courts of this State could not take jurisdiction of the case where the second marriage took place out of the State. State v. Coates, 83 N. C. 355, 63 S. E. 653. In this decision a clause was inserted in the section in furtherance of a purpose to make the offense cognizable in this State no matter where it occurred out of the State without proving that the parties afterwards cohabited in North Carolina. The constitutionality of the section was upheld in State v. Long, 143 N. C. 570, 671, 57 S. E. 349, but from the statement of facts in that case it appears that while the second marriage took place in another state, the parties later cohabited in North Carolina, the parties, having once contracted a marriage, were subject to the jurisdiction upon the courts. See State v. Herron, 175 N. C. 754, 74 S. E. 698; State v. Moon, 178 N. C. 715, 100 S. E. 614.

Pleading and Proof.—If the defendant wishes to rely upon the fact that the offense of bigamy was committed outside the state, he can not move to quash or in arrest, but must prove the fact in defense under his plea of not guilty. State v. Barrington, 141 N. C. 630, 51 S. E. 661; State v. Burton, 138 N. C. 375, 57 S. E. 214; State v. Mitchell, 83 N. C. 674; State v. Long, 143 N. C. 671, 67 S. E. 269.

Foreign Divorces.—Where a decree of divorce in another state, which is attacked by the prosecution for insufficient residence in such other state, is relied upon as the only defense on a trial for bigamy, the defendant must satisfy the jury that he was not unjustly deprived of the benefit of his residence in the other state. State v. Herron, 175 N. C. 574, 94 S. E. 698.

A man and a woman from this state to Nevada and, after residing there for a time sufficient to meet the requirements of a Nevada statute, secured decrees from a Nevada court, divorcing them from their respective spouses, and later in the same year solemnized another marriage in Nevada. A Nevada divorce decree based on substituted service, where defendant made no appearance, could not be recognized in this state, and (2) that defendants went to Nevada, not to es...
work bonâ fide residence, but solely for the purpose of taking advantage of the laws of that state to obtain a divorce through a fraud upon the Nevada court. It was held that, as it could not be determined on the record that the verdict was not based solely upon an agreement involving a construction and application of the Federal Constitu- tion—the review in the supreme court of the United States must be of that ground, leaving the other out of considera- tion. Williams v. North Carolina, 177 U. S. 207, 21 S. E. 189, reversing 220 N. C. 445, 17 S. E. (2d) 769.

Proof of a divorce granted in another State, upon a trial for bigamy, is not only unnecessary but no evidence of the fact should be submitted to the jury under proper instructions. State v. Herron, 175 N. C. 734, 94 S. E. 698.

The Indictment. — An indictment for bigamy which charges that the marriage is "fraudulent and felonious" and that the alleged "married man, did marry one W. during the life of his first wife," sufficiently avers the first marriage. State v. Davis, 109 N. C. 780, 14 S. E. 55.

Same—Name of First Wife. — It is not necessary, in an in- dictment for bigamy, to set out the name of the first wife. State v. Davis, 109 N. C. 780, 14 S. E. 55.

Same—Neglecting Divorce Unnecessary. — It was not neces- sary that an indictment for bigamy should contain an aver- rant that the defendant had not been divorced from his wife. State v. Norman, 13 N. C. 222; State v. Davis, 109 N. C. 780, 14 S. E. 55; State v. Melton, 120 N. C. 591, 596, 25 S. E. 938.

Same—Time and Place of Marriage. — This section does not by its language make it necessary for the indictment to state the time and place of the marriage. State v. Taylor, 15-155 expressly en- ables the court from rendering judgment. This seems to be the status of affairs in this state until a party marries while in another county in which he is apprehended, and it is not required that a bill be used. Id. The state is not called upon to allege or prove the bigamous cohabitation takes place. State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769, reversed on other grounds by State v. Lyerly, 52 N. C. 158, s. 2; C. S. 4345.)

Venue. — Defendant may be prosecuted for bigamy in the county in which he is apprehended, and it is not required that the prosecution be instituted in the county in which the marriage took place. State v. Mann, 135 N. C. 571, 14 S. E. 549; State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769, reversed on other grounds, in Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 189.

§ 14-184. Fornication and adultery. — If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: Provided, that the admissions or confessions of one of them shall not be received in evidence against the other. (Rev. s. 3350; Code, s. 1041; R. C., s. 34, s. 45; 1805, s. 684; C. S. 4346.)

General Consideration. — Adultery is an aggravated species of fornication. State v. Roberts, 135 N. C. 490, 124 S. E. 833. For- nication occurs upon cohabitation after miscegenation. See § 14-184 and notes thereto.

The law of adultery as hereinafter defined and punished by the statutes on the subject relates only to relations of opposite sexes. State v. Doolittle, 107 N. C. 866, 12 S. E. 83; and were of different sex. State v. Britt, 150 N. C. 811, 812. Evidence of the same must be admissible and competent; and evidence of the same is admissible when made by the female defendant in the presence of the male. See State v. Roberts, 135 N. C. 490, 124 S. E. 833.

Evidence. — The admissions or confessions of one party are not to be received against the codefendant. State v. Rhine- hart, 105 N. C. 787, 11 S. E. 512. However, it has been held that under certain circumstances such declarations are ad- missible when made by the female defendant in the presence of the male. See State v. Roberts, 135 N. C. 490, 124 S. E. 833.

It is proper to prove that either defendant had a liv- ing spouse. State v. Manly, 95 N. C. 661. Statements and conduct prior to the offense and any evidence of a affair with the arrested spouse, which is admissible. (Hansley v. Austin, 108 N. C. 780, 13 S. E. 219, as is also testimony as to conduct of the parties after indictment. State v. Stubbs, 108 N. C. 764, 13 S. E. 90.)

Adulterous as to One Party. — Where only one party is convic- ted and the other acquitted, there can be no judgment against the one convicted. State v. Mainor, 28 N. C. 340.

This holding was followed in the case of State v. Loyler, 52 N. C. 158, and was held as law in this state until doubted in the opinion of Mr. Justice Davis in State v. Rhinehart, 106 N. C. 787, 11 S. E. 512. The case came before the court from the district court of Dare County, and the case was reversed, the court from rendering judgment. This seems to be the status of affairs in this state until doubted in the opinion of Mr. Justice Davis in State v. Rhinehart, 106 N. C. 787, 11 S. E. 512.

Both Convicted—New Trial as to One.—Following a line of reasoning similar to that discussed in the foregoing par- agraph, the court in State v. Parham, 133 N. C. 577, 57 S. E. 497, held that if both defendants are convicted, a new trial may be granted as to one party without disturbing the verdict as to the other.

Punishment.— In fixing the punishment of persons con- victed under this section, the courts have looked to the pro- visions of section 14-3 which prescribes the punishment of misdemeanors for which a specific punishment has not been fixed.—Ed. Note.

Persons convicted of fornication and adultery may be im- prisoned in the common jail for a period to be fixed in the discretion of the court. State v. Manly, 95 N. C. 661, 663, citing State v. McNeal, 75 N. C. 15; State v. Jackson, 82 N. C. 565.

The court has power, during the term, to correct or modify an unexecuted judgment in criminal as well as in civil actions. State v. Manly, 95 N. C. 661, 663. See also, In re Brittain, 91 N. C. 387.

Applied in State v. Miller, 214 N. C. 317, 199 S. E. 89.

§ 14-185. Inducing female persons to enter ho- tels or boarding-houses for immoral purposes.— Any person who shall knowingly persuade, induce or entice, or cause to be persuaded, induced or en- ticed, any woman or girl to enter a hotel, public inn or boarding-house for the purpose of prostitu- tion or debauchery or for the purpose of any other immoral purpose, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in the dis- cretion of the court. (1917, c. 158, s. 1; C. S. 4344.)

§ 14-186. Opposite sexes occupying same bed- room at hotel for immoral purposes; falsely regist- ering as husband and wife.—Any man and woman occu- pying the same bedroom in any hotel, public inn or boarding-house for any immoral purpose, or any man and woman falsely registering as, or otherwise representing themselves to be, husband and wife in any hotel, public inn or boarding-house, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in the discretion of the court. (1917, c. 158, s. 2; C. S. 4345.)

§ 14-187. Permitting unmarried female under eighteen in house of prostitution.—Whoever, being the keeper of a house of prostitution, or as- signation house, building or premises in the state where prostitution, fornication or concubinage is allowed or practiced, shall suffer or permit any unmarried female under the age of eighteen years to live, board, stop, or room in such house, building or premises, shall be guilty of a misdemeanor. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 18; C. S. 4346.)

§ 14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined.—On a prosecution in any court for keeping a disorderly house or bawdy-house, or permitting a house to be used as a bawdy-house, or used in such a way as to make it disorderly, or a common nuisance, evidence of the general reputation or character of the house shall be admissible and competent; and evidence of the lewd, dissolve and boisterous conversation of the inmates and frequenters, while in and around such
house, shall be prima facie evidence of the bad character of the inmates and frequenters, and of the disorderly character of the house. The manager or person having the care, superintendency or government of a disorderly house or bawdy-house is the “keeper” thereof, and one who employs another to manage and conduct a disorderly house or bawdy-house is also “keeper” thereof.

(1907, c. 779; C. S. 4347.)

Constitutionality.—This section is constitutional. State v. Price, 175 N. C. 804, 95 S. E. 478.

Disorderly House Defined—Illustrations. — A disorderly house is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by. State v. Wilson, 92 N. C. 628. A few of the decided cases are given here in order that the counsel may have an idea as to what situations and conditions have been held to be included in the definition set out in the above paragraph.

The following have been held to constitute disorderly houses: A shop in which disorderly crowds assemble. State v. Robertson, 86 N. C. 628. A store in which persons collect and disturb the neighborhood. State v. Thomson, 44 N. C. 252.

The following have been held not to constitute disorderly houses: A private dwelling wherein an uproar was frequently raised but which disturbed few people. State v. Wright, 51 N. C. 25. The residence of an unchaste woman. State v. Evans, 27 N. C. 603.

Persons Leasing Premises as a “Keeper.”—A person who has knowledge that it is to be used for disorderly and unlawful purposes is treated as a direct offender. State v. Boyd, 175 N. C. 791, 95 S. E. 101.

Powers of City Authorities. — In the exercise of the powers of a municipality to enact ordinances concerning houses of ill-fame is discussed by Mr. Justice Avery in State v. Webber, 107 N. C. 962, 12 S. E. 598.

Evidence.—This section authorizes the admission of evidence tending to show the lewd, dissolute, and especially lewd conversation of the inmates and frequenters of the house, and especially provides that evidence of the general reputation or of the conduct of the inmates of a house house or bawdy-house shall be admissible and competent.

State v. Hilderbran, 201 N. C. 780, 161 S. E. 488.

§ 14-189. Obscene literature.—It shall be unlawful for any person, firm or corporation to exhibit for the purpose of gain or for display for sale, lend or hire, or otherwise publish or sell for the purpose of gain, or exhibit in any school, college, or other place of instruction, or have in his possession for the purpose of sale or distribution, any obscene literature, as determined and defined in the postal laws and regulations of the United States post office department, in the form of book, paper-writing, print, drawing, or other representation, at any newsstand, book store, drug store or other public or private places; or if any person shall post any indecent placards, writings, pictures or drawings on walls, fences, billboards or other public or private places, he shall be guilty of a misdemeanor. (Rev., s. 3731; 1885, c. 125; 1907, c. 502; 1935, c. 57; 1941, c. 273; C. S. 4348(a).)

Editor’s Note.—The 1941 amendment added the last sentence to this section. For comment on the amendment, see 19 N. C. Law Rev. 479.

§ 14-191. Sheriffs and deputies to report violations of two preceding sections.—It shall be the duty of the sheriffs and their deputies of the various counties to report to the proper county officer any such violation, and in the discharge of their duties they shall be entitled to receive reasonable compensation for their services.

Powers of Officers.—Under section 14-189 it was held that the chief of police and his lawful officers or subordinates had the right to prevent or suppress an indecent or immoral show, given in any public place or in any place to which the public were invited and, in the proper discharge of these duties, they could act immediately whenever such exhibitions were taking place in their presence or were imminent and their interference was required to prevent them. Brewer v. Wynne, 163 N. C. 319, 79 S. E. 629.

§ 14-192. Cutting or painting obscene words or pictures near public places.—It shall be unlawful for any person to write, cut or carve any indecent word, or to paint, cut or carve any obscene or lewd picture or representation, on any tree or other object near the public highways or other public places. Any person guilty of violating this section shall be fined not more than fifty dollars, or imprisoned not more than thirty days. (1907, c. 944; C. S. 4349.)

§ 14-193. Exhibition of obscene or immoral pictures; posting of advertisements. — If any person, firm, or corporation shall, for the purpose of gain or otherwise, exhibit any obscene or immoral motion pictures; or if any person, firm or corporation shall post any obscene or immoral placard, writings, pictures, or drawings on walls, fences, billboards, or other places, advertising theatrical exhibitions or moving picture exhibitions or shows; or if any person, firm, or corporation shall permit such obscene or immoral exhibitions to be conducted in any tent, booth, or other place or building owned or controlled by said person, firm, or corporation, the person, firm, or corporation performing either one or all of the said acts

[670]
shall be guilty of a misdemeanor, and punishable in the discretion of the court. For the purpose of enforcing this statute any spectator at the exhibition of an obscene or immoral moving picture may make the necessary affidavit upon which the warrant for said offense is issued. (1921, c. 212; C. S. 4340(a).)

§ 14-194. Circulating publications barred from the mails.—It shall be unlawful for any news agent, news dealer, book-seller, or any other person, firm, or corporation to offer for sale, sell, or cause to be circulated within the State of North Carolina any magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

It shall be unlawful for any person, firm, or corporation to offer for sale, sell, or give to any person under the age of twenty-one years any such magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

This section shall not be construed to in any way conflict with or abridge the freedom of the press, and shall in no way affect any publication which is permitted to be sent through the United States mails.

Any person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor. (Ex. Sess. 1924, c. 45.)

Editor's Note.—A practical criticism of the effect of this section upon the freedom of the press will be found in 4 N. C. Law Rev. 35. See also the review in 5 N. C. Law Rev. 26.

§ 14-195. Using profane or indecent language on passenger trains.—It shall be unlawful for any person to curse or use profane or indecent language on any passenger train. Any person so offending shall upon conviction be fined not more than fifty dollars or imprisoned not more than thirty days. (1907, c. 470, ss. 1, 2; C. S. 4350.)

§ 14-196. Using profane or indecent language to female telephone operators.—It shall be unlawful for any person to use any lewd or profane words, or any words of vulgarity, or to use indecent language to any female telephone operator operating any telephone, switchboard, circuit or line. Any person violating this section shall upon conviction be guilty of a misdemeanor. (1913, c. 33; 1915, c. 41; C. S. 4351.)

§ 14-197. Using profane or indecent language on public highways, counties exempt.—If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The following counties shall be exempt from the provisions of this section: Beaufort, Brunswick, Camden, Cleveland, Craven, Dare, Macon, Martin, Orange, Pasquotank, Pitt, Stanly, Swain, Transylvania, Tyrrell, Washington and Watauga. (1913, c. 40; Pub. Loc. Ex. Sess. 1924, c. 65; 1933, c. 309; 1937, c. 9; 1939, c. 73; C. S. 4352.)

Editor's Note.—Public Laws of 1933, c. 309, omitted Gates from the list of excepted counties. The 1937 amendment struck out Perquimans and the 1939 amendment struck out Jones.

§ 14-198. Lewd women within three miles of colleges and boarding-schools.—If any loose woman or woman of ill-fame shall commit any act of lewdness with or in the presence of any student, who is under twenty-one years old, of any boarding-school or college, within three miles of such school or college, she shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Upon the trial of any such case students may be competent but not compellable to give evidence. No prosecution shall be had under this section after the lapse of six months. (Rev., s. 3353; 1889, c. 523; C. S. 4353.)

§ 14-199. Obstructing way to places of public worship.—If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3776; Code, s. 3669; R. C, c. 97, s. 5; 1785, c. 241; C. S. 4354.)

Cross References.—As to procedure for laying out church roads, see § 136-71. As to obstruction of such highway, see § 136-90 and annotations thereto.

§ 14-200. Disturbing religious assembly by certain exhibitions.—If any person shall bring within half a mile of any place where the people are assembled for divine worship, and stop for exhibition, any stallion or jack, or shall bring within that distance any natural or artificial curiosities and there exhibit them, he shall forfeit and pay to any one who will sue therefor the sum of twenty dollars and shall also be guilty of a misdemeanor: Provided, that nothing herein shall be construed to prohibit such exhibitions at any time if made within the limits of any incorporated town, or without such limits if made before the hour of ten o'clock in the forenoon or after three o'clock in the afternoon. (Rev., s. 3705; Code, s. 3670; R. C, c. 97, s. 6; 1809, c. 779; s. 1; 1907, c. 432; C. S. 4355.)

Local Modification.—Dare, Hatteras township: C. S. 4355.

§ 14-201. Permitting stone-horses and stone-mules to run at large.—If any person shall let any stone-horse or stone-mule of two years old or upwards run at large, he shall be guilty of a misdemeanour, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3323; Code, s. 2315; R. C, c. 17, s. 6; 1907, c. 412; C. S. 4356.)

Local Modification.—Dare, Hatteras township: C. S. 4356.

§ 14-202. Secretly peeping into room occupied by woman.—Any person who shall peep secretly into any room occupied by a woman shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1923, c. 78; C. S. 4356(a).)

Editor's Note.—It was suggested in 1 N. C. Law Rev. 286 that although this law is made to apply generally to all persons, it is believed that it will not interfere with police officers or detectives who may be compelled to violate the letter of the law to get evidence.

Art. 27. Prostitution.

§ 14-203. Definition of terms.—The term "prostitution" shall be construed to include the offering or receiving of the body for sexual intercourse for
§ 14-204. Prostitution and various acts abetting prostitution unlawful.—It shall be unlawful:

1. To keep, set up, maintain, or operate any place, structure, building, or conveyance for the purpose of prostitution or assignation.

2. To occupy any place, structure, building, or conveyance for the purpose of prostitution or assignation; or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution or assignation, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose.

3. To receive, or to offer or agree to receive any person into any place, structure, building, or conveyance for the purpose of prostitution or assignation, or to permit any person to remain there for such purpose.

4. To direct, take, or transport, or to offer or agree to take or transport, any person to any place, structure, or building or to any other person, with knowledge or reasonable cause to know that the purpose of such directing, taking, or transporting is prostitution or assignation.

5. To procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignation.

6. To reside in, enter, or remain in any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution or assignation.

7. To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever. (1919, c. 215, s. 1; C. S. 4358.)

Cross Reference.—As to declaring houses of prostitution to be nuisances, see § 19-1.

Transporting.—Where defendants, taxi drivers, were apprehended in a clearing in the woods, each under the wheel of his taxi with motor running, and carrying soldiers, the evidence of the character of the scene and the other circumstantial evidence was sufficient to support the inference that defendants knew their destination and brought their conveyance for the purpose of prostitution or assignation contrary to the form of the statute and against the language of subsection 7 of this section, and is sufficient to charge the offense therein proscribed. State v. Willis, 220 N. C. 712, 18 S. E. (2d) 118.

Aiding and Abetting.—A warrant alleging that defendant on a particular day in the designated county "did unlawfully, and willfully aid and abet in the prostitution and assignment contrary to the form of the statute and against the peace and dignity of the state" follows the language of subsection 7 of this section, and is sufficient to charge the offense therein proscribed. State v. Johnson, 220 N. C. 773, 18 S. E. (2d) 358.

Competency of Evidence.—Evidence of the reputation of the upstairs of a building owned by defendant, and of the persons frequenting it, is competent in a prosecution under this section. State v. Waggoner, 207 N. C. 396, 176 S. E. 566.

Cited in State v. Fletcher, 199 N. C. 815, 155 S. E. 927.

§ 14-205. Prosecution: in what courts.—Prosecutions for the violation of any of the provisions of this article shall be tried in the courts of this state wherein misdemeanors are triable except those courts the jurisdiction of which is so limited by the constitution of this state that such jurisdiction cannot by statute be extended to include criminal actions of the character herein described. (1919, c. 215, s. 6; C. S. 4359.)

§ 14-206. Reputation and prior conviction admissible as evidence.—In the trial of any person charged with a violation of any of the provisions of this article, testimony of a prior conviction, or testimony concerning the reputation of any place, structure, or building, and of the person or persons who reside in or frequent the same, and of the defendant, shall be admissible in evidence in support of the charge. (1919, c. 215, s. 3; C. S. 4360.)

§ 14-207. Degrees of guilt.—Any person who shall be found to have committed two or more violations of any of the provisions of § 14-204 of this article within a period of one year next preceding the date named in an indictment, information, or charge of violating any of the provisions of such section, shall be deemed guilty in the first degree. Any person who shall be found to have committed a single violation of any of the provisions of such section shall be deemed guilty in the second degree. (1919, c. 215, s. 4; C. S. 4361.)

Province of Judge.—When the degree of guilt has been properly ascertained the judge doubtless has the right to hear testimony for the purpose of fixing the terms of imprisonment within the limits of the statute; but this right does not extend to or include the finding by the judge of the degree of the offender's guilt. State v. Barnes, 122 N. C. 1031, 29 S. E. 381; State v. Lee, 192 N. C. 225, 134 S. E. 458; State v. Brinkley, 193 N. C. 747, 748, 138 S. E. 138.

§ 14-208. Punishment; probation; parole.—Any person who shall be deemed guilty in the first degree, as set forth in § 14-207, shall be guilty of a misdemeanor, and may be fined or imprisoned in the discretion of the court, or may be committed to any penal or reformatory institution in this state: Provided, that in case of a commitment to a reformatory institution, the commitment shall not exceed an indeterminate period of time of not less than one nor more than three years in duration, and the board of managers or directors of the reformatory institution shall have authority to discharge or to place on parole any person so committed after the service of the minimum term or any part thereof, and to require the return to said institution for the balance of the maximum term of any person who shall violate the terms or conditions of the parole.

Any person who shall be deemed guilty in the second degree, as set forth in § 14-207, shall be guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court: Provided, that the defendant may be placed on probation in the care of a probation officer designated by law, or theretofore appointed by the court.

Probation or parole shall be granted or ordered in the case of a person infected with venereal disease only on such terms and conditions as shall insure medical treatment therefor and prevent the spread thereof, and the court may order any convicted defendant to be examined for venereal disease.

No girl or woman who shall be convicted under this article shall be placed on probation or on parole in the care or charge of any person except [ 672 ]
to commit such willful and corrupt perjury as is mentioned in § 14-209, the person so offending shall be punished in like manner as the person committing the perjury. (Rev., 1899, c. 54, s. 97; C. S. 2364.)

Cross Reference.—See also, § 58-302.

§ 14-215. False oath to certificate of mutual fire insurance company.—Any person taking a false oath in respect to the certificate required by law before issuing policies in a mutual fire insurance company shall be guilty of perjury. (Rev., 1913, c. 89, s. 28; C. S. 4370.)

Cross Reference.—See also, § 58-302.

§ 14-216. False oath to certificate of mutual fire insurance company.—Any person taking a false oath in respect to the certificate required by law before issuing policies in a mutual fire insurance company shall be guilty of perjury. (Rev., 1899, c. 54, s. 97; C. S. 4368.)

§ 14-212. Perjury in court-martial proceedings.—If any person shall willfully and corruptly swear falsely before any court-martial, touching and concerning any matter or thing cognizable before such court-martial, he shall be liable to the pains and penalties of perjury. (Rev., s. 3493; 1899, c. 54, s. 97; C. S. 4368.)

§ 14-213. False oath to statement of insurance company.—Any person who shall make oath to a false or fraudulent statement in the annual report or other statement required by law from an insurance company shall be guilty of perjury. (Rev., s. 3493; 1899, c. 54, s. 97; C. S. 4368.)

§ 14-214. False oath to procure benefit of insurance policy or certificate.—Any person who shall willfully and knowingly present or cause to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon a contract of insurance; or prepares, makes or subscribes to a false or fraudulent account, certificate, affidavit or proof of loss, or other document or writing, with intent that the same may be presented or used in support of such claim, shall be punishable by imprisonment for not more than five years or by a fine of not more than five hundred ($500.00) dollars, or by both such fine or imprisonment within the discretion of the court. (Rev., s. 3487; 1899, c. 54, s. 60; 1913, c. 89, s. 98; 1937, c. 248; C. S. 4353.)

Burden of Proof on State.—The burden is upon the state to prove that the claim for loss was false, that defendant knew it was false, and that, with such knowledge, he proceeded to make the claim for payment of insurance thereon. State v. Stephenson, 218 N. C. 198, 10 S. E. (2d) 819.

§ 14-215. False oath to statement required of fraternal benefit societies.—Any person who shall willfully make any false statement in any verified report or declaration under oath, required or authorized by law from fraternal benefit societies, shall be guilty of perjury. (1913, c. 89, s. 28; C. S. 4370.)

Cross Reference.—See also, § 58-302.

§ 14-216. False oath to certificate of mutual fire insurance company.—Any person taking a false oath in respect to the certificate required by law before issuing policies in a mutual fire insurance company shall be guilty of perjury. (Rev., s. 3611; Code, s. 2857; 1869-70, c. 5, s. 4; C. S. 4366.)

§ 14-213. False oath to statement of insurance company.—Any person who shall make oath to a willfully false statement in the annual report or other statement required by law from an insurance company shall be guilty of perjury. (Rev., s. 3493; 1899, c. 54, s. 97; C. S. 4368.)
company, that every subscription for insurance is genuine and made with an agreement that every subscriber will take the policies subscribed for by him within thirty days after granting a license to such company, shall be guilty of perjury. (Rev., ss. 473; 1868-9, c. 176, ss. 2, 3; 1903, c. 438; s. 4; C. S. 4371.)

Cross Reference.—As to the oaths required of officers of a mutual fire insurance company, see § 58-92.

Art. 29. Bribery.

§ 14-217. Bribery of officials.—If any person holding office under the laws of this state who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison for a term not exceeding five years, or fined not exceeding five thousand dollars, or both, in the discretion of the court. (Rev., s. 3568; Code, s. 4372.)

Cross References.—As to bank examiners' accepting bribes, see § 14-233. As to bribing agents and servants to violate duties owed employers, see § 14-353. As to bribery of baseball players, umpires, and officials, see § 14-373 et seq. As to when costs of prosecuting charges of bribery shall be paid by the state, see § 6-16.

"The distinction between bribery and extortion seems to be that the former offense consists in offering a present or reward, or any promise, contract, undertaking, obligation or security for the payment or delivery of any money, goods, right of action, bribe, present or reward, or any other valuable thing whatever, to any member of the senate or house of representatives of this state after his election as such member, and either before or after he shall have qualified and taken his seat, with intent to influence his vote or decision on any question, matter, cause or proceeding which may then be pending before the general assembly, or which may come before him for action in his capacity as a member of the general assembly, such person so offering, promising or giving, or causing or procuring to be promised, offered or given, any such money, goods, bribe, present or reward, or any bond, contract, undertaking, obligation or security for the payment or delivery of any money, goods, bribe, present or reward, or other valuable thing whatever, and the member-elect who shall in anywise accept or receive the same or any part thereof, shall be guilty of a felony, and shall be fined not exceeding double the amount so offered, promised or given, and imprisoned in the state's prison not exceeding five years, and the person convicted of so accepting or receiving the same, or any part thereof, shall forfeit his seat in the general assembly and shall be forever disqualified to hold any office of honor, trust or profit under this state. (Rev., s. 3570; Code, s. 2852; 1868-9, c. 176, s. 5; C. S. 4374.)

§ 14-220. Bribery of jurors.—If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a state prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by his verdict, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years. (Rev., s. 3897; Code, s. 990; R. C., s. 34, s. 84; § Edw. III, c. 10; 34 Edw. III, c. 8; 58 Edw. III, c. 12; C. S. 4375.)


§ 14-221. Breaking or entering jails with intent to injure prisoners.—If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoner, he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisoned in the state's prison or the county jail not less than two nor more than fifteen years. (Rev., s. 3998; 1893, c. 461, s. 1; C. S. 4376.)

Cross References.—As to cost of investigating lynchings, see § 6-43. As to sheriff's duty to protect prisoner, see § 165-21. As to investigation of lynchings, see § 15-98 and § 114-15. As to venue, see § 15-128.

Conviction of Attempt.—On an indictment under this section as construed with sections 15-128 and 15-170, the defendant may be found guilty of an attempt. State v. Rumple, 178 N. C. 717, 100 S. E. 622.

Indictment Need Not Charge Accomplices.—It was error to quash a bill of indictment under this section which charged the defendant with conspiring "with others" to commit the crime of lynching, because it did not name the other charge that they were unknown. State v. Lewis, 142 N. C. 626, 58 S. E. 600. As to effect of splitting act of 1893, see note of this case under section 6-43.

Indictment in Adjoining County.—In an indictment for lynching it was error to quash the bill on the ground that it appeared on the face of the bill that the offense charged was committed in the county in which the bill was found, but in an adjoining county. See sec. 15-128. State v. Lewis, 142 N. C. 626, 58 S. E. 600.
§ 14-222. Refusal of witness to appear or to testify in investigations of lynchings.—If any person summoned as a witness in the investigation of a charge of lynching shall willfully fail to attend as a witness in obedience to the process served on him, or if, after being sworn, he shall refuse to answer questions pertinent to the matter being investigated before any tribunal, he shall be guilty of a misdemeanor, and, on conviction, shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3699; 1899, c. 461, s. 3; C. S. 4377.)

Cross Reference.—As to privilege of witnesses, see § 15-99.

§ 14-223. Resisting officers.—If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging his office, or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor. (Rev., s. 3700; 1889, c. 51, s. 1; C. S. 4378.)

Cross References.—As to powers and duties of constable, see §§ 151-7 and 160-18. As to criminal authority of police officers, see §§ 160-21. As to arrest in general, see §§ 15-39 et seq. 569.

Indictment in Two Counts.—An indictment having two counts, one against one person under this section, and the other against several persons under section 14-224, is defective but not objected to before a verdict which convictions on one count and acquits on the other, is not sufficient grounds for arrest of judgment, as the acquittal is equivalent to a nolle pros. State v. Perdue, 107 N. C. 853, 12 S. E. 253.

Quashing Indictment if Sufficient to Convict of Assault.—Where an indictment for resisting an officer is defective, as such it only not to be quashed if the defendant may be convicted thereon for a simple assault. State v. Dunn, 105 N. C. 839, 13 S. E. 881.

Process Must Be Legal.—A person is not liable for resisting an unlawful arrest, as where the warrant lacked a seal and the officer did not state what he arrested him for. State v. Curtis, 2 N. C. 471.

Authority of Officer and Notice to Party.—"If the officer has no authority to make the arrest, or has the authority, is not known to be an officer and does not in some way notify the party that he is an officer and has authority, the party arrested may lawfully resist the arrest as if it were made by a private person." State v. Belk, 76 N. C. 10, 14; State v. Kirby, 24 N. C. 301; State v. Bryant, 65 N. C. 327.

In a prosecution for resisting arrest under this section, a defense that the arrest was made by a constable outside of his township and that therefore defendant did not resist an officer in the performance of his duty is unavailing in view of the cases in State v. Stringer, 24 N. C. 201, 207 N. C. 805, 178 S. E. 564. State v. Coppening, 207 N. C. 805, 178 S. E. 564.


Preventing Road Overseer Cutting Ditch.—See State v. New, 130 N. C. 771, 41 S. E. 1033.

Resisting Second Service of Warrant.—Defendant is not liable for assault and battery for resisting an entry into his house by an officer armed with a warrant which had once been returned, though defendant had entered into a recognizance and failed to appear. State v. Queen, 66 N. C. 615.

Persons Aiding and Abetting.—See State v. Morris, 10 N. C. 615.


§ 14-224. Failing to aid police officers.—If any person, after having been lawfully commanded to aid an officer in arresting any person, or in taking any person who has escaped from lawful custody, or in executing any legal process, willfully neglects or refuses to aid such officer, he shall be guilty of a misdemeanor. (Rev., s. 3701; 1889, c. 51, s. 2; C. S. 4379.)
of record wherein justice is administered; or if any person shall give or pay money, reward or other profit, or shall make any promise, agreement, bond or assurance for any of such offices, or for the deputation of any of them, or for any part of them, the person so offending in any of the cases aforesaid shall be guilty of a misdemeanor, and, on conviction thereof, shall forfeit all his right, interest and estate in such office, and every part and parcel thereof, and shall be imprisoned and fined at the discretion of the court. (Rev., s. 3571; Code, s. 998; R. C., c. 34, s. 33; 5, 6 Edw. VI, c. 16, ss. 1, 5; C. S. 4383.)

Cross References.—As to sheriff letting to farm his office, see §128-3. As to validity of bargain to sell an office, see §128-5.

§ 14-229. Acting as officer before qualifying as such.—If any officer shall enter on the duties of his office before he executes and delivers to the authority entitled to receive the same the bonds required by law, and qualifies by taking and subscribing and filing in the proper office the oath of office prescribed, he shall be guilty of a misdemeanor and shall be ejected from his office. (Rev., s. 3565; Code, s. 79; C. S. 4385.)

§ 14-230. Willfully failing to discharge duties.—If any clerk of any court of record, sheriff, justice of the peace, recorder, prosecuting attorney of any recorder's court, county commissioner, county surveyor, coroner, treasurer, constable or official of any of the state institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office and shall be dismissed by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court. (Rev., s. 3592; 1901, c. 270, s. 2; 1943, c. 347; C. S. 4384.)

Cross References.—As to failure of county commissioners to perform duty, see §153-15. As to failure of sheriff to make return, see §14-242. As to prosecution of officers failing to discharge duties, see §128-16 et seq.

Editor's Note.—The 1943 amendment made this section applicable to recorders and prosecuting attorneys of recorder's courts.

In General.—"The law will not countenance or condone any attempt to extend its mandates. The private citizen must obey the law, and the public officer is not exempt from this duty by any special privilege appertaining to his office. He is not wiser than the law, nor is he above it. The truth is, that if he willfully neglects or omits to perform a public duty, he is liable to indictment at common law. State v. Commissioners, 4 N. C. 419; State v. Williams, 34 N. C. 172; State v. Com's, 48 N. C. 399; State v. Ferguson, 73 N. C. 197; the neglect, omission or refusal to discharge any of his official duties is willful and corrupt, it is criminal misbehavior, and subjects him to indictment for a misdemeanor and punishment by fine or imprisonment, and, as a part of the penalty, to removal from office." State ex rel. Battle v. Rocky Mount, 156 N. C. 329, 337, 72 S. E. 354.

Proceedings of Forfeiture under Section 1-515.—Forfeiture exacted by judgment of a motion from office as a part of the punishment, through the clerk has been convicted of a misdemeanor, under this section in willfully neglecting to discharge the duties of his office, but proceedings of forfeiture must be under section 1.-515. State v. Norman, 82 N. C. 669. No Willful Neglect and Injury to Public.—It is to be observed that the essentials of the crime as prescribed are: first, a willful neglect in the discharge of official duty; and second, injury to the public. State v. Anderson, 196 N. C. 771, 147 E. 395, quoting from State v. Hatch, 116 N. C. 1003, 21 S. E. 436.

Corrupt Intent Not Necessary.—It is not necessary to allege corrupt intent in a bill of indictment against county commissioners for neglect of duty in providing a necessary county service, if it is sufficient to show that the services are ill provided. State v. Looper, 146 N. C. 655, 61 S. E. 585. However honest the defendants may be (and their honesty is not called in question) the public have a right to protection against any such official negligence or unprofessional acts, if there is carelessness amounting to a willful want of care in the discharge of their official duties, which injures the public. State v. Anderson, 196 N. C. 771, 147 E. 385, quoting from State v. Hatch, 116 N. C. 1003, 21 S. E. 436.

Liability for Honest Errors.—It is so well settled that there is nothing to the contrary that an officer who shall exercise his judgment or discretion is not liable criminally for any error which he commits, provided he acts honestly. State v. Powras, 75 N. C. 281, 284.

"If the illegal act be done malafide, then it becomes a crime, and the officer liable both civilly and criminally, but if free of any wicked intent, then he is civilly liable only." State v. Snuggs, 85 N. C. 542, 544.

The Indictment.—It is required that the indictment under this section sufficiently charge the offense of which such officer is accused; and where the action is against the superintendent of a State hospital for the insane, and the indictment charges that he removed or caused to be removed patients to his private farm and caused them to be worked thereon, without allegation of injury to the public, to the benefit of the patients, or of any gain to the defendant, the indictment fails to charge facts sufficient to constitute an offense under the statute, and defendant's motion in arrest of judgment should be allowed. State v. Anderson, 196 N. C. 771, 147 E. 385.

Cited in Moffitt v. Davis, 205 N. C. 555, 570, 172 S. E. 317.

§ 14-231. Failing to make reports and discharge other duties.—If any state or county officer shall fail, neglect or refuse to make, file or publish any report, statement or other paper, or to deliver to his successor all books and other property belonging to his office, or to pay over or deliver to the proper person all moneys which come into his hands by virtue or color of his office, or to discharge any duty devolving upon him by virtue of his office and required of him by law, he shall be guilty of a misdemeanor. (Rev., s. 3576; C. S. 4385.)

Cross References.—As to mandamus generally, see §1-511 et seq. As to failure of sheriff to make return, see §14-242. As to embezzlement by officers, see §14-92. As to failure of a county officer to account for public funds, see §§153-47, 109-36, and 109-37.

Injuricus Effect Not Necessary.—The crime exists although no injurious effects result to any individual because of the misconduct of the officer. State v. Glasgow, 1 N. C. 264.

Honesty of Purpose.—There may be neglect without corruption. The truth is, that if the night of an individual or a full defense under this section. Turner v. Mckee, 137 N. C. 251, 254, 49 S. E. 330, and cases there cited.

Enforcing Unconstitutional Law.—An officer is not liable for any misconduct in the discharge of any constitutional statute. State v. Godwin, 123 N. C. 697, 31 S. E. 221.

Liability on Official Bonds.—See sections 109-33 et seq. and notes thereto.

Manager of Elections.—Any conduct of the manager of a primary election for county officials which interferes with the freedom or purity of the election is punishable at common law under this section. State v. Cole, 157 N. C. 618, 72 S. E. 221.

§ 14-232. Swearing falsely to official reports.—If any clerk, sheriff, register of deeds, county com-
missioner, county treasurer, justice of the peace, constable or other county officer shall willfully swear falsely to any report or statement required by law to be made or filed, concerning or touching the county, state or school revenue, he shall be guilty of a misdemeanor. (Rev., s. 3605; Code, s. 731; 1874-5, c. 151, s. 4; 1876-7, c. 276, s. 4; C. S. 4386.)

§ 14-233. Making of false report by bank examiners; accepting bribes.—If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the state prison for not less than four months nor more than ten years. (Rev., s. 3324; 1903, c. 275, s. 24; 1921, c. 4, s. 79; C. S. 4387.)

Editor's Note.—The amendment of this section by Public Laws 1921, c. 4, sec. 79, effected one change. Prior to this amendment the offense was "receiving or accepting" any bribe instead of "keeping or accepting" any bribe as the section now reads. It is easy to see the change that this amendment brings about. By the prior law one was an offender if he received a bribe no matter what his purpose might be. If he received the bribe for the sole purpose of bringing the person offering the bribe to justice, he himself was guilty. Under such law it was hard to ascertain one who would not be guilty who were a bank examiner, for the act that would make the officer guilty of bribery would also make the examiner guilty of receiving a bribe. Now the offense is only the keeping and does not subject a bank examiner to punishment for accepting bribes in an attempt to ascertain and convict crooked bank officials.

§ 14-234. Director of public trust contracting for his own benefit.—If any person, appointed or elected a commissioner or director to receive funds from or for any county, city, town or state may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor. Provided, that this section shall not apply to public officials transacting business with banks or banking institutions in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board. (Rev., s. 3532; Code, s. 1011: R. C., c. 34, s. 38; 1823, c. 1269; 1826, c. 29; 1929, c. 19, s. 1; C. S. 4388.)

Cross Reference.—As to state highway and public works commission selling materials to the commission, see § 136-14.

Editor's Note.—The Act of 1929 added the two provisos at the end of this section.

Effect of Special Validating Act.—Although municipal bonds were sold to a corporation controlled by the mayor, an act passed by the legislature expressly confirming and validating the sale removes all objections based upon the violation of the provisions of this section. Starmount Co. v. Ohio Sav. Bank, etc., Co., 55 F. (2d) 649.

Additional Service. — A member of the board of county commissioners cannot recover for services rendered the board in inspecting a bridge. Davidson v. Guilford County, 152 N. C. 436, 67 S. E. 918.

Officer of City and Corporation.—The prohibition of this section extends to an officer of a corporation in making contracts between the corporation and an undertaking in which he is a commissioner or an alderman. State v. Williams, 153 N. C. 595, 59 S. E. 900.

Contracts between city when an alderman is an employee of the other contracting party are not covered by the section. State v. Weddell, 153 N. C. 587, 68 S. E. 897.

Contracts for Benefit of County.—A sheriff is not guilty of a misdemeanor where he purchases county claims at less than their value, but for the benefit of the county, at the instance of the county commissioners. State v. Garland, 134 N. C. 749, 47 S. E. 426.

§ 14-235. Speculating in claims against towns, cities and the state.—If any clerk, sheriff, register of deeds, county treasurer or other county, city, town or state officer shall engage in the purchasing of any county, city, town or state claim, including teacher's salary voucher, at a less price than its full and true value or at any rate of discount thereon, or be interested in any speculation on any such claim, he shall be guilty of a misdemeanor and shall be fined or imprisoned, and shall be liable to removal from office at the discretion of the court. (Rev., s. 3575; Code, s. 1009; 1868-95, c. 260; 1923, c. 136, s. 208; C. S. 4389.)

Editor's Note.—The amendment of this section by Public Laws 1921, c. 156, sec. 208, added "including teacher's salary voucher," and replaced the words "speculation in any such claim" with "speculation on any such claim."

§ 14-236. Acting as agent for those furnishing supplies for schools and other state institutions.—If any member of any board of directors, board of managers, board of trustees of any of the educational, charitable, eleemosynary or penal institutions of the state, or any member of any board of education, or any county or district superintendent or examiner of teachers, or any trustee of any school or other institution supported in whole or in part from any of the public funds of the state, or any officer, agent, manager, teacher; or employee of such boards, shall have any pecuniary interest, either directly or indirectly, proximately or remotely in supplying any goods, wares or merchandise of any nature or kind whatsoever for any of said institutions or schools; or if any of such officers, agents, managers, teachers or employees of such institution or school or state or county officer shall act as agent for any manufacturer, merchant, dealer, publisher or author for any article of merchandise to be used by any of said institutions or schools, or receive, directly or indirectly, any gift, emolument, reward or promise of reward for his influence in recommending or procuring the use of any manufactured article, goods, wares or merchandise of any nature or kind whatsoever by any of such institutions or schools, he shall be forthwith removed from his position in the public service, and shall upon conviction be deemed guilty of a misdemeanor and fined not less than fifty dollars nor more than five hundred dollars and be imprisoned, in the discretion of the court. (Rev., s. 3833; 1899, c. 735; 1897, c. 543; C. S. 4390.)

Purchase of Property from Company Owned by Wife.—A member of the board of education of a county is not guilty under this section for voting as such member for the purchase of school buses from a company selling them owned by his wife, and in which he had no pecuniary interest and for which he worked upon a salary, when the sale was made by other agents of the company upon a commission basis. State v. Dehnam, 196 N. C. 740, 146 S. E. 857.
§ 14-237. Buying school supplies from interested officer.—If any county board of education or school committee shall buy school supplies in which any member has a pecuniary interest, the membership of any board shall be removed from their positions in the public service and shall, upon conviction, be deemed guilty of a misdemeanor. (Rev., s. 3825; 1901, c. 4, s. 69; C. S. 4391.)

§ 14-238. Soliciting during school hours without permission of school head.—No person, agent, representative or salesman shall solicit or attempt to sell or explain any article of property or proposition to any teacher or pupil of any public school on the school grounds or during the school day without having first secured the written permission of the superintendent, principal or person actually in charge of the school and responsible for it.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1933, c. 220.)

§ 14-239. Allowing prisoners to escape; burden of proof.—If any person charged with a crime or sentenced by the court upon conviction of any offense, shall be legally committed to any sheriff, constable or jailer, or shall be arrested by any sheriff, deputy sheriff or coroner acting as sheriff, being thereof convicted, shall be removed from office, and shall be fined or imprisoned, or both, at the discretion of the court before whom the trial may be had; and in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that the person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence: Provided, that such removal of a sheriff shall not affect his duty or power as a collector of the public revenue, but he shall proceed on such duty and be accountable as if such conviction and removal had not been had. (Rev., s. 3577; Code, s. 1022; R. C. c. 34, s. 32; 1791, c. 343, s. 1; 1905, c. 350; C. S. 4393.)

Cross References.—See also, § 14-257. As to liability for escape under civil process, see § 162-21.

General Consideration.—This is a common law offense. Stambaugh v. Shook, 116 N. C. 587, 19 S. E. 221. The statute contemplates two offenses—negligently permitting or willfully promoting the escape—but charging negligence alone will suffice. State v. McLain, 104 N. C. 694, 10 S. E. 518. The section changes the ordinary rule of the burden of proof by shifting such burden to the defendant. State v. Hunter, 94 N. C. 829; State v. Lewis, 113 N. C. 622, 18 S. E. 69. The question of good faith and diligence of the officer is for the jury. State v. Blockley, 131 N. C. 726, 42 S. E. 569.

Right to Kill to Prevent Escape.—The guard has no authority to kill one convicted of a misdemeanor while fleeing from escape without his offer, threat or menace or show of force in doing so, or anything that would suggest danger to the person of the guard. Holloway v. Moser, 191 N. C. 185, 136 S. E. 395.

Where the escape is due to the negligence of an assistant the only question presented is whether the defendant has exercised due care in his selection. State v. Lewis, 113 N. C. 622, 18 S. E. 69. Cited by Avery, J., concurring in State v. Kittelle, 110 N. C. 580, 573, 15 S. E. 103; Sutton v. Williams, 199 N. C. 546, 155 S. E. 160.

§ 14-240. Solicitor to prosecute officer for escape.—It shall be the duty of solicitors, when they shall be informed or have knowledge of any felony, or person otherwise charged with any crime or offense against the state, having within their respective districts escaped out of the custody of any sheriff, deputy sheriff, coroner, constable or jailer, to take the necessary measures to prosecute such sheriff or other officer so offending. (Rev., s. 2882; Code, s. 1033; R. C. c. 34, s. 36; 1791, c. 343, s. 2; C. S. 4394.)

§ 14-241. Disposing of public documents or refusing to deliver them over to successor.—It shall be the duty of the clerk of the superior court of each county, and every other person to whom the acts of the general assembly, supreme court reports or other public documents are transmitted or delegated the use of the county or the state, to keep the same safely in their respective offices; and if any such person having the custody of such books and documents, for the uses aforesaid, shall negligently and willfully dispose of the same, by sale or otherwise, or refuse to deliver over the same to his successor in office, he shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, or both, at the discretion of the court. (Rev., s. 3598; Code, s. 1073; 1881, c. 151; C. S. 4395.)

§ 14-242. Failing to return process or making false return.—If any sheriff, constable or other officer, whether state or municipal, or any person who shall presume to act as any such officer, not being by law authorized so to do, refuse or neglect to return any precept, notice or process, to him tendered or delivered, which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to anyone who will sue for the same one hundred dollars, and shall moreover be guilty of a misdemeanor. (Rev., s. 3604; Code s. 1112; R. C. c. 34, s. 118; 1818, c. 980, s. 3; 1827, c. 20, s. 4; C. S. 4396.)

Cross Reference.—See also, § 163-14 and annotation thereto.

Civil Process.—This section applies to failure to return civil as well as criminal process. State v. Berry, 169 N. C. 371, 83 S. E. 387, overruling Mig. Co. v. Buxton, 105 N. C. 777; N. C. 34, s. 1182; 1818, c. 980. An officer is not subject to the penalty under this section for declining to receive process that could not be served. State v. Brown, 119 N. C. 827, 25 S. E. 830.

Process That Could Not Be Served.—An officer is not subject to the penalty under this section for declining to receive process which, at the time it was tendered, he could not have executed. Pentress v. N. C. Brown, 61 N. C. 213.


§ 14-243. Failing to surrender tax-list for inspection and correction.—If any sheriff or tax collector shall refuse or fail to surrender his tax-list for inspection or correction upon demand by the authorities imposing the tax, or their successors in office, he shall be guilty of a misdemeanor, and shall be imprisoned not more than five years, and fined not exceeding one thousand dollars, at the discretion of the court. (Rev., s. 3788; Code, s. 3823; 1870-1, c. 177, s. 2; C. S. 4397.)

§ 14-244. Failing to file report of fines or penalties.—If any officer who is by law required to file any report or statement of fines or penalties with the county board of education shall fail so to
§ 14-245. Justices of the peace soliciting official business or patronage.—If any justice of the peace shall solicit official business, and/or patronage for his or her office, he or she shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court. (1935, c. 58.)

§ 14-246. Failure of ex-justice of the peace to turn over books and papers.—If any justice of the peace, on expiration of his term of office, or if any personal representative of a deceased justice of the peace shall, after demand upon him by the clerk of the superior court, willfully fail and refuse to deliver to the clerk of the superior court all dockets, all law and other books, and all official papers which came into his hands by virtue or color of his office, he shall be guilty of a misdemeanor. (Rev., s. 3578; Code, ss. 828, 839; 1885, c. 402; C. S. 4399.)


§ 14-247. Private use of publicly owned vehicle.—It shall be unlawful for any officer, agent or employee of the State of North Carolina, or of any county or of any institution or agency of the State, to use for any private purpose whatsoever any motor vehicle of any type or description whatsoever belonging to the State, or to any county, or to any institution or agency of the State. (1925, c. 239, s. 1.)

§ 14-248. Obtaining repairs and supplies for private vehicle at expense of State.—It shall be unlawful for any officer, agent or employee to have any privately owned motor vehicle repaired at any garage belonging to the State or to any county, or any institution or agency of the State, or to use any tires, oils, gasoline or other accessories purchased by the State, or any county, or any institution or agency of the State, in or on any such private car. (1925, c. 239, s. 2.)

§ 14-249. Limitation of amount expended for vehicle.—It shall be unlawful for any officer, agent, employee or department of the State of North Carolina, or of any county, or of any institution or agency of the State, to expend from the public treasury an amount in excess of fifteen hundred dollars ($1,500) for any motor vehicle other than motor trucks; except upon the approval of the Governor and Council of State: Provided, that nothing in §§ 14-247 through 14-251 shall apply to the purchase, use or up-keep or expense account of the car for the executive mansion and the Governor. (1925, c. 239, s. 5.)

§ 14-250. Publicly owned vehicle to be marked.—It shall be the duty of the executive head of every department of the State Government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement with letters of not less than three inches in height, that such car belongs to the State, or to some county, or institution or agency of the State, and that such car is "for official use only." Provided, however, that no automobile used by any officer or official in any county in the State for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be so lettered. (1925, c. 239, s. 4; 1929, c. 303, s. 1.)

Editor's Note.—The 1929 amendment added the proviso at the end of this section.

§ 14-251. Violation made misdemeanor.—Any person, firm or corporation violating any of the provisions of sections 14-247 to 14-250 shall be guilty of a misdemeanor, and punished by a fine of not less than one hundred dollars ($100), nor more than one thousand dollars ($1,000), or imprisonment in the discretion of the court. Nothing in §§ 14-247 through 14-251 shall apply to the purchase, use or up-keep or expense account of the car for the executive mansion and the Governor. (1925, c. 239, s. 5.)

§ 14-252. Five preceding sections applicable to cities and towns.—Sections 14-247 through 14-251 in every respect shall also apply to cities and incorporated towns. (1931, c. 31.)

Art. 32. Misconduct in Private Office.

§ 14-253. Failure of certain railroad officers to account with successors.—If the president and directors of any railroad company, and any person acting under them, shall, upon demand, fail or refuse to account with the president and directors elected or appointed to succeed them, and to transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, they shall be guilty of a felony, and shall be punished by imprisonment in the state's prison for not less than one nor more than five years, and be fined at the discretion of the court. All persons conspiring with any such president, directors or their agents to defeat, delay or hinder the execution of the section shall be guilty of a misdemeanor, and shall be punished in like manner. The governor is hereby authorized, at the request of the president, directors and other officers of any railroad company, to make requisition upon the governor of any other state for the apprehension of any such president failing to comply with this section. (Rev., s. 3760; Code, ss. 2001, 2002; 1870-1, c. 72, ss. 1-3; C. S. 4400.)

Cross Reference.—As to duty of railroad officials to account to successors, see § 115-174.

Not Applicable to Tax Bond.—As this section has reference only to money, books, choses, etc., an indictment can not be sustained against a former president of a railroad, for refusing to transfer to his successor in office certain special tax bonds. State v. Jones, 67 N. C. 210.

§ 14-254. Malfeasance of corporation officers and agents.—If any president, director, cashier, teller, clerk or agent of any corporation shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false

[ 679 ]
entry in any book, report or statement of the cor-
poration with the intent in either case to injure or
defraud or to deceive any officer of the corpora-
tion, or if any person shall aid and abet in the
doing of any of these things, he shall be guilty of a
felony, and upon conviction shall be imprisoned in
the state’s prison for not less than four months
nor more than fifteen years, and likewise fined, at
the discretion of the court. (Rev., s. 3325; 1903,
c. 275, s. 15; C. S. 4401.)

Cross Reference.—As to misapplication of funds by bank
officers, see § 55-129.

Art. 33. Prison Breach and Prisoners.

§ 14-255. Escape of hired prisoners from cus-
tody.—If any prisoner, who shall be removed from
the prison of the respective counties, cities and
towns under the law providing for the hiring out of
prisoners by counties and towns, shall escape from
the person or company having him in custody, he
shall be guilty of a misdemeanor, and shall be im-
prisoned at hard labor not more than thirty days,
or fined not more than fifty dollars. (Rev., s.
3658: Code, s. 3455; 1876-7, c. 196, s. 4; C. S.
4403.)

Cross Reference.—As to power of counties, cities and towns
to hire out prisoners, see §§ 153-191 to 153-193.

§ 14-256. Prison breach and escape.—If any
person shall break prison, being lawfully confined
therein, or shall escape from the custody of any
superintendent, guard or officer, he shall be guilty
of a misdemeanor. (Rev., s. 3657; Code, s. 1021;
R. C. c. 34, s. 19; 1 Edw. II, st. 2d; 1909, c.
872; C. S. 4404.)

Cross Reference.—As to penalty for escaping or assisting
in an escape from the state prison, see § 148-45.

At Common Law.—The offense of breaking jail was a
felony at common law, but by this section, all cases, no
matter what the person is confined for, are reduced to

Escape from Officer.—This section applies only to breaking
prison and escaping therefrom and does not, because of
its wording, include escape from an officer before being con-

Cost of Recapture May Not Be Recovered from Prisoner.

The state may not recover of a prisoner monies expended
by it to recapture him after escape from custody, since the
offense does not involve any property right of the state, but
the expenditures is voluntary and made by it for
the protection of the people of the state in preserving
the integrity of the penal system. State Highway, etc.,

Cited in Holloway v. Moser, 193 N. C. 185, 136 S. E. 375.

§ 14-257. Permitting escape of or maltreating
hired convicts.—If any person charged in any way
with the control or management of convicts,
hired for service outside of the state’s prison, shall
negligently permit them to escape, or shall mal-
treat them, he shall be guilty of a misdemeanor;
but this provision shall not be held to relieve any
person from any criminal liability. (Rev., s.
3659: Code, s. 3450; 1881, c. 127, s. 2; C. S. 4403.)

Cross Reference.—As to escape of prisoners from neg-
ligent officer’s custody, see § 14-239.

Negligence Test of Guilt.—Officers and public agents
will not be held to the rigorous common-law rule of responsibil-
ity for the custody of convicts employed in labs outside of
the Penitentiary, actual negligence being the test of guilt.
State v. Johnson, 94 N. C. 924.

Negligence Implied.—It is not necessary to prove negligence
of the person having lawful custody of prisoners, for it is
implied, unless occasioned by the act of God, or irresistible

Cited in State v. Sneed, 94 N. C. 806, 809.

§ 14-258. Conveying messages and weapons to
or trading with convicts and other prisoners.—If
any person shall convey to or from any convict
any letters or oral messages, or shall convey to
any convict or person imprisoned, charged with
crime and awaiting trial any weapon or instrument
by which to effect an escape, or that will aid him
in an assault or insurrection, or shall trade with
a convict for his clothing or stolen goods, or shall
sell to him any article forbidden by prison
rules, he shall be guilty of a misdemeanor: Pro-
vided, that when a murder, an assault or an escape
is effected with the means furnished, the person
convicted of furnishing the means shall be sen-
tenced to not less than four years, nor more than
fifteen years, and likewise fined, at
the discretion of the court. (Rev., s. 3662: Code, s. 3450;
1873-4, c. 158, s. 12; 1911, c. 11; C. S. 4406.)

Cross Reference.—As to furnishing prisoners with intox-
cating liquors, narcotics, and fire arms, see § 14-390.

§ 14-259. Harboring or aiding escaped prisoners.

It shall be unlawful for any person know-
ning, or having reasonable cause to believe, that
any other person has escaped from any prison,
jail, reformatory, or from the criminal insane de-
partment of any state hospital, or from the cus-
tody of any peace officer who had such person in
charge, or that such person is a convict or pris-
oner whose parole has been revoked, to conceal,
hide, harbor, feed, clothe, or offer aid and com-
fort in any manner to any such person.

Every person who shall conceal, hide, harbor,
feed, clothe, or offer aid and comfort to any other
person in violation of this section shall be guilty
of a felony, if such other person has been con-
victed of, or is charged with, any crime which, if
charged against him would have been punished in
the state prison not more than five years; and
shall be guilty of a misdemeanor, if such other
person had been convicted of, or was in custody
upon a charge of a misdemeanor, and shall be
punished in the discretion of the court.

The provisions of this section shall not apply to
members of the immediate family of such es-
cape. For the purposes of this section “imme-
diate family” shall be defined to be the mother,
father, brother, sister, wife, husband and child
of said escapee. (1939, c. 72.)

Editor’s Note.—For comment on this enactment, see 17 N.
C. Law Rev. 368.

§ 14-260. Injury to prisoner by jailer.—If the
keeper of a jail shall do, or cause to be done,
any wrong or injury to the prisoners committed
to his custody, contrary to law, he shall not only
pay treble damages to the person injured, but
shall be guilty of a misdemeanor. (Rev., s.
3661: Code, s. 3463; R.-C., c. 87, s. 8; 1795, c.
453, s. 5; C. S. 4407.)

Cross Reference.—As to the degree of protection against
violence allowed the jailer in the state prison system, see
§ 148-46.

Evidence Sufficient for Jury.—Evidence that the plain-
tiff’s thumb had inadvertently been placed against the door
jamb when jailer started to close door of cell, and that
when plaintiff pushed against the door to release his thumb
the plaintiff pushed the door shut with his shoulder, thereby
cutting off plaintiff’s thumb, is sufficient to be submitted
to the jury on the issue of the jailer’s negligent injury to
the plaintiff. Davis v. Moore, 215 N. C. 492, 2 S. E. (2d)
366.

§ 14-261. Confining prisoners to improper apart-
ments.—If the sheriff or jailer shall wantonly or
unnecessarily confine those committed to his cus-
tody in any apartment, other than that provided
[ 680 ]
and designated by law for persons of the descrip-
tion of the prisoner, he shall be guilty of a misde-
meanor. (Rev., s. 3660; Code, s. 3471; R. C., c. 87,
s. 16; 1795, c. 433, s. 4; C. S. 4408.)

Cross Reference.—As to apartments for prisoners, see § 153-31.

§ 14-262. Requiring female prisoners to work in chain-gang.—If any officer, either judicial, execu-
tive or ministerial, shall order or require the work-
ning of any female on the streets or roads in any

group or chain-gang in this state, he shall be
deemed guilty of a misdemeanor. (Rev., s. 3596;
1897, c. 270; C. S. 4409.)

§ 14-263. Classification and commutation of
time for prisoners other than state prisoners.—
The board of county commissioners, or such gov-
erning body as may have charge of prisoners in
any county, city or town in the State of North
Carolina, shall divide all prisoners into three
classes, or grades, as follows:

In the first class shall be included all those
prisoners who have not as yet given evidence that
they will, or who it is believed will observe the rules
and regulations and work diligently and are likely
to maintain themselves by honest industry after their
discharge. These shall be known as Grade A
prisoners and shall receive a commutation of their
sentences at the rate of one hundred and four days
for each year served.

In the second class shall be included those pris-
oners who have not as yet given evidence that
they can be trusted entirely, but are reasonably
obedient to the rules and regulations. These shall
be known as Class B prisoners and shall receive a
commutation of their sentences of seventy-eight
days for each year served.

In the third class shall be those prisoners who
have demonstrated that they are incorrigible, have
no respect for the rules and regulations and se-
riously interfere with the discipline and the effec-
tiveness of the labor of the other prisoners. Such
prisoners shall receive no commutation of their
sentences.

All prisoners shall be admitted into Class B
except where it is known by the superintendent
of the prison that a prisoner is serving for a sec-
ond offense. In such cases the superintendent
may put the prisoner in Class C in his discretion.

Prisoners of Class A shall be known as honor
prisoners and shall be worked in the discretion of the
superintendent of the prison without guards.
When in prison camps or in any other place of
detention they may not be chained or under armed
guards.

Prisoners in Class B shall be under guard and
may or may not be chained in the discretion of the
superintendent.

Prisoners in Class C shall wear chains during
the day or night as in the opinion of the superin-
tendent may be necessary.

Preference in assignment of work shall be given
Class A prisoners.

The purpose of §§ 14-263 through 14-265 is to
unify the regulations pertaining to county prison-
ers and to encourage industriousness among the
prisoners. (1927, c. 178, s. 1; 1937, c. 88, s. 2.)

Editor’s Note.—The mandatory provisions of this section
with reference to the use of stripes were repealed by Public
Laws 1937, c. 88, s. 2.

§ 14-264. Record to be kept; items of record.—
The superintendent or other person having charge
of prisoners shall keep a record showing, the name,
age, date of sentence, length of sentence, crime
for which convicted, home address, next of kin,
and the conduct of each prisoner received. (1927,
c. 178, s. 2.)

§ 14-265. Commutation of sentences for Sun-
day work.—All prisoners in the State’s Prison,
or in any county jail or county convict camp,
who shall be assigned to regular work which re-
quires the performance of the same, or substan-
tially the same duties on Sundays as on other
days of the week, shall be allowed a commutation
of their sentences for each Sunday, or fractional
part of a Sunday on which they shall be required
to perform the duties of the task assigned to
them. The commutation of sentence provided for
in this section shall be in addition to all other
commutations of sentence allowed such prison-
ers under existing statutes and laws of the State.
(1931, c. 198, s. 1.)

Art. 34. Custodial Institutions.

§ 14-266. Persuading inmates to escape.—It
shall be unlawful for any parent, guardian, brother,
sister, uncle, aunt, or any person whatsoever to
persuade or induce to leave, carry away, or ac-
company from any state institution, except with
the permission of the superintendent or other per-
son next in authority, any boy or girl, man or
woman, who has been legally committed or ad-
mitted under suspended sentence to said institu-
tion, by juvenile, recorder’s, superior, or any other
court of competent jurisdiction. (1935, c. 307, s.
1; 1957, c. 189, s. 1.)

Editor’s Note.—The 1937 amendment included within the
provisions of this and the following section inmates who have
been "admitted under suspended sentence." Apparently,
there was a loophole in the old law. 15 N. C. Law Rev.,
p. 341.

§ 14-267. Harboring fugitives.—It shall be un-
lawful for any person to harbor, conceal, or give
sucor to, any known fugitive from any institu-
tion whose inmates are committed by court or are
admitted under suspended sentence. (1935, c. 307,
s. 2; 1937, c. 189, s. 2.)

Editor’s Note.—See note under § 14-266.

§ 14-268. Violation made misdemeanor.—Any
person violating the provision of this article, shall
be guilty of a misdemeanor, and fined or im-
prisoned, in the discretion of the court. (1935, c.
307, s. 3.)

SUBCHAPTER IX. OFFENSES AGAINST
THE PUBLIC PEACE.

Art. 35. Offenses against the Public Peace.

§ 14-269. Carrying concealed weapons.—If any
one, except when on his own premises, shall carry
concealed about his person any bowie-knife, dirk,
dagger, slug shot, loaded cane, brass, iron or
metallic knuckles or razor or other deadly weapon
of like kind, he shall be guilty of a misdemeanor,
and shall be fined or imprisoned at the discretion
of the court. If any one, except on his own pre-
misises, shall carry concealed about his person any
pistol or gun, he shall be guilty of a misdemeanor
and shall be fined not less than fifty dollars, nor
more than two hundred dollars, or imprisoned
or submission the deadly weapon with reference
not less than thirty days nor more than two years,
ply to the following persons: officers and soldiers
any one, not being on his own lands, shall have
concealment thereof. This section shall not ap-
destroyed by the judge presiding at the trial. If
§ 14-269

local modification—Caswell: 1941, c. 90; Durham: 1923, c. 67; Franklin: 1923, c. 57; Ex. sess. 1924, c. 30; 1929, c. 51, 224; C. S. 4410.)
cross references.—as to tramps carrying weapons, see § 14-199. as to going armed on Sunday, see § 103-2.
edit note.—The construction of this section has fre-
time been before the court but the power of the legislature
to prescribe the rules of evidence and fix the burden of
proof to the extent herein dictated has never been questioned.
Publie laws, 1929, c. 224, added the qualifying clause, ap-
parring in the last sentence, which follows the reference to
soldiers and sailors and reads "when in discharge of offi-
cial duties," etc.

inserted: butcher knife.—The act of assembling making it
indictable for one to carry concealed about his person any
"pistol, bowie knife, razor or other deadly weapon of like

concealment is gist of offense.—The mischief provided
against, is the practice of wearing weapons concealed about
his person or on any premises, State v. Brown, 91 N. C. 545; 121 N. C. 493.
The intent to carry, not the intent to
use, determines the guilt. State v. Reams, 121 N. C. 555, 27 S. E. 1004. But the weapon carried must be concealed.
State v. Mangum, 187 N. C. 477, 121 S. E. 765.

To conceal a weapon means something more than the mere
act of having it where it may be seen, State v. Brown, 125 N. C. 713, 27 S. E. 1004. But the weapon carried
must be concealed, State v. Bridgers, 169 N. C. 309, 34 S. E. 549.

Concealment is Gist of Offense.—The mischief provided
against, is the practice of wearing weapons concealed about
his person or on any premises, State v. Brown, 91 N. C. 545; 121 N. C. 493.
The intent to carry, not the intent to
use, determines the guilt. State v. Reams, 121 N. C. 555, 27 S. E. 1004. But the weapon carried must be concealed.

The presence of a pistol by one on the premises of
another is not alone sufficient to make him guilty of
concealing a weapon in violation of this section, although the stat-
ute makes such possession prima facie evidence of the con-

Same—Weapon on Person Prima Facie Evidence.—The fact
that a defendant had a pistol about his person, off of his own
premises, was prima facie evidence of concealment, which
shifted the burden of proof as to whether or not the defendant

Justification of a violation of the statutory offense, but in
violation of this section. State v. Bridgers, 169 N. C. 309, 34 S. E. 549.

Same—Concealment Question for Jury.—Whether, in a
given case, the weapon is concealed from the public and such
presumption of guilty intent is rebutted by the mode of carry-
ing the weapon, are questions for the jury. State v. Reams, 121 N. C. 556, 27 S. E. 1004. See also State v. Lilly, 116 N. C. 1099, 21 S. E. 453.

Carrying on Own Premises.—The use of the words, "on his own premises," and not being "on his own lands," in this sec-
tion, shows an intention to restrict the right to carry con-
cealed weapons to those who are in the privacy of their own
premises and not where they are away from the neighborhood
of the public, nor tempted, on a sudden quarrel, to use the great

Servant on Employer's Premises.—A mere servant
or hireling who carries concealed weapons on the premises of
his employer is indictable. State v. Deyton, 119 N. C. 880, 26 S. E. 549.

Warrant Must State Defendant Carried Weapon Off His
Own Premises.—In prosecution for carrying a concealed
weapon, the warrant is held fatally defective in failing to
embrace in the charge the essential element of the offense
that the weapon was carried concealed by defendant off
his own premises, the warrant itself excluding the charge that
the weapon was carried concealed by defendant. In an uncontroverted case, the weapon was a concealed weapon on

Illustrations.—Not on Person but Within Reach.—The lan-
guage of the statute is, not "concealed on his person," but "concealed about his person, etc." The weapon carried
must be concealed. State v. Perry, 120 N. C. 580, 26 S. E. 915, 1931, A. S. 18c. 52.

Same—Pistol in Coat on Shoulder.—Upon evidence tending
to show that the defendant had a pistol with the butt end
projecting above his hip pocket, and with his coat off and

Same—Apprehension of Assault.—Carrying concealed weap-
ons in reasonable apprehension of deadly assaults is not
justification of a violation of the statutory offense, but in
aggravation thereof, and may be considered by the trial judge
in imposing the sentence, according to the discretion given
him herein by this section. State v. Woodiel, 172 N. C. 585, 190 S. E. 137.

Same—Acting upon Advice of Attorney.—A person acting
in ignorance of the law in good faith and upon advice of the
clerk of the court or of an attorney, but in violation of this
section, is not to be excused. State v. Simmons, 143 N. C. 613, 56 S. E. 701.

Exceptions.—Necessity of Being in Performance of Duties.
—In order to come within the exception of this section, the
defendant, acting upon advice of his attorney, must have been
in the actual performance of his duties at the time. State v.
Simmons, 143 N. C. 613, 56 S. E. 701.

Same—Officials of Transportation Companies.—The ex-
ception in this section does not apply to the officials of cor-
rporations, such as turnpikes, railroads and others, which
invite the public to use their lines of travel. State v. Perry,
120 N. C. 580, 26 S. E. 915, 1931, A. S. 18c. 52.

Same—Irritants.—A United States mail carrier is indictable under this section for carrying a con-
cealed weapon while carrying the mail and while returning
to his home after delivering the mail. State v. Boone, 132 N. C. 1107, 56 S. E. 701.

Same—Night Watchman.—A private night watchman is not guity of carrying a concealed weapon, under this sec-
tion, while on duty upon the premises he is employed to

Jurisdiction.—The superior court does not acquire juris-
diction over a prosecution for carrying a concealed

Former Conviction of Assault.—A conviction of assault
with a deadly weapon will not sustain a plea of former con-
viction in a subsequent trial for carrying a concealed
§ 14-270. Time Not Essence of Offense.—Time is not the essence of the offense of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. State v. Spencer, 185 N. C. 765, 117 S. E. 803.

§ 14-271. Engaging in and betting on prize fights.—If any person shall send, accept or bear a challenge to fight a duel, though no death ensue, he, and all such as counsel, aid and abet him, shall be guilty of a misdemeanor, and shall, moreover, be ineligible to any office of trust, honor or profit in the state, the pardon or reprieve notwithstanding. (Rev., s. 3628; Code, s. 1012; K. C., c. 34, s. 48; 1802, c. 609, s. 1; C. S. 4411.)

Cross Reference.—As to killing adversary in duel, see § 14-23.

§ 14-272. Disturbing picnics, entertainments and other meetings.—If any person shall wilfully interrupt or disturb any picnic, excursion party, school entertainment, political meeting, or any meeting or other organization whatsoever lawfully and peaceably held, either at, within or without the place where such meeting or school is held, or injure any person present, and for-
to represent to any person that they are duly authorized peace officers, and acting upon such representation to arrest any person, search any building, or in any way impersonate a peace officer or act in accordance with the authority delegated to duly authorized peace officers. Nothing in this section shall be construed to prohibit a private citizen in whose presence a felony has been committed from arresting such person or persons participating in the commission of said felony when such arrest is deemed necessary, or to prohibit any private citizen in whose presence an act, which would constitute a breach of the peace and for which an indictment would lie, is committed from arresting such person or persons committing said breach of the peace when such arrest is deemed necessary. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction may be fined or imprisoned at the discretion of the court. (1927, c. 229.)

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

Art. 36. Offenses against the Public Safety.

§ 14-278. Malicious injury of property of railroads and other carriers; causing death or other physical injury thereby.—If any person shall willfully and maliciously put or place any matter or thing upon, over or near any railroad track; or shall willfully and maliciously destroy, injure or remove the road-bed, or any part thereof, or any rail, sill or other part of the fixture appurtenant to or constituting or supporting any portion of the track of such railroad; or shall willfully and maliciously do any other thing with intent to obstruct, stop, hinder, delay or displace the cars traveling on such road, or to stop, hinder or delay the passengers or others passing over the same; or shall willfully and maliciously injure the road-bed or the fixtures aforesaid, or any part thereof, with any other intent whatsoever, such person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars nor less than two hundred dollars, and be imprisoned in the state's prison or county jail not less than four months nor exceeding one thousand dollars nor less than two hundred dollars, and be imprisoned in the state's prison for time of not less than three nor more than seven years. If it shall happen that by reason of the commission of the offenses aforesaid, or any of them, any engine or car shall be displaced from the track, or shall be stopped, hindered or delayed, so that any one thereby be instantly killed, or so wounded or hurt as to die therefrom within twelve calendar months thereafter, or shall thereby be maimed or disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aids and abettors, shall be imprisoned not less than ten years, and shall be imprisoned in the state's prison, at the discretion of the court. (Rev., s. 3754; Code, s. 1099; R. C., c. 34, s. 101; C. S. 4417.)

§ 14-279. Injuring without malice property of railroads and other carriers; causing death or other physical injury thereby.—If any person, unlawfully, and on purpose, but without malice, shall commit any of the offenses mentioned in § 14-278, he shall be guilty of a misdemeanor. If it shall happen that by reason of the commission of any such offense any person shall be instantly killed, or so wounded or hurt as to die therefrom, in twelve calendar months thereafter, or shall thereby be maimed or disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aids and abettors, shall be imprisoned not less than ten years, and shall be imprisoned in the state's prison, at the discretion of the court. (Rev., s. 3755; Code, s. 1109; R. C., c. 34, s. 101; C. S. 4418.)

§ 14-280. Shooting or throwing at trains or passengers.—If any person shall willfully and unmannerly, cast, throw or shoot any stone, rock, bullet, shot, pellet or other missile at, against, or into any railroad car, locomotive or train, or any person thereon, while such car or locomotive shall be in progress from one station to another, or while such car, locomotive or train shall be stopped for any purpose, the person so offending shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment in the county jail or state's prison, at the discretion of the court. (Rev., s. 3763; Code, s. 1100; 1877, c. 10; 1876-7, c. 1; 1911, c. 179; C. S. 4449.)

Intent a Question for Jury.—Where a defendant was indicted, for shooting at a train, with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted. State v. Barbee, 92 N. C. 182.

Proof that Gun was Loaded Unnecessary.—If a gun be unloaded and this is relied on as a defense, in an action for shooting at a train, the fact must be shown by the defendant. State v. Hinson, 82 N. C. 597.

Proof of Conspiracy.—Upon trial for throwing stones at a train, it is not necessary to show a conspiracy. It appearing that the several defendants were not only present, but threw stones at different coaches of the same train. State v. Holder, 153 N. C. 606, 69 S. E. 66.

The Indictment.—Upon a trial for throwing stones at a train, a charge in the bill that it was done "from one station to another" follows the form set out in the statute, and is not void for vagueness and uncertainty. It is not necessary that the indictment contain the word "feloniously." State v. Holder, 153 N. C. 606, 69 S. E. 66.

But it must charge that the train was in actual motion or stopped for a temporary purpose. State v. Boyd, 8 N. C. 450.

§ 14-281. Operating trains and street cars while intoxicated.—Any train dispatcher, telegraph operator, engineer, fireman, flagman, brakeman, switchman, conductor, motorman, or other employee of any steam, street, suburban or interurban railway company, who shall be intoxicated while engaged in running or operating, or assisting in running or operating, any railway train, shifting-engine, or street or other electric car, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court. (Rev., s. 3758; Code, s.
§ 14-283. Displaying dynamite cartridges and bombs. — If any person shall fire off or explode, or cause to be fired off or exploded, except for mechanical purposes in a legitimate business, any dynamite cartridge, bomb or other explosive of a like nature, he shall be guilty of a misdemeanor. (Rev., s. 3794; 1887, c. 364, s. 53; C. S. 4423.)

Cross References. — As to burglars with explosives, see § 14-57. As to willful injury with explosives, see § 14-49.

§ 14-284. Keeping for sale or selling explosives without a license. — If any dealer or other person shall sell or keep for sale any dynamite cartridges, bombs or other combustibles of a like kind, without a license for that purpose, he shall be guilty of a misdemeanor. (Rev., s. 3817; 1887, c. 364, ss. 1, 4; C. S. 4425.)

§ 14-285. Failing to enclose marl beds. — If any person shall open any marl bed without surrounding it with a lawful fence, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, this shall not apply to any person whose marl bed is situated inside his own inclosure. (Rev., s. 3796; 1887, cc. 225, 268; C. S. 4422.)

Cited in Wells v. Sherrin, 217 N. C. 534, 8 S. E. (2d) 830 (dissenting opinion).

§ 14-286. Giving false fire alarms; molesting fire alarm system. — It shall be unlawful for any person or persons to wantonly and willfully give or cause to be given, or to advise, counsel, or aid and abet any one in giving a false alarm of fire, or to break the glass key protector, or to pull the slide, arm, or lever of any station or signal box of any municipal fire alarm system, except in case of fire, or in any way to willfully interfere with, damage, deface, molest, or injure any part or portion of the fire alarm system of any municipality. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 46; C. S. 4426(a).)

§ 14-287. Leaving unused well open and exposed. — It shall be unlawful for any person, firm or corporation, after discontinuing the use of any well, to leave said well open and exposed; said well, after the use of same has been discontinued, shall be carefully and securely filled: Provided, that this shall not apply to wells on farms that are protected by curbing or board walls. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court. (1923, c. 125; C. S. 4426(c).)

Editor's Note. — This section is said to be a sensible regulation in 1 N. C. Law Rev. 350. Cited in Wells v. Sherrin, 217 N. C. 534, 8 S. E. (2d) 820.

§ 14-288. Unlawful to pollute any bottles used for beverages. — It shall be unlawful for any person, firm or corporation having custody for the purpose of sale, distribution or manufacture of any beverage bottle, to place, cause or permit to be placed therein turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material, or to send, ship, return and deliver or cause or permit to be sent, shipped, returned or delivered to any producer of beverages, any bottle used as a container for beverages, and containing any turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined on the first offense, one dollar for each bottle so defiled, and for any subsequent offense not more than ten dollars for each bottle so defiled. (1929, c. 324, s. 1.)

Cross Reference. — As to destruction or taking of soft drink bottles, see § 14-86.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Art. 37. Lotteries and Gaming.

§ 14-289. Advertising lotteries. — If any one, by writing or printing or by circular or letter or in any other way, advertise or publish an account of a lottery, whether within or without this state, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or how it may be obtained, he shall be guilty of a misdemeanor. (Rev., s. 3725; 1887, c. 211; C. S. 4427.)

See the discussion in § N. C. Law Rev. 31.

§ 14-290. Dealing in lotteries. — If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person shall, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a misdemeanor, and shall be fined not exceeding two thousand dollars or imprisoned not exceeding six months, or both, in the discretion of the court. Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets, bottle crowns, bottle caps, seals on containers, other devices or certificates sold for that purpose, shall be held liable to prosecution under this section. Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section.
§ 14-291. Selling “numbers” tickets; possession prima facie evidence of violation.—If any person shall sell, barter or cause to be sold or bartered, any ticket, token, certificate or order for any number or shares in any lottery, commonly known as the numbers or better and egg lottery, or lotteries of similar character, to be drawn or paid within or without the state, such person shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, or both, in the discretion of the court. Any person who shall have in his possession any tickets, tokens, certificates or orders used in the operation of any such lottery shall be guilty under this section, and the possession of such tickets shall be prima facie evidence of the violation of this section. (1943, c. 550.)

§ 14-292. Gambling.—If any person play at any game of chance at which any money, property or other thing of value is bet, whether the same be in store or not, both those who play and those who bet thereon shall be guilty of a misdemeanor. (Rev., s. 3715; 1891, c. 29; C. S. 4430.)

Cross Reference.—As to gaming contracts, see § 16-1 et seq.

See 11 N. C. Law Rev. 246, for reference to acts legalizing pari-mutuel race track betting.

In General.—Betting is essential to the offense; playing without bet is not indictable. State v. Brennen, 33 N. C. 379. The mere fact that one game is played does not mean that every game played here there is no betting. State v. DeBoy, 117 N. C. 702, 23 S. E. 167. Tenpins is not a game of chance. State v. King, 133 N. C. 551, 44 S. E. 169.


Calling Transaction a Raffle.—Where several parties each put up a piece of money and then decide, by throwing dice, who shall have the aggregate sum or “pool,” the game is a “raffle.” State v. DeBoy, 117 N. C. 702, 23 S. E. 167. The aggregate sum put up may be divided into shares, and the game is still a “raffle.” State v. DeBoy, 117 N. C. 702, 23 S. E. 167.

“Raffle” is included within the category of “gaming” or “gambling.” The word “game” is very comprehensive and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. Let a stake be laid on the chance of a game, and it is gaming. State v. Brown, 221 N. C. 301, 20 S. E. (2d) 286. Betting on horse racing, or on other sort of race, is an offense against the criminal law. The fact that the race itself is one of skill and endurance on the part of the jockey and his mount does not confer immunity upon those who wager on its result. Id.

Ordinances as to Gambling Void.—Gambling being an offense under the general law of the state, any covering the same subject is void. State v. McCoy, 116 N. C. 1059, 21 S. E. 690.

Sufficiency of Indictment.—An indictment charging defendant with being an operator of a house of gambling, or with maintaining a gambling house is sufficient, though it is not alleged that the games played there were games of chance, or that they were played at a place or places where games of chance were played. State v. Morgan, 133 N. C. 745, 45 S. E. 1033.

§ 14-293. Allowing gambling in houses of public entertainment; duty of police officers; penalty.—If any keeper of an ordinary or other house of entertainment, or of a house wherein liquors are dealt or sold, shall knowingly allow any game, at which money or property, or anything of value, is bet, whether the same be in store or not, to be
played in any such house, or in any part of the premises occupied therewith; or shall furnish persons so playing or betting either on said premises or elsewhere with drink or other thing for their comfort or subsistence during the time of play, he shall be guilty of a misdemeanor, and shall be fined not less than five hundred dollars and be imprisoned not less than six months. Any person who shall be convicted under this section shall, upon such conviction, forfeit his license to do any of the businesses mentioned in this section, and shall be forever debarred from doing any of such businesses in this state. The court shall embody in its judgment that such person has forfeited his license, and no board of county commissioners, board of town commissioners or board of aldermen shall thereafter have power or authority to grant to such convicted person or his agent a license to do any of the businesses mentioned herein. It shall be the duty of every police officer of the cities, towns and villages of this state to make diligent inquiry and to exercise constant watchfulness to discover whether any of the offenses enumerated in this section are being committed, and to report once a week under oath to the mayor or other chief officer of his city, town or village, whether such offenses are being committed, and all the facts within his knowledge, or of which he has information relating thereto. If any such police officer shall know or have information that such offenses are being committed and shall fail or neglect to report the same to such mayor or other chief officer, together with all the information known to him, as to the person or persons committing the same, the time and place where such offenses are committed, the names of such witnesses thereto, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court, and shall forfeit his office. It shall be the duty of such mayor or other chief officer to require the report herein provided for, and to require that the same shall be verified by the oath of such policeman, and if it appear upon such report that any of the said offenses have been committed, it shall be the duty of such mayor or other chief officer to issue his warrant for the arrest of the offender. Any such mayor or other chief officer of any city, town or village who shall fail or neglect to require or to verify the same, or who shall refuse or neglect, upon its appearing from such reports that there is probably cause to believe that any of the said offenses have been committed, to issue his warrant for the arrest of the offender, shall be guilty of a misdemeanor. Any person committing any of the offenses mentioned in this section shall be liable to a penalty of five hundred dollars, to be recovered by suit in the superior court in the county in which such offense may have been committed, one-half thereof to the use of the house in which the tavern was kept, but had been leased and was not under the control of the landlord, it was held that the defendant landlord could not be convicted under this section. State v. Keizler, 51 N. C. 73.

§ 14-295. Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.—If any person shall establish, use or keep any gaming table (other than a faro-bank), by whatever name such table may be called, an illegal punch board or an illegal slot machine, at which games of chance may be played, he shall on conviction thereof be fined not less than two hundred dollars and shall be imprisoned not less than thirty days; and every person who shall play thereat or thereat bet any money, property or other thing of value, whether the same be in stake or not, shall be guilty of a misdemeanor, and shall be fined not less than ten dollars. (Rev., s. 3718; Code, s. 1045; R. C., c. 31, s. 72; 1798, c. 336; 1798, c. 502, s. 2; 1931, c. 14, s. 2; C. S. 4433.)

Cross Reference.—As to compelling testimony in cases when this section and §§ 14-295 to 14-297 have been violated, see § 8-35.


§ 14-296. Illegal slot machines and punchboards defined.—An illegal slot machine or punchboard within the contemplation of §§ 14-295 through 14-298 is defined as one that shall not produce for or give to the person who places coin or money or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. (1931, c. 14, s. 1.)

Editor's Note.—The Act from which this section was taken was amended several times making them applicable to illegal slot machines and punch boards. The Act expressly provided that it should not have the effect of modifying in any way sections 14-301 to 14-303 and should be construed as supplemental to that act.


§ 14-297. Allowing gaming tables, illegal punchboards or slot machines on premises.—If any person shall knowingly suffer to be opened,
kept or used in his house or on any part of the premises occupied therewith, any of the gaming tables prohibited by §§ 14-289 through 14-300 or any illegal punch board or illegal slot machine, he shall forfeit and pay to any one who will sue therefor two hundred dollars, and shall also be guilty of a misdemeanor and fined and imprisoned. (Rev., s. 3719; Code s. 1048; R. C., c. 34, s. 72; 1708, c. 502, s. 3; 1800, c. 5, s. 2; 1931, c. 14, s. 2; C. S. 4434.)

See note to § 14-296.

Where the agreed statement of facts in an action to recover the penalty under this section states that defendant kept a slot machine in his store, without a finding that the machine is illegal, the findings are insufficient to support a judgment against defendant. Nivens v. Justice, 210 N. C. 349, 186 S. E. 237.

Cited in State v. Webster, 213 N. C. 692, 12 S. E. (2d) 272.

§ 14-289. Gaming tables, illegal punchboards and slot machines to be destroyed by justices and police officers. — All justices of the peace, sheriffs, constables and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by §§ 14-289 through 14-300, or any illegal punchboard or illegal slot machine is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction. (Rev., s. 3720; Code, s. 1049; R. C., c. 34, s. 74; 1791, c. 336; 1798, c. 502, s. 2; 1931, c. 14, s. 4; C. S. 4433.)

See note to § 14-296.

Enjoining Officers. — The court should have found whether the slot machines involved were illegal in determining the plaintiff's right to enjoin officers from interfering with his business. McCormick v. Proctor, 217 N. C. 23, 6 S. E. (2d) 870.

Cited in Daniels v. Homer, 139 N. C. 219, 226, 232, 51 S. E. 992; State v. Calcutt, 219 N. C. 545, 15 S. E. (2d) 9 (dis. op.)

§ 14-299. Property exhibited by gamblers to be seized; disposition of same.—All moneys or other property or thing of value exhibited for the purpose of alluring persons to bet on any game, or used in the conduct of any such game, shall be liable to be seized by any justice of the peace or other court of competent jurisdiction or by any person acting under his or its warrant. Moneys so seized shall be turned over to and paid to the treasurer of the county wherein they are seized, and placed in the general fund of the county. Any property seized which is used for and is suitable for gambling shall be destroyed in the manner provided for the sale of personal property by execution, and the proceeds derived from said sale shall be turned over and paid to the treasurer of the county wherein the property was seized, to be placed by said treasurer in the general fund of the county. (Rev., s. 3722; Code, s. 1051; R. C., c. 34, s. 77; 1708, c. 502, s. 3; 1943, c. 84; C. S. 4436.)

Editor's Note.—The 1943 amendment inserted in the first sentence the words "or used in the conduct of any such game." Prior to the amendment one-half of the moneys or property seized went to the person seizing them and the other half went to the use of the poor.


§ 14-300. Opposing destruction of gaming tables and seizure of property.—If any person shall oppose the destruction of any prohibited gaming table, or the seizure of any moneys, property or other thing staked on forbidden games, or shall take and carry away the same or any part thereof after seizure, he shall forfeit and pay to the person so opposed one thousand dollars, for the use of the state and the person so opposed, and shall, moreover, be guilty of a misdemeanor. (Rev., s. 3723; Code, s. 1052; R. C., c. 34, s. 78; 1798, c. 505; s. 4; C. S. 4437.)


§ 14-301. Operation or possession of slot machine; separate offenses.—It shall be unlawful for any person, firm or corporation to operate, keep in his possession or in the possession of any other person, firm or corporation, for the purpose of being operated, any slot machine, that shall not produce for or give to the person who places coin or money, or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. Each time said machine is operated as aforesaid shall constitute a separate offense. (1923, c. 138, ss. 1, 2; C. S. 4437(a.).)

Editor's Note.—It was said in 1 N. C. Law Rev. 285, that "the interesting part of the statute is the definition of unlawful machine or device as one that does not produce for or give to the person operating, playing or patronizing the machine or device 'the same return in market value each and every time such machine or device is operated or patronized by paying money or other thing of value.' The act seems to cover all possible gambling devices not already covered by the lottery provisions of the Consolidated Statutes." Construed with § 14-304.—This and the two following sections proscribing the operation and possession of slot machines of the type therein defined, are not repealed by §§ 14-304 to 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but complementary. State v. Calcutt, 219 N. C. 545, 15 S. E. (2d) 9.

Where an indictment charged defendant in one count with ownership, sale, lease and transportation of certain slot machines and devices prohibited by law, §§ 14-304 to 14-309, and charged defendant in the second count with the operation and possession of certain illegal slot machines, under this and the two following sections, it was held that the different counts in the bill may stand as separate and distinct offenses, and separate judgments may be entered thereon, and defendant's contention of duplicity is untenable. 1943, c. 84, s. 91.

Value Required to Be Given.—Under this section, a slot machine so operated that one putting into it a coin receives, in any event, the value of such coin in chewing gum, and stands to win by chance additional chewing gum or discs of commercial value without further payment, is condemned by the statute as being unlawful. But if the slot machine were so operated that one who puts in a coin receives the same return in market value each and every time such machine is operated, it would not then fall within condemnation of the statute. State v. May, 188 N. C. 470, 471. 125 S. E. 9.

License of Lawful Machines Only.—The State license issued for the operation of a slot machine is for one that is lawful, and does not permit the operation of one so devised as to give to the one who happens to strike certain mechanical combinations more of the merchandise than received at other times. State v. May, 188 N. C. 470, 471.

Sufficiency of Indictment.—An indictment charging that the defendant "unlawfully and willfully did operate a lottery, to wit, a slot machine (chapter 138, Public Laws 1923) against the form of the statute," etc., is insufficient because it fails to inform the accused of the specific offense or the necessary ingredients thereof, notwithstanding the statute is cited. State v. Ballangue, 191 N. C. 700, 701, 132 S. E. 795.

Cited in Calcutt v. McGeehy, 217 N. C. 1, 195 S. E. 49.

§ 14-302. Punchboards, vending machines, and other gambling devices; separate offenses.—It shall be unlawful for any person, firm or corporation to operate or keep in his possession, or the possession of any other person, firm or corpora-
tion, for the purpose of being operated, any punch-board, machine for vending merchandise, or other gambling device, by whatsoever name known or called, that shall not be for or give to the person operating, playing or patronizing same, whether personally or through another, the same return or returns of equal value each and every time such machine, apparatus or device is operated, played or patronized by paying of money or other thing of value for the privilege thereof. Each time said punch-board, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played, or patronized by the paying of money or other thing of value for the privilege thereof, shall constitute a separate violation of this section as to operation thereunder. (1923, c. 138, ss. 3, 4; C. S. 4437(b)).

An indictment charging possession of gambling devices, but failing to charge that defendant operated the device or had them in his possession for the purpose of being operated, is fatally defective. State v. Jones, 218 N. C. 734, 12 S. E. (2d) 292.

§ 14-303. Violation of two preceding sections a misdemeanor.—A violation of any of the provisions of §§ 14-301, 14-302 shall be a misdemeanor punishable by a fine or imprisonment, or, in the discretion of the court, by both. (1923, c. 138, s. 5; C. S. 4437(c)).

§ 14-304. Manufacture, sale, etc., of slot machines and devices.—It shall be unlawful to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained, used or kept in any room, building, vehicle, vessel, store, warehouse, or space or building owned, leased or occupied by him or under his management or control, any slot machine or device. (1937, c. 196, s. 1.)

Editor's Note.—For comment on this and the following sections, see 15 N. C. Law Rev. 340.

Constitutionality.—This and following sections, prohibiting coin slot machines in the operation of which a player may make varying scores or tallies upon which wagers may be made, and differentiating between such machines and those returning a definite and unvarying service or things of value each time they are played, are in accord with the policy of the state to suppress gambling and have a reasonable relation to this objective, and this statute is constitutional as a reasonable regulation relating to the public morals and welfare, within the power of the State. Calculone v. McGeachy, 213 N. C. 1, 126 S. E. 49; State v. Abbott, 218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 11 S. E. (2d) 545, 546, 547.

§ 14-305. Manufacture with § 14-301. See note to § 14-301.

Not Repealed by 1939 Licensing Act.—The provisions of the Flanagan Act, ch. 196, Public Laws of 1937, prohibiting the possession and distribution of a coin slot machine in the operation of which the user may secure additional chances or rights to use the machine, is not repealed by § 105-66, since subsection 5 of that section expressly negates the intention to license or legalize any gaming slot machines and devices, and subsection 1 of that section excludes from its licensing provisions slot machines which "automatically vend" any prize, coupon or reward which may be used in the further operation of such machine, the word "give" being given its plain, ordinary meaning and intent being to exclude from the licensing provisions a machine which provides a player with additional plays or chances, or gives a premium price, or reward, irrespective of whether physical tokens of such premium, prize or reward are, or are not, delivered to the player. State v. Abbott, 218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 11 S. E. (2d) 545, 546, 547.


§ 14-305. Agreements with references to slot machines or devices made unlawful.—It shall be unlawful to make or permit to be made with any person any agreement with reference to any slot machines or device, pursuant to which the user thereof may be entitled to receive any money, credit, allowance, or anything of value or additional chance or right to use such machines or devices, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value. (1937, c. 196, s. 2.)

§ 14-306. Slot machine or device defined.—Any machine, apparatus or device is a slot machine or device within the provisions of §§ 14-304 through 14-309, if it is one that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, or which may be exchanged for any money, credit, allowance or any thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; or in the playing of which the operator or user has a chance to make varying scores or tallies upon the outcome of which wagers might be made, irrespective of whether it may, apart from any element of chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication or weight, entertainment or other thing of value. This definition is intended to embrace all slot machines and similar devices except slot machines in which is kept any article to be purchased by contrivances operated by depositing in the machine any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, where such slot machines make the same return or returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money, credit, allowance or anything of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies. (1937, c. 196, s. 3.)

An indictment charging the ownership and distribution of slot machines adapted for use in such a way that as a result of the insertion of a coin the machine may be operated in such a manner that the user may secure addi-
§ 14-307

Issuance of license prohibited.—There shall be no state, county, or municipal tax levied for the privilege of operating the machines or devices the operation of which is prohibited by §§ 14-304 through 14-309. (1537, c. 196, s. 4.)

§ 14-308. Declared a public nuisance.—An article or apparatus maintained or kept in violation of §§ 14-304 through 14-309 is a public nuisance. (1937, c. 196, s. 5.)

§ 14-309. Violation made misdemeanor.—Any person who violates any provision of §§ 14-304 through 14-309 is guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1937, c. 196, s. 6.)

Art. 38. Marathon Dances and Similar Endurance Contests.

§ 14-310. Dance marathon and walkathons prohibited.—It shall be unlawful for any person, firm, association or corporation to promote, advertise or conduct any marathon dance contests, walkathon contests and/or similar endurance contests, by whatever name called, of walking or dancing, and it shall be unlawful for any person to participate in any marathon dance contest, walkathon contest, and/or similar physical endurance contest by walking and dancing continuously or intermittently for a period of more than eight consecutive hours, whether or not an admission is charged and/or a prize awarded, and it shall be unlawful for any person to participate in more than one such contest or performance within any period of forty-eight hours. (1935, c. 13, s. 1.)

§ 14-311. Penalty for violation.—Any persons violating the provisions of this article shall be guilty of a misdemeanor and shall be punishable by imprisonment in the county or municipal jail for not less than thirty days nor more than ninety days, or by a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or by both such fine and imprisonment in the discretion of the court. (1935, c. 13, s. 2.)

§ 14-312. Each day made separate offense.—Each and every day that any person, firm or corporation shall continue such a contest or engage in any such activities and/or each day's participation in such contest or advertisement of the same or do any act in violation of the provisions of this article shall be and constitute a distinct and separate offense. (1935, c. 13, s. 3.)


§ 14-313. Selling cigarettes to minors.—If any person shall sell, give away or otherwise dispose of, directly or indirectly, cigarettes, or tobacco in the form of cigarettes, or cut tobacco in any form or shape which may be used or intended to be used as a substitute for cigarettes, to any minor under the age of seventeen years; or if any person shall aid, assist or abet any other person in selling such articles to such minor, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment in the discretion of the court. (Rev., s. 3804; 1891, c. 276; C. S. 4438.)

Cross Reference.—As to giving intoxicants to unmarried minors under 17 years of age, see §§ 14-331 and 14-332.

§ 14-314. Aiding minors in procuring cigarettes; duty of police officers.—If any person shall aid or assist any minor child under seventeen years old in obtaining the possession of cigarettes, or tobacco in any form used as a substitute therefor, by whatsoever name it may be called, he shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court.

It shall be the duty of every police officer, upon knowledge or information that any minor under the age of seventeen years is or has been smoking any cigarette, to inquire of any such minor the name of the person who sold or gave him such cigarette, or the substance from which it was made, or who aided and abetted in effecting such gift or sale. Upon receiving this information from any such minor, the officer shall forthwith cause a warrant to be issued for the person giving or selling, or aiding and abetting in the giving or selling of such cigarette or the substance out of which it was made, and have such person dealt with as the law directs. Any such minor who shall fail or refuse to give to any officer, upon inquiry, the name of the person selling or giving him such cigarette, or the substance out of which it was made, shall be guilty of a misdemeanor. (Rev., s. 3805; 1891, c. 276, s. 2; 1913, c. 185; C. S. 4439.)

§ 14-315. Selling or giving weapons to minors.—If any person shall knowingly sell, offer for sale, give or in any way dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie-knife, dirk, loaded cane or sling-shot, he shall be guilty of a misdemeanor. (Rev., s. 3832; 1893, c. 514; C. S. 4440.)

§ 14-316. Permitting young children to use dangerous firearms.—Any person, being the parent or guardian of, or standing in loco parentis to, any child under the age of twelve years, who shall knowingly permit such child to have the possession or custody of, or use in any manner whatever, any gun, pistol or other dangerous firearm, whether such firearm be loaded or unloaded, or any other person who shall knowingly furnish such child any such firearm, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1913, c. 32; C. S. 4441.)

§ 14-317. Permitting minors to enter barrooms, billiard rooms and bowling alleys.—If the keeper or owner of any barroom, billiard room or bowling alley shall allow any minor to enter or remain in such barroom, billiard room or bowling alley, where before such minor enters or remains in such barroom, billiard room or bowling alley, the owner or keeper thereof has been notified by the parents or guardian of such minor not to allow him to enter or remain in such barroom, billiard room or bowling alley, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3729; 1897, c. 278; C. S. 4442.)
§ 14-318. Exposing children to fire.—If any person shall lead any child of the age of seven years or less locked or otherwise confined in any dwelling, building or enclosure, and go away from such dwelling, building or enclosure without leaving some person of the age of discretion in charge of the same, so as to expose the child to danger of fire, the person so offending shall be guilty of a misdemeanor, and shall be punished at the discretion of the court. (Rev., s. 3795; 1893, c. 12; C. S. 4443.)

§ 14-319. Marrying females under fourteen years old.—If any person shall marry a female under the age of fourteen years, he shall be guilty of a misdemeanor. (Rev., s. 3368; Code, s. 1083; R. C., c. 34, s. 46; 1820, c. 1041, ss. 1, 2; C. S. 4444.)

Cross Reference.—As to capacity to marry in general, see § 51-2.

Cited in Caroon v. Rogers, 51 N. C. 240.

§ 14-320. Separating child under six months old from mother.—It shall be unlawful for any person to separate or aid in separating any child under six months old from its mother for the purpose of placing such child in a foster home or institution, or with the intent to remove it from the state for such purpose, unless the consent in writing for such separation shall have been obtained from the clerk of the superior court and the county health officer of the county in which the mother resides, or of the county in which the child was born; and it shall be unlawful for any mother to surrender her child for such purpose without first having obtained such consent; provided, that in every instance the county superintendent of public welfare shall have made proper investigation of the condition and situation of said mother and child and shall make a written report of same to the clerk of court and the county health officer before they take action. Any person violating this section shall, upon conviction, be fined not exceeding five hundred dollars or imprisoned for one year, or both, in the discretion of the court. (1917, c. 159; 1919, c. 240: 1939, c. 56; C. S. 4445.)

Cross Reference.—As to adoption generally, see Chapter 48.

Editor's Note.—The 1929 amendment added the proviso to the first sentence.

§ 14-321. Failing to pay minors for doing certain work.—Whenever any person, having a contract with any corporation, company or person for the manufacture or change of any raw material by the piece or bond, shall employ any minor to assist in the work upon the faith of and by color of the terms of such contract, with intent to cheat and defraud such minor, and, having secured the contract price, shall willfully fail to pay the minor when he shall have performed his part of the contract work, whether done by the day or by the job, the person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3432a; 1893, c. 309; C. S. 4446.)

Cross Reference.—As to child labor regulations, see § 110-1 et seq.

Art. 40. Protection of the Family.

§ 14-322. Abandonment of family by husband.—If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor; provided, that the abandonment of children by the father shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen years. (Rev., s. 3355; Code, s. 970; 1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; 1925, c. 290; C. S. 4447.)

Cross References.—As to failure of husband to provide adequate support for family, see § 14-325. As to competency of wife's testimony upon trial of husband for abandonment, see § 8-57.

Editor's Note.—The latter part of this section, providing that the abandonment shall be a continuing offense until the youngest child should arrive at the age of eighteen years and barring the running of the statute of limitation until that time was added by Public Laws 1925, ch. 290.

The purpose of this section was to make unlawful a willful abandonment of a wife by a husband without providing adequate support for her. It is not made unlawful for a husband to simply willfully abandon his wife—a husband is not compelled to live with his wife if he fails to provide adequate support. Hyder v. Hyder, 215 N. C. 239, 240, 1 S. E. (2d) 541.

Section must be strictly construed. State v. Gardner, 219 N. C. 331, 13 S. E. (2d) 529.

It has no application to illegitimate children, and, therefore an indictment drawn under this section charging defendant with the abandonment of his illegitimate child fails to charge a crime. State v. Gardner, 219 N. C. 331, 13 S. E. (2d) 529.

Two Offenses Created.—The placing of the comma after the words "such wife," in this section, expresses the legislative intent to create two offenses, the one, the willful abandonment of the wife, and the other, the willful abandonment by the father of his children of the marriage; especially when construed in connection with section 14-325, making it a misdemeanor for the husband to "willfully neglect to provide adequate support for his wife and the child or children which he has begotten by her." State v. Bell, 184 N. C. 701, 11 S. E. 190.

This section in express terms constitutes the abandonment of children by the father a continuing offense. The prosecution of an offense of this nature is a bar to a subsequent prosecution for the same offense charged to have been committed at any time before the institution of the first prosecution, but it is not a bar to a subsequent prosecution for continuing the same offense thereafter, as this is a new violation of the law. State v. Hinson, 209 N. C. 187, 190, 183 S. E. 397.

Willful failure and refusal to support an illegitimate child, constitutes a continuing offense. State v. Johnson, 212 N. C. 566, 154 S. E. 319.

Construed with § 14-323.—Where the husband has been indicted for willful abandoning his wife and minor children (under this section), and, secondly, for willfully failing to support them (§ 14-325), an order suspending judgment upon the second count, to take effect, however, upon the defendant's willingness and ability to order support under this first one, is not made unavailing as being conditional or alternative. State v. Vickers, 196 N. C. 471, 147 S. E. 879.

The Indictment.—An indictment against a husband for abandoning his wife must aver his failure to support her. State v. May, 132 N. C. 1029, 43 S. E. 819.

Abandonment Must Be Willful.—The willful abandonment of the wife is an essential element of the offense created by this section, and this, the prosecutrix is required to show beyond a reasonable doubt. State v. Falkner, 182 N. C. 729, 188 S. E. 756; State v. Smith, 164 N. C. 475, 79 S. E. 797.

But there is no reversible error in the charge of the court for omitting the word "willful" in one part thereof when he has charged elsewhere repeatedly to the jury that in order to convict the abandonment must have been willful, which must be proved beyond a reasonable doubt. State v. Taylor, 175 N. C. 833, 96 S. E. 661.

Where the defendant is indicted under this section for failure to provide adequate support for his minor children, and in the prosecution of the action the evidence tends to show that the defendant and his wife were living apart and that he had not provided any support for his children, the charge of abandonment has been properly entered in a civil action by the wife awarding all his personalty except the proceeds of the personal estate which he had transferred his realty to his daughter for the support of the wife and [691]
minor children, there is no presumption of wildness from the failure to provide adequate support under § 14-322, and an instruction that leaves out this essential element of the crime will be held for reversible error. State v. Roberts, 197 N. C. 261, 149 S. E. 199.

The word "willfully" as used in § 49-2 is used with the same import as in this section. State v. Cook, 207 N. C. 651, 170 S. E. 759.

Petition, fees. It is within the discretion of the trial judge to provide for the support of the wife and the minor children of the marriage from the property or labor of the husband upon his conviction of abandonment and nonsupport. The amount of support should be definite in providing for the contingencies that may arise, such as the coming of age of the children, etc., and should state what part thereof is for the support of the children; and an order requiring the defendant to pay a certain sum monthly into the office of the clerk of the Superior Court, under a bond of the defendant to secure compliance, without further provision, would be permissible. The contingency that the children may be called upon to perform the duty to support being a continuing one during the marital union, to be performed by him unless relieved therefrom by legal excuse; and his willful abandonment and failure to provide constitutes the statutory offense. State v. Beam, 181 N. C. 907, 107 N. E. 668.

"In State v. Johnson, 194 N. C. 378, 139 S. E. 697, it was said: 'An offending husband may be convicted of abandonment and nonsupport when—... when—... when—... when—... two things are established, a willful abandonment of the wife; and, second, a failure to provide "adequate support for such wife, and the children which he may have begotten upon her."' State v. Vickers, 196 N. C. 239, 145 S. E. 175."

Both Abandonment and Nonsupport Must Be Proved.—Both the fact of willful abandonment and that of failure to support must be alleged and proved, the abandonment, being a single act and not a continuing offense, day by day, but the duty to support being a continuing one, and where further provisions are not made, the venue of an action for the violation thereof, an instruction that withdraws the question as to the fact of abandonment, or neglect to provide adequate support, is not, however, a competent witness to prove the fact of marriage. State v. Brown, 67 N. C. 470. See 81 and 82.

Not a Continuing Offense.—The crime of willful abandonment by the husband of his wife is not a continuing offense, day by day, and where there has been a complete act of abandonment, no refusal of the husband to support his wife or remittances of funds for an adequate support, when he was residing in another State, he cannot direct her choice of residence and is inadmissible under this section in the county of her residence. State v. Beam, 181 N. C. 907, 107 N. E. 668.

Venue.—When the husband has agreed to a separation from his wife upon consideration of his remitting periodically a certain sum of money to a certain county in which she was to reside, and he fails of performance, the venue of an action under the provisions of this section, is in that county. State v. Hooker, 186 N. C. 761, 120 S. E. 449.

Same.—Where Husband Non-Resident.—Where a man willfully abandons his wife in another county and refuses to support his minor child although repeated demands were made on him after the parties had returned to the jurisdiction of the courts of this State and subject to the provisions of our statute making it a misdemeanor. State v. Beam, 181 N. C. 907, 107 N. E. 668.

Statute of Limitations.—Where the abandonment consisted in the failure to remit a certain sum of money periodically to a certain county in which his conduct had forced her to reside, and where failure to support continued for two years therefrom is not barred by the statute of limitations. State v. Beam, 181 N. C. 907, 107 N. E. 668; State v. Hooker, 186 N. C. 761, 120 S. E. 449.

Same.—Same and Also.[1]—The prosecution of the father to support his children and his making gifts to them is sufficient to reflect the bar of the two-year statute of limitations, whether he was living in the home with them or otherwise, in proceedings to show his willful abandonment and failure to support, and an indictment found within two years therefrom is not barred by the statute of limitations. State v. Beam, 181 N. C. 907, 107 S. E. 429.

Motion for Judgment of Conviction.—Where a man willfully abandons his wife, sends remittances for her support, returns with her and as with a wife for a while, and again abandons her, his willfully leaving her the second time without providing an adequate support, for her subsistence and failure to support, and an indictment found within two years therefrom is not barred by the statute of limitations. State v. Beam, 181 N. C. 907, 107 S. E. 429.

Instruction.—Plaintiff's contention that the court should have charged that the failure to provide support under this section must have been willful in order to constitute an abandonment is untenable. Hyder v. Hyder, 215 N. C. 239, 1 S. E. (2d) 540.

Plea in Abatement after Plea of Not Guilty.—Where the defendant had been convicted of abandoning his wife and child and failing to provide an adequate support for them under the provisions of this section, his plea in abatement comes too late after his plea of not guilty. State v. Hooker, 186 N. C. 761, 120 S. E. 449.

Amendment of Complaint.—See § 1-129.

Sufficient Evidence to Show Willful Abandonment and Failure to Support Minor Child.—Evidence that defendant is the father of the child although repeated demands were made on him after the parties had returned to this State, is held to show that the offense of willful abandonment and failure to support said minor child was committed by the defendant in this State, since this section
provides that the abandonment by the father of a minor child shall constitute a continuing offense. State v. Hinson, 220 N. C. 187, 183 S. E. 397.

§ 14-322. Intoxicating Liquors. — A person violating the liquor laws who shall not be sentenced for a second offense for ten years shall not be sentenced for a third offense for ten years thereafter, nor for any subsequent offense. State v. Vickers, 197 N. C. 756, 168 S. E. 226.

§ 14-323. Evidence that abandonment was willful. — If the fact of abandonment of and failure to provide adequate support for the wife and children shall be proved, or, while living with such wife, neglect by the husband to provide for the adequate support of such wife or children shall be proved, then the fact that such husband neglects applying himself to some honest calling for the support of himself and family, and is found sauntering about, endeavoring to maintain himself by gaming or other undue means, or is a frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment and neglect is willful. (Rev., s. 3356; Code, s. 971; 1868-9, c. 209, s. 3; C. S. 4449.)

When Evidence for Defendant Necessary. — Where the nonsupport and abandonment of the husband are both established or admitted, under this section, it may be necessary for the defendant to come forward with his evidence and proof that the abandonment was not willful to avoid the risk of an adverse verdict. State v. Falkner, 182 N. C. 783, 108 S. E. 754.

Cited in Steel v. Steel, 194 N. C. 631, 10 S. E. 707.

§ 14-324. Order to support from husband's property or earnings. — Upon any conviction for abandonment, any judge or any recorder having jurisdiction thereof may, in his discretion, make such order as in his judgment will best provide for the support, as far as may be necessary, of the deserted wife or children, or both, from the property or labor of the defendant. (1917, c. 259; C. S. 4449.)

A judgment that the defendant be confined in the common jail for one year upon each count in the indictment, the term under one count to begin at the expiration of the term under the other, the judgment to be fully satisfied at the expiration of both terms, with provision that the judgment be suspended upon the payment to the defendant of a monthly stipulated amount for a definite period and the giving of a bond for compliance therewith, is in this case held to be sufficiently certain and definite in its terms. State v. Vickers, 197 N. C. 62, 147 S. E. 673. See notes to § 14-322.

In Addition to Section 14-322. — This section is in addition to the powers conferred by section 14-322, and does not otherwise modify or interfere with its force and effect in making the abandonment of the wife a misdemeanor. State v. Faulkner, 182 N. C. 635, 116 S. E. 168, and the defendant was sentenced to two years on the road. It was held that the judgment was void because entered without the knowledge or presence of the accused.

§ 14-325. Failure of husband to provide adequate support for family. — If any husband, while living with his wife, shall willfully neglect to provide adequate support of such wife or the children which he has begotten upon her, he shall be guilty of a misdemeanor. Upon conviction of such husband as herein provided, the court having jurisdiction thereof may, in his discretion make such order as in his judgment will best provide for the support of such wife or children, and may commit the said husband to the common jail of the county, to be hired out by the county commissioners for such length of time as the court may deem proper, which said wage or salary shall be paid to the said wife or children, to be used toward their support. (Rev. s. 3357; Code, s. 972; 1868-9, c. 209, s. 2; 1873-4, c. 176, s. 11; 1879, c. 92; 1921, c. 103; C. S. 4450.)

Cress Reference. — As to abandonment of wife and children see § 14-323. Editor's Note. — The last sentence of the section was added by Public Laws of 1921, ch. 103.

Sufficiency of Indictment. — An indictment charging violation and following the words of the statute is sufficient. State v. Kerby, 110 N. C. 558, 14 S. E. 856.

Cited in State v. Bell, 184 N. C. 701, 115 S. E. 190.

§ 14-326. Abandonment of child by mother. — If any mother shall willfully abandon her child or children, whether legitimate or illegitimate, and under sixteen years of age, she shall be guilty of a misdemeanor. (1931, c. 57, s. 1.)

Art. 41. Intoxicating Liquors.

§ 14-327. Adulteration of liquors. — If any person shall adulterate any spirituous, alcoholic, vinous or malt liquors by mixing the same with any substance of whatever kind, except as provided in the following section, or if any person shall sell or offer to sell any spirituous, alcoholic, vinous or malt liquors, knowing the same to be thus adulterated, or shall import into this state any spirituous or intoxicating liquors, and sell or offer to sell such liquor, knowing the same to be thus adulterated, he shall be guilty of a misdemeanor and shall be fined
§ 14-328. Selling recipe for adulterating liquors.—If any person shall sell or offer for sale any recipe or formula whatever for adulterating any spirituous or alcoholic liquors, by mixing the same with any substance of whatever kind, except as is herein provided, he shall be guilty of a felony, and shall be fined or imprisoned as is provided in the preceding section: Provided, that this section and the two sections that immediately precede and follow it respectively shall not be so construed as to prevent druggists, physicians and persons engaged in the mechanical arts from adulterating liquors for medical and mechanical purposes. (Rev., s. 3513; Code, s. 984; 1858-9, c. 57, ss. 2, 3; C. S. 4452.)

§ 14-329. Manufacturing or selling poisonous liquors.—If any person shall manufacture, sell, or in any way deal out spirituous liquors, of any name or kind, which are poisonous to the human system, or mix any foreign poisonous matter in or with any such spirituous liquor, he shall be guilty of a felony and shall be imprisoned in the state's prison not less than five years, and may be fined in the discretion of the court. It shall be competent for any citizen, after making purchase of any spirituous liquor, to cause the same to be analyzed by some known competent chemist, and if upon such analysis it shall be found to contain any foreign properties or ingredients poisonous to the human system, he shall be guilty of a felony and shall be imprisoned in the state's prison not less than five years, and may be fined in the discretion of the court. The father, or if he be dead, the mother, guardian or employer of any minor to whom a sale or gift shall be made in violation of this section, shall have a right of action in a civil suit against the person so offending by such sale or gift, and upon proof of such illicit sale or gift shall recover from the party so offending such exemplary damages as a jury may assess: Provided, that such assessment shall not be less than twenty-five dollars. (Rev., ss. 3534, 3535; Code, ss. 1077, 1078; 1873-4, c. 68; 1881, c. 242; C. S. 4456.)

§ 14-330. Selling or giving away liquor near political speaking.—If any person shall sell or give away, either directly or indirectly, any spirituous liquors, wine or bitters containing alcohol, within two miles of any place at which political public speaking shall be advertised to take place, and does take place, during the day on which such speaking shall take place, he shall be guilty of a misdemeanor, and shall be fined not less than ten dollars nor more than twenty dollars, or imprisoned not exceeding twenty days. (Rev., s. 3528; Code, s. 983; 1873-4, c. 180, ss. 1, 2; C. S. 4453.)

§ 14-331. Giving intoxicants to unmarried minors under seventeen years old.—If any person shall give intoxicating drinks or liquors to any unmarried minor under the age of seventeen years; or if any person shall aid, assist or abet any other person in giving such drinks or liquors to such minor, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment in the discretion of the court; but nothing in this section shall prevent any parent or other person standing in loco parentis from giving or administering any such drinks or liquors to his minor child for medicinal purposes, nor any physician from giving or administering such drinks or liquors to any minor patient under his care; nor shall this section apply to the giving or using of wine in the administration of the sacrament. (1915, c. 82; C. S. 4454.)

Cross Reference.—As to giving cigarettes to minors, see §§ 14-333 and 14-314.

§ 14-332. Selling or giving intoxicants to unmarried minors by dealers; liability for exemplary damages.—If any dealer in intoxicating drinks or liquors sell, or in any manner part with for a compensation therefor, either directly or indirectly, or give away such drinks or liquors, to any unmarried person under the age of twenty-one years, knowing such person to be under the age of twenty-one years he shall be guilty of a misdemeanor; and such sale or giving away shall be prima facie evidence of such knowledge. Any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit shall be considered a dealer within the meaning of this section.

The father, or if he be dead, the mother, guardian or employer of any minor to whom a sale or gift shall be made in violation of this section, shall have a right of action in a civil suit against the person so offending by such sale or gift, and upon proof of such illicit sale or gift shall recover from the party so offending such exemplary damages as a jury may assess: Provided, that such assessment shall not be less than twenty-five dollars. (Rev., ss. 3534, 3535; Code, ss. 1077, 1078; 1873-4, c. 68; 1881, c. 242; C. S. 4456.)

For cases under this law, see Spencer v. Fisher, 159 N. C. 264, 73 S. E. 810; 161 N. C. 116, 76 S. E. 731; State v. Kittelle, 110 N. C. 560, 15 S. E. 103; State v. Lawrence, 97 N. C. 492, 2 S. E. 307; State v. Walker, 103 N. C. 413, 4 S. E. 582.

Art. 42. Public Drunkenness.

§ 14-333. Public drinking on railway passenger cars; copy of section to be posted.—Any person who shall publicly engage in the drinking of intoxicating liquors in the presence of passengers on any passenger car shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned not to exceed thirty days. This section shall not apply to any smoking compartment or to any closet, dining or buffet car. It shall be the duty of all railway companies to have posted a copy of this section in all passenger coaches used for transporting passengers within the state. (1907, c. 455; C. S. 4457.)

§ 14-334. Public drunkenness and disorderliness.—It shall be unlawful for any person to be drunk and disorderly in any public place or on any public road or street in North Carolina; person or persons convicted of a violation hereof shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days in the discretion of the court. (1921, c. 211; C. S. 4457(a).)

Verdict of guilty of disorderly conduct but not of drunkenness will not support conviction for drunken and disorderly conduct under this section. State v. Myrick, 203 N. C. 8, 164 S. E. 326.

§ 14-335. Local: Public drunkenness.—If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county, township, city, town, village or other place herein named, he shall be guilty of a misdemeanor, and upon conviction shall be punished as is provided in this section:

1. By a fine of not more than fifty dollars, or by imprisonment for not more than thirty days, in the counties of Alamance, Ashe, Avery, Brunswick, Burke, Catawba, Cherokee, Clay, Cleve-

§ 14-335

CH. 14. CRIMINAL LAW

§ 14-335

11. By a fine of not less than twenty-five dollars or imprisonment for not more than thirty days, for the second offense of not more than fifty dollars, or imprisonment for not more than sixty days; and for the third offense within a period of twelve months, either fine or imprisonment, in the discretion of the court. (1935, c. 207; 1937, c. 203; 1941, c. 82, 150.)

In Edgecombe county, by a fine, for the first offense, of not more than fifty dollars ($50.00), or imprisonment for not more than thirty days; for the second offense within a period of twelve months, by a fine of not more than one hundred dollars ($100.00), or imprisonment for not more than sixty days; and for the third offense within any twelve months' period such fine or imprisonment is to be declared a misdemeanor, punishable as a misdemeanor within the discretion of the court. (1935, c. 207; 1937, c. 203; 1941, c. 82, 150.)

12. In Edgecombe county, by a fine, for the first offense, of not more than fifty dollars or imprisonment for not more than thirty days, or by imprisonment for not more than thirty days, in Yancey county. (1909, c. 236; C. S. 4458.)

13. In Jackson and Macon counties, any person violating this section shall be guilty of a misdemeanor, punishable as a misdemeanor within the discretion of the court. Provided, that in the event the county commissioners of Jackson county abolish the recorder's court of said county, then, and in that event, the first sentence of this subsection shall not apply to Jackson county. (Pub. L. 1927, c. 17; Pub. L. 1931, c. 413.)

14. Any person or persons found drunk or intoxicated on the public highway, or at any public place or meeting in Currituck County, shall be guilty of a misdemeanor and upon conviction shall be fined not less than ten dollars ($10.00), nor more than fifty dollars ($50.00) for each offense, or be imprisoned not exceeding thirty (30) days, at the discretion of the court.

Upon complaint before any justice of the peace, he shall issue a warrant for the arrest of the accused and in the absence of a duly authorized officer to execute the said warrant, he shall deputize any citizen to execute the same. (1943, c. 506.)

Editor's Note.—By the amendment of 1929 paragraph one of this section was made applicable in Northampton county.

Laws of 1933, chapter 287, added subdivision 19 applicable to King High School District, Stokes county. Chapter 10 struck out Swain from the list of counties in subdivision 1, and added subdivision 9 applicable in that county only.

Public Laws of 1935, chapter 208, added Orange to the list of counties in subdivision 1. Public Laws of 1935, chapter 208, added Orange to the list of counties in subdivision 1. Public Laws of 1935, chapter 49, added Cherokee and Clay to subsection 1 and deleted other subsections applicable to said counties. Section 4 of this amendatory act makes it lawful for Cherokee and Clay counties to sentence the defendant to thirty days in prison to be assigned to work on the highway. Public Laws 1939, c. 55, made said section 4 of chapter 49 of Public Laws of 1935, applicable to Jackson county. Public Laws of 1935, chapter 350, added subdivision 10 to the section. Public Laws of 1935, chapter 207, added subdivision 11.

1936 amendatory act makes it applicable to Surry county, and added subdivision 12. The 1938 amendatory act also inserted several counties in the list in subdivision 1 as follows: C. 46, Duplin; c. 96, Johnston; c. 286, Avery, Davie, Mitchell, Wilkes and Yadkin; c. 329, Alamance; c. 443, Brunswick.
§ 14-336. Persons classed as vagrants.—If any person shall come within any of the following classes, he shall be deemed a vagrant, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, however, that this limitation of punishment shall not be binding except in cases of a first offense, and in all other cases such person may be fined or imprisoned, or both, in the discretion of the court:

1. Persons wandering or strolling about in idleness who are able to work and have no property to support them.
2. Persons leading an idle, immoral or profligate life, who have no property to support them and who are able to work and do not work.
3. All persons able to work having no property to support them and who have not some visible and known means of a fair, honest and reputable livelihood.
4. Persons having a fixed abode who have no visible property to support them and who live by stealing or by trading in, bartering for or buying stolen property.
5. Professional gamblers living in idleness.
6. All able-bodied men having no other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife or minor children, except of male children over eighteen years old.
7. Keepers and inmates of bawdy-houses, assignation houses, lewd and disorderly houses, and other places where illegal sexual intercourse is habitually carried on: Provided, that nothing here intended or shall be construed as abolishing the crime of keeping a bawdy-house, or lessening the punishment by law for such crime. (Rev., s. 3740; 1905, c. 391; 1907, c. 1012, s. 1; 1913, c. 75; 1915, c. 1; C. S. 4450.)

Cross References.—As to effect of § 108-80 et seq. on this section, see § 108-89. As to prostitution, see § 14-203.

Editor's Note.—For a case decided under the former law, see § 14-203.

§ 14-337. Police officers to furnish list of disorderly houses; inmates competent and compellable to testify.—It shall be the duty of the chief of police, marshal, constable or other chief ministerial officer of each city and town in this state to furnish every thirty days to the police justice, recorder, mayor or other trial officer of such city or town a list of the bawdy, assignation, lewd and disorderly houses and other places where illegal sexual intercourse is carried on, together with the names of the keepers and inmates of such houses and places, in such city or town; and it shall be the duty of such police justice, recorder, mayor or other trial officer, upon the filing of such list, to issue his warrant for the persons declared in subsection seven of § 14-336 to be vagrants, and to punish in accordance with the provisions of that section such of them as may be found guilty. In all trials under said subsection seven of § 14-336 any keeper or inmate of any of the houses or places named, or his employees, shall be competent and compellable to give evidence, of the character and nature of such house or place and of the character and acts of the keepers and inmates thereof; but the person so testifying shall not be prosecuted or punished for the commission of any crime against which he shall have been required to testify.

If any chief of police, marshal, constable or other chief ministerial officer of any city or town shall fail to furnish the list of houses and places provided for in this section, or shall suppress the name of any person whom he is required herein to report, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. (1907, c. 1012, ss. 2, 3; C. S. 4460.)

Cross References.—As to the effect of § 108-80 et seq. on this section, see § 108-89.

§ 14-338. Tramp defined and punishment provided; certain persons excepted.—If any person shall go about from place to place begging or subsisting on charity, he shall be denominated a tramp, and shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days: Provided, that any person who shall furnish satisfactory evidence of good character shall be discharged without cost. Any act of begging or vagrancy by any person, unless a well-known object of charity, shall be evidence that the person committing the same is a tramp. This section shall not apply to any woman, to any minor under the age of fourteen years, or to any blind person. (Rev., s. 3735; Code, ss. 3826, 3829, 3831, 1897, c. 268; 1879, c. 198, ss. 1, 4, 6; C. S. 4461.)

Cross References.—As to the effect of § 108-80 et seq. on this section, see § 108-89. As to release for good behavior of one committed to house of correction, see § 153-222.

§ 14-339. Trespassing and the carrying of dangerous weapons by tramps.—If any tramp shall enter any dwelling-house or kindle any fire in the land of another without the consent of the owner or occupant thereof, or shall kindle a fire on any highway, or shall be found carrying any firearm or other dangerous weapon, or shall threaten to do any injury to the person, or to the real or personal estate, of another, he shall be punished by imprisonment, at the discretion of the court, not to exceed twelve months. (Rev., s. 3736; Code, s. 3829; 1879, c. 198, s. 2, C. S. 4462.)
§ 14-340. Malicious injuries by tramps to persons and property.—If any tramp shall willfully and maliciously do any injury to the person, or to the real or personal estate, of another, he shall be punished by imprisonment, at the discretion of the court, not to exceed three years. (Rev., s. 3737; Code, s. 3830; 1879, c. 198, s. 3; C. S. 4463.)

§ 14-341. Arrest of tramps by persons who are not officers.—Any person, upon a view of any officer described in §§ 14-338 through 14-346, shall cause the offender to be arrested upon a warrant and taken before some justice of the peace, or he may apprehend the offender and take him before a justice of the peace, for examination, and, on his conviction, he shall be entitled to the same fee as a sheriff. (Rev., s. 3738; Code, s. 3832; 1879, c. 198, s. 5; C. S. 4464.)

Art. 44. Regulation of Sales.

§ 14-342. Selling or offering to sell meat of diseased animals.—Any person shall knowingly and willfully slaughter any diseased animal and sell or offer for sale any of the meat of such diseased animal for human consumption, or if any person knows that the meat offered for sale or sold for human consumption by him is that of a diseased animal, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court. (Rev., s. 3442; 1905, c. 303; C. S. 4465.)

§ 14-343. Unauthorized dealing in railroad tickets.—If any person shall sell or deal in tickets issued by any railroad company, unless he is a duly authorized agent of the railroad company, or shall refuse upon demand to exhibit his authority to sell or deal in such tickets, he shall be guilty of a misdemeanor. (Rev., s. 3764; 1895, c. 83, s. 1; C. S. 4466.)


§ 14-344. Sale of athletic contest tickets in excess of printed price.—It shall be unlawful for any person, firm or corporation selling, or offering for sale any ticket of admission to any baseball, basketball, football game or other athletic contest of any kind in excess of the sale price written or printed on such ticket or tickets. Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1941, c. 180.)

§ 14-345. Sale of cotton at night under certain conditions.—If any person shall buy, sell, deliver or receive, for a price, or for any reward whatever, any cotton in the seed, or any unpacked lint cotton, brought or carried in a basket, hamper or sheaf, or in any mode where the quantity is less than what is usually baled, or where the cotton is not baled, between the hours of sunset and sunrise, such person so offending shall be guilty of a misdemeanor. (Rev., s. 3813; Code, s. 1006; 1873-4, c. 62; 1874-5, c. 70; 1905, c. 417; C. S. 4467.)

Local Modification.—Mecklenburg, Nash: C. S. 4467.


§ 14-346. Sale of convict-made goods prohibited.—Except as hereinafter provided, the sale anywhere within the state of North Carolina of any and all goods, wares and merchandise manufactured, produced or mined wholly or in part, by convicts or prisoners, except by convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions is hereby prohibited and declared to be unlawful.

The provisions of this section shall not apply to sales or exchanges between the state penitentiary and other penal, charitable, educational and/or custodial institutions, maintained wholly or in part by the state, or its political subdivisions, for use in said institution or by the wards thereof; nor shall the provisions of this section apply to the sale of cotton, corn, grain or other processed or unprocessed agricultural products, including seed for growing purposes, or to the sale of stone, quarried by convict labor, or to the sale of coal or charcoal mined by convict labor, in any mine operated by the state: Provided that this section shall apply with equal force to sales to the state or any political subdivision thereof by any state penal or correctional institution, including the state highway: Provided further that the state of North Carolina shall have the right of manufacture in any of its penal or correctional institutions products produced thereby can be used exclusively by the state or any of its agencies.

This section shall apply equally to convict or prison-made goods, wares or merchandise, whether manufactured, produced or mined within or without the state of North Carolina.

Any person, firm or corporation selling, undertaking to sell, or offering for sale any such prison-made or convict-made goods, wares or merchandise, anywhere within the State, in violation of the provisions of this section, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to fine, or imprisonment, or both, in the discretion of the court. Each sale or offer to sell, in violation of the provisions of this section, shall constitute a separate offense. (1933, c. 146, ss. 1-4.)

Art. 45. Regulation of Employer and Employee.

§ 14-347. Enticing servant to leave master.—If any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted in writing or orally to serve his employer, to leave unlawfully the service of his master or employer; or if any person shall knowingly and unlawfully harbor and detain, in his own service and from the service of his master or employer, any servant who shall unlawfully leave the service of such master or employer, then, in either case, such person and servant shall be guilty of a misdemeanor and shall be fined not exceeding one hundred dollars or imprisoned not exceeding six months. (Rev., s. 3365; Code, ss. 3119, 3120; 1656, c. 58; 1866-7, c. 124; 1891, c. 303; C. S. 4469.)

Cross Reference.—As to a similar provision in the case of landlord and tenant or cropper, see § 14-339.

In General.—The offense was not known to the common law, State v. Rice, 76 N. C. 194. The section applies only where there has been an enticement, and not where a servant merely leaves his employer, even though such leaving is in violation of a contract between the parties. State v. Daniel, 89 N. C. 555. Nor does the section apply to the parent of a minor child who commands such child to quit employment. State v. Anderson, 104 N. C. 771, 10 S. E. 47. But if a minor is induced to leave his employment by a stranger, not in loco parentis, such stranger is amenable.
§ 14-348. Enticing seamen from vessel.—If any person shall induce any seaman, in the employ of any domestic or foreign vessel, to leave any such vessel before his term of service shall have expired, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (Rev., s. 3555; Code, s. 1109; 1879, c. 219, s. 1; 1881, c. 256, s. 2; C. S. 4474.)

Cross Reference.—As to employing tenant or cropper who has unlawfully violated a contract with his landlord, see § 14-338.

§ 14-349. Search warrants for deserting seamen.—If any credible witness shall complain, upon oath before any justice of the peace, that any person has deserted from any domestic or foreign vessel, knowing that such seaman has deserted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days; and if such seaman be found concealed or secreted by any person on whose premises any seaman who has deserted on his premises any seaman who has deserted from any such domestic or foreign vessel, it shall be lawful for such justice to grant a search warrant to be executed within the limits of his county to any proper officer, authorizing him to search for such seaman, and to arrest the person on whose premises he may be found; and the person on whose premises such seaman shall be found shall be adjudged to pay the costs of the search warrant, if on examination it shall appear that such seaman was secreted or concealed by such person; otherwise the costs shall be paid by the party making the complaint. (Rev., s. 3557; Code, s. 1110; 1881, c. 256, s. 3; C. S. 4473.)

§ 14-350. Appeal in cases of deserting seamen regulated.—In all cases arising under §§ 14-349 through 14-351, if any appeal is prayed by either party at the time of the trial, it shall be granted; but no appeal shall be granted by any justice at any time after the final hearing of the case. In case an appeal is prayed at the trial, it shall be the duty of the justice to proceed immediately to reduce to writing the testimony of any witness whose testimony is material (if such witness shall be master, officer or seaman on board of any vessel), in the presence of the adverse party, who may cross-question such witness, which testimony shall be subscribed by such witness and returned by the justice with the papers in the case; and on the hearing in the appellate court, the testimony so taken and reduced to writing by the justice shall be read, heard and accepted as the true and lawful testimony of such witness, as if such person were in person present to give evidence. For reducing such testimony to writing the justice shall receive the same fees as are allowed for taking depositions. (Rev., s. 3558; Code, s. 1111; 1881, c. 256, ss. 4, 5; C. S. 4474.)

§ 14-353. Influencing agents and servants in violating duties owed employers.—Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, any gift or gratuity from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from any person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1913, c. 190, s. 1; C. S. 4475.)
subpoena or in any other way.——If no person so testifying or producing any such books, papers, contracts, agreements or other documents shall be exempted from prosecution and punishment for perjury committed in so testifying. (1913, c. 190, s. 2; C. S. 4476.)

Cross References.—As to constitutional provisions against self-incrimination, see the North Carolina Constitution, Art. I, § 11, and notes thereto, and the United States Constitution, Amendment XV.

Editor’s Note.—For an article discussing the limits to self-incrimination, see 15 N. C. Law Rev. 229.

§ 14-355. Blacklisting employees.—If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars; and such person, agent, company or corporation shall be liable in penal damages to such discharged person for damages so recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge. (1909, c. 858, s. 1; C. S. 477.)

Intent of Section.—This section was intended to correct the abuse under the common law of statements made concerning a discharged employee out of malice, where damages for the loss of employment were difficult of admeasurement; and under the provisions of the act a statement made as to the standing of the discharged employee is not privileged, if made maliciously. Seward v. Receivers, 159 N. C. 241, 242, 75 S. E. 34.

Remedial Provisions.—The provisions of this act and the following section are remedial and do not put the burden upon the plaintiff of showing either malice or actual damages. Goins v. Sargent, 196 N. C. 478, 146 S. E. 131.

What Constitutes a Violation.—Where an employer has discharged his employee for being a member of a lawful association of like employees, and has advised others, without a request from them, who would have engaged the service of such employee that he would not sell his product to them should they employ him, and thus has prevented the discharged employee from getting employment within the State, and forced him to obtain employment in another state, depriving him of his living at home here with his family, etc., the employee is entitled to recover damages in his civil action against his former employer, and a demurrer or tenus to a complaint setting forth this cause of action is bad. Goins v. Sargent, 196 N. C. 478, 146 S. E. 131.

§ 14-356. Conspiring to blacklist employees.—It shall be unlawful for two or more persons to agree together to blacklist any discharged employee or to attempt, by words or writing or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left the service of his employer, from obtaining employment with any other person or company. Persons violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (1909, c. 858, s. 1; C. S. 477.)

Editor’s Note.—See notes to § 14-355.


§ 14-357. Issuing nontransferable script to laborers.—If any person who employs laborers by the day, week or month shall issue in payment for the services of such laborers any ticket, certificate or other script bearing upon its face the word “non-transferable,” or shall issue such ticket, certificate or other script in any form that would render it void by transfer from the person to whom issued, or shall refuse to pay to the person holding the same its face value, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars nor more than fifty dollars for each offense, or imprisoned not more than thirty days. (Rev., s. 3730; 1889, c. 280; 1891, c. 46, 78, 167, 370, 456; 1895, c. 127; C. S. 4479.)

“Face Value” Defined.—The “face value” is the value expressed on the face of the writing in the commodity in which it is payable. Marriner v. Roper Co., 112 N. C. 164, 16 S. E. 906.

Rights of Assignee.—This section does not authorize the assignee of a ticket or scrip payable in merchandise to demand and receive payment in money instead of in merchandise. Marriner v. Roper Co., 112 N. C. 164, 16 S. E. 906.

Art. 46. Regulation of Landlord and Tenant.

§ 14-358. Local: Violation of certain contracts between landlord and tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall apply to the following counties only: Wayne, Lenoir, Greene, Johnston, Jones, Onslow, Craven, Cleveland, Sampson, Pitt, Duplin, Gates, Cumberland, Perquimans, Chowan, Robeson, Bladen, Nash, Harnett, Edgecombe, Hertford, Wilson, Rockingham, Pender, Currituck, Gaston, Stokes, Surry, Alamance, Northampton, Beaufort, Chatham, Tyrrell, Mecklenburg, Halifax, Caswell, Camden, Cabarrus, Columbus, Martin, Washington, Wake, Alexander, Montgomery, Pamlico, Rowan, Rutherford, Bertie, Vance, Warren, Lincoln, Randolph and Lee. (Rev., s. 3366; 1905, c. 297, 383, 445, 820; 1907, c. 108; 1907, c. 935, s. 1; 1907, c. 839, 719, 869; Ex. Sess. 1920, c. 26; 1925, c. 285, s. 2; Pub. Loc. 1925, c. 211; Pub. Loc. 1927, c. 614; 1931, c. 138, s. 1; C. S. 4480.)

Cross References.—As to similar provisions for master and servants, see § 14-347 et seq. As to ejectment of tenants, see § 42-26 and annotation thereto.

Editor’s Note.—This section was amended by Public Laws 1925, c. 370, § 13, and Lee county was added to the list of counties to which its provisions are applicable. In 1925, Public Laws 1925, c. 285, section 2, Randolph County was added thereto. Public-Loc. Laws, 1925, c. 211, added Stokes and Surry counties; and Alamance was added by Public-Loc. Laws, 1927, c. 614. The Act of 1911 added Vance County.

Constitutionality of Section.—The provisions of this section contravene Article I, section 16, of our State Constitution, prohibiting imprisonment for debt, except in cases of
fraud; and an indictment thereunder, without averment of fraud, will be quashed. State v. Williams, 150 N. C. 832, 63 S. E. 949; Minton v. Early, 183 N. C. 199, 111 S. E. 347.

Jurisdiction.—A court of a justice of the peace has final jurisdiction in all cases of willful and without cause or without permission of step or in violation of this section. State v. Wilkes, 149 N. C. 453, 62 S. E. 430.

Indictment Insufficient.—An indictment under the provisions of this section which does not charge that the abandonment of the crop by tenant or cropper was "without cause" and "before paying for such advances," should be quashed as insufficient. State v. Williams, 150 N. C. 832, 63 S. E. 949.


§ 14-359. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully refuse to cultivate such crops or negligently or willfully abandon the same without good cause and before paying for such advances; or if any landlord who induces another to become tenant or cropper by agreeing to furnish him advances to enable him to make a crop, shall willfully fail or refuse without good cause to furnish such advances according to his agreement; or if any person shall entice, persuade or procure any tenant, lessee or cropper, who has made a contract agreeing to cultivate the land of another, to abandon or to refuse or fail to cultivate such land, or after notice shall harbor or detain on his own premises, or on the premises of another, any such tenant, lessee or cropper, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not more than thirty days. Any person who employs a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof. This section shall apply only to the following counties: Washington, Cabarrus, Alamance, Davidson, Harnett, Wake, Hyde, Anson, Hertford, Sampson, Franklin, Union, Richmond, Moore, Lincoln, Rowan, Rutherford, Halifax, Rockingham, Vance, Lee, Stokes, Granville, Randolph, Person and Stanly.

(Rev. s. 3367; 1903, c. 299, ss. 1-7; 1907, c. 84, s. 2; 1907, c. 288, s. 1; 1907, c. 353, s. 2; 1907, c. 543, s. 1; 1908, c. 299, ss. 20, 26; 1923, c. 32; 1925, c. 285, s. 12; Pub. Loc. 1927, c. 614; 1929, c. 4, s. 1; 1931, c. 44; 1931, c. 163, s. 2; 1933, c. 95; C. S. 4481.)

Cross Reference.—As to willful destruction of landlord's property by the tenant, see § 42-11.

Editor's Note.—The counties of Randolph and Lee were added by Public Laws 1923, ch. 26; Granville and Person counties were added by Public Laws 1923, ch. 22; and Randolph County was added by Public Laws 1925, ch. 285, § 3. Alamance was added by Public Laws 1927, ch. 414. The 1939 amendment added Washington, Cabarrus, David- son and Harnett counties.


Art. 47. Cruelty to Animals.

§ 14-360. Cruelty to animals; construction of section.—If any person shall willfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, cruelly beat, needlessly mutilate or kill or cause or procure to be overdriven, overloaded, wounded, injured, tortured, tormented, deprived of necessary sustenance, cruelly beaten, needlessly mutilated or killed as aforesaid, any useful beast, fowl or animal, every such offender shall for every such conviction be guilty of a misdemeanor. In this section and in every law which may be enacted relating to animals, the words "animal" and "dumb animal" shall be held to include every living creature; the words "torture," "torment" or "cruelty" shall be held to include every act, omission or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted; but such terms shall not be construed to prohibit lawful shooting of birds, deer and other game for human food. (Rev., s. 3299; Code, ss. 2482, 2490; 1891, c. 65; 1881, c. 34, s. 1; 1881, c. 368, ss. 1, 15; 1907, c. 42; C. S. 4483.)

Cross Reference.—As to livestock, see also § 14-366.

In General.—Anger does not excuse the killing when it was wanton and needless. State v. Neal, 120 N. C. 613, 27 S. E. 81. And under such circumstances the intent is immaterial. Id. In order to convict, however, there must be a finding that the act was "willfully and unlawfully" done. State v. Wilkes, 101 N. C. 702, 8 S. E. 346. A charge that defendant "did unlawfully and willfully beat" was held sufficient in State v. Allerson, 90 N. C. 733.

Injury to Prevent Delinquency.—If any tenant or cropper who has violated the provisions of this section which does not charge that the abandonment of the crop by tenant or cropper was "without cause" and "before paying for such advances," should be quashed as insufficient. State v. Porter, 112 N. C. 887, 16 S. E. 915.

The Indictment.—The facts constituting torturing, tormenting or cruelly beat a tenant or cropper, is a sufficient allegation. State v. Wilkes, 112 N. C. 887, 16 S. E. 915. An indictment charging only that the dog had barked at night, is properly excluded from the evidence upon the state's objection, since the evidence does result in unpleasant odors around the place, and that the dog had barked at night, is properly excluded from the evidence upon the state's objection, since the evidence does not charge that defendant "did unlawfully and wilfully beat" was held sufficient in State v. Allerson, 90 N. C. 733.

The word "willful" as used in criminal statutes signifies more than the mere intention to do a thing, and means the commission of the act "without just cause, excuse, or justification." State v. Yarbrough, 119 N. C. 862, 26 S. E. 35.

A dog is a useful animal within the meaning of this section. State v. Dickens, 215 N. C. 303, 1 S. E. (2d) 837.

Unnecessary to Show Dog Has Pecuniary Value.—It is unnecessary to show that a dog is of a pecuniary value to the owner to maintain an indictment for cruelty forbidden by this section. State v. Smith, 156 N. C. 862, 67 S. E. 859.

Illustrations.—Shooting pigeons for sport (State v. Porter, 112 N. C. 887, 16 S. E. 915). Unnecessary to show dog has pecuniary value. (State v. Bosser, 145 N. C. 579, 59 S. E. 859) have been held violations of the section.

Hitting a running horse with a rock, however, has been held insufficient to sustain a directed verdict— because the witness failed to show the wilful purpose to injure being for the jury. State v. Isley, 119 N. C. 862, 26 S. E. 35.

A dog is a useful animal within the meaning of this section. State v. Bosser, 145 N. C. 579, 59 S. E. 859.

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The word "willful" as used in criminal statutes signifies more than the mere intention to do a thing, and means the commission of the act "without just cause, excuse, or justification." State v. Yarbrough, 119 N. C. 862, 26 S. E. 35.

Justification.—In a prosecution for needlessly killing a use- ful animal, evidence that the dog, not identified as the dog killed, had frequented the place where defendant was employed, resulting in unpleasant odors around the place, and that the dog had barked at night, is properly excluded from the evidence upon the state's objection, since the evidence does not tend to establish justification, the presence of the dog on the premises giving the defendant only the right to drive him away but not to injure him unnecessarily, and provoking the dog as committed by the dog not being justification for killing him, the right to kill being founded on the immediate necessity of protecting property, a person, or another animal. State v. Dickens, 215 N. C. 303, 1 S. E. (2d) 837.


§ 14-361. Instigating or promoting cruelty to animals.—If any person shall willfully set on foot, or instigate, or move to, carry on, or promote, or engage in, or do any act towards the furtherance of any act of cruelty to any animal, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3300; Code, s. 2487; 1891, c. 65; 1881, c. 368, s. 6; C. S. 4484.)


§ 14-362. Bear-baiting, cock-fighting and similar
amusements.—If any person shall keep, or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting, or baiting any bull, bear, dog, cock, or other animal; or if any person shall encourage, aid or assist therein, or shall permit or suffer any place to be so kept or used, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3301; Code, s. 2483; 1891, c. 65; 1881, c. 368, s. 2; C. S. 4485.)

§ 14-363. Conveying animals in a cruel manner.—If any person shall carry or cause to be carried in or upon any vehicle or other conveyance, any animal in a cruel or inhuman manner, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. Whenever an offender shall be taken into custody therefor by any officer, the owner of such animal in an action known by such person to be dangerous to the life, health or safety of any person, the expenses which may be incurred for taking charge of and keeping and sustaining the vehicle or other conveyance shall be a lien thereon, to be paid before the same can be lawfully reclaimed; or the said expenses, or any part thereof remaining unpaid, may be recovered by the person incurring the same, or by the owner of such vehicle as if convicted of larceny. (Rev., s. 3302; Code, s. 2486; 1891, c. 65; 1881, c. 368, s. 5; C. S. 4486.)

Art. 48. Animal Diseases.

§ 14-364. Selling, using or exposing diseased animals.—If any person shall sell, offer for sale, use or expose, or cause or procure to be sold, offered for sale, used or exposed, any horse or other animal having the disease known as glanders or farcy, or any other contagious or infectious disease known by such person to be dangerous to the life, health or safety of any person, every such person shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3295; Code, s. 2488; 1891, c. 65; 1881, c. 368, s. 7; C. S. 4487.)

Art. 49. Protection of Livestock Running at Large.

§ 14-365. Failing to show hide and ears of livestock killed while running at large.—If any person shall kill any neat cattle, sheep or hogs in the woods or range, and shall for two days fail to show the hide and ears to the nearest justice or to two freeholders, he shall be guilty of a misdemeanor. (Rev., s. 3315; Code, s. 2318; R. C., c. 17, s. 2; 1901, c. 546; 1907, c. 821; C. S. 4493.)

Local Modification.—Tyrrell: C. S. 4493.

§ 14-366. Molesting or injuring livestock.—If any person shall unlawfully and on purpose drive any livestock, lawfully running at large in the range, from said range, or shall kill, maim or injure any livestock, lawfully running at large in the range or in the field or pasture of the owner, whether done with actual intent to injure the owner, or to drive the stock from the range, or with any other unlawful intent, every such person, his counselors, aids, and abettors, shall be guilty of a misdemeanor: Provided, that nothing herein contained shall prohibit any person from driving out of the range any stock unlawfully brought from other states or places. In any indictment under this section it shall not be necessary to name in the bill or prove on the trial the owner of the stock molested, maimed, killed or injured. (Rev., s. 3314; Code, s. 1002; 1885, c. 383; 1887, c. 368; 1895, c. 100; R. C., c. 34, s. 104; 1850, c. 94, ss. 1, 2; C. S. 4494.)

Local Modification.—Graham, Haywood, Jackson, Swain, Transylvania: C. S. 460.

Cross Reference.—As to cruelty to animals, see § 14-360.


§ 14-367. Altering the brands of and misbranding another's livestock.—If any person shall knowingly alter or deface the mark or brand of any other person's horse, mule, ass, neat cattle, sheep, goat, or hog, or shall knowingly mismatch or brand any such beast that may be unbranded or unmarked, not properly his own, with intent to defraud any other person, the person so offending shall be guilty of a felony, and shall be punished as if convicted of larceny. (Rev., s. 3317; Code, s. 1001; R. C., c. 34, s. 57; 1797, c. 486, s. 2; C. S. 4495.)

Cross Reference.—As to cattle brands, their registration, defacement, etc., see § 80-45 et seq.

§ 14-368. Placing poisonous shrubs and vegetables in public places.—If any person shall throw into or leave exposed in any public square, street, lane, alley or open lot in any city, town or village, or in any public road, any mockorange or other poisonous shrub, plant, tree or vegetable, he shall be liable in damages to any person injured thereby and shall also be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. (Rev., s. 3318; 1887, c. 338; C. S. 4496.)

Cross Reference.—As to putting out poisonous food stuffs, see § 14-40.

§ 14-369. Wounding, capturing or killing of homing pigeons prohibited.—It shall be unlawful for any person or persons at any time or in any manner to hurt, pursue, take, capture, wound, maim, disfigure or kill any homing pigeon then and there owned by another person, or to trap the same by use of any pit, pitfall, scaffold, cage, snare, trap, net, baited hook or similar trapping device, or make use of any drug, poison, explosive or chemical for the purpose of injuring, capturing or killing any such homing pigeon. Any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished in the discretion of the court. (1941, c. 10.)


§ 14-370. Wrongfully obtaining or divulging knowledge of telephonic messages.—If any person wrongfully obtains, or attempts to obtain, any knowledge of a telephonic message by connivance with a clerk, operator; messenger or other employee of a telephone company, or, being such clerk, operator, messenger or employee, willfully divulges to any but the person for whom it was intended, the contents of a telephonic message or
§ 14-371. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly.—If any person wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger or other employee of a telegraph company, or, being such clerk, operator, messenger, or other employee, willfully divulges to any but the person for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or willfully refuse or neglect duly to transmit or deliver the same, he shall be guilty of a misdemeanor. (Rev., s. 3848; 1889, c. 41, s. 1; C. S. 4497.)

Cross Reference.—As to penalty for failure to transmit an intrastate telegraphic message within a reasonable time, see § 56-11.

§ 14-372. Unauthorized opening, reading or publishing of sealed letters and telegrams.—If any person shall willfully, and without authority, open or read, or cause to be opened or read, a sealed letter or telegram, or shall publish the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, he shall be guilty of a misdemeanor. (Rev., s. 3728; 1889, c. 41, s. 2; C. S. 4490.)

The Indictment.—It is necessary to charge, in an indictment for a violation of this section and to prove upon the trial, that the letter or telegram was “sealed,” or that it was published with knowledge that it had been opened and read without authority. State v. Bagwell, 107 N. C. 859, 12 S. E. 254.


§ 14-373. Bribery of baseball players, umpires, and officials.—If any person shall bribe or offer to bribe, any baseball player with the intent to influence his play, action or conduct in any baseball game, or if any person shall bribe or offer to bribe any umpire of a baseball game, with intent to influence his decision or bias his opinion or judgment, in relation to any baseball game, or if any person shall bribe or offer to bribe any manager, or other official of a baseball club, league, or association by whatsoever named conducting said game of baseball, such person shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the state penitentiary for not less than one nor more than five years. (1921, c. 23, s. 1; C. S. 4499(a).)

§ 14-374. Acceptance of bribes by baseball players, umpires, or officials.—If any baseball player shall accept, or agree to accept, a bribe offered for the purpose of influencing his play, action or conduct in any baseball game, or if any umpire of a baseball game shall accept or agree to accept a bribe offered for the purpose of influencing his decision or biasing his opinions, rulings or judgment, or if any manager of a baseball club, or club or league official shall accept or agree to accept any bribe offered for the purpose of inducing him to lose or cause to be lost any baseball game, as set forth in § 14-373 of this article, such baseball player, manager, official, or umpire shall be guilty of a felony, and upon conviction, shall be punished by confinement in the state penitentiary for not less than one year nor more than five years. (1921, c. 23, s. 2; C. S. 4499(b).)

§ 14-375. Completion of offenses set out in sections 14-373, 14-374.—To complete the offenses mentioned in §§ 14-373, 14-374, it shall not be necessary that the baseball player, manager, umpire, or official, shall, at the time, have been actually employed, selected, or appointed to perform their respective duties; it shall be sufficient if the bribe be offered, accepted or agreed to with the view of the probable employment, selection or appointment of the person to whom the bribe is offered or by whom it is accepted. Neither shall it be necessary that such baseball player, umpire or manager actually play or participate in a game or games concerning which said bribe is offered or accepted; it shall be sufficient if the bribe be given, offered, or accepted in view of his or their possibly participating therein. (1921, c. 23, s. 3; C. S. 4499(c).)

§ 14-376. “Bribe” defined.—By a “bribe” as used in this article, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or the promise of either, bestowed or promised for the purpose of influencing, directly or indirectly, any baseball player, manager, umpire, club or league official, to see which game an admission fee may be charged, or in which game of baseball any player, manager or umpire is paid any compensation for his services. Said bribe as defined in this article need not be direct; it may be such as is hidden under the semblance of a sale, bet, wager, payment of a debt, or in any other manner designed to cover the true intention of the parties. (1921, c. 23, s. 4; C. S. 4499(d).)

§ 14-377. Intentional losing of baseball game or aiding therein.—If any baseball player, manager or club official shall commit any willful act of omission or commission in playing or directing the playing of a baseball game with intent to cause the ball club with which he is affiliated to lose a baseball game; or if any umpire officiating in a baseball game, or league official, shall commit any willful act connected with his official duties for the purpose and with the intent to cause a baseball club to win or lose a baseball game which it would not otherwise have won or lost under the rules governing the playing of said game, he or they shall be guilty of a felony, and upon conviction, shall be punished by imprisonment in the state penitentiary for not less than one nor more than five years. (1921, c. 23, s. 5; C. S. 4499(e).)

§ 14-378. Venue.—In all prosecutions under this article the venue may be laid in any county where the bribe herein referred to was given, offered or accepted, or in which the baseball game was played in relation to which the bribe was offered, given or accepted, or the acts referred to in § 14-377 committed. (1921, c. 23, s. 6; C. S. 4606(c).)

§ 14-379. Bonus or extra compensation.—Nothing in this article shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager or baseball player by any person to encourage such manager or player...
to a higher degree of skill, ability or diligence in the performance of his duties. (1921, c. 23, s. 7; C. S. 4499 (f).)

§ 14-380. Application of article. — This article shall apply only to baseball league and club officials, umpires, managers and players who are officials of, or employed by, baseball clubs who are members of “The National Association of Professional Baseball Leagues.” (1921, c. 23, s. 7a; C. S. 4499 (g).)

Art. 52. Miscellaneous Police Regulations.

§ 14-381. Desecration of state and national flag. —Any person who in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature, or who shall expose to public view, make, sell, expose or cause to be exposed to public view any such flag, standard, color or ensign of the United States of America, or state flag or ensign of this state, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign upon which shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design or drawing or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale or to give away, or for use for any purpose, any article or substance of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance upon which it is so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast aside, deface, defile, or defy, trample upon or cast aside any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding fifty dollars or by imprisonment for not more than thirty days. Any person violating this section shall also forfeit a penalty of fifty dollars for each offense, to be recovered with costs in a civil action or suit in any court having jurisdiction. Such action or suit may be brought by and in the name of any citizen of this state, and such penalty, when collected, shall be paid one-half to the person suing and one-half to the school fund of the county in which suit was brought; and two or more penalties may be recovered with costs in a civil action or suit.

The words, flag, standard, color or ensign, as used in this section, shall include any flag, standard, color, ensign, or any picture, representation, or representation of any of them, made of any substance or representation of any of them, made of any substance or representation of any size, evidently purporting to be a flag, standard, color or ensign of the United States of America, or a picture or a representation of any of them, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe it to represent the flag, colors, standard or ensign of the United States of America.

The possession by any person other than a public officer, as such, of a flag, standard, color, ensign, article, substance, or thing, on which there is anything made unlawful by this section, shall be presumptive evidence that the same is in violation of this section. (1917, c. 271; C. S. 4500.)

§ 14-382. Pollution of water or lands used for dairy purposes. — It shall be unlawful for any person, firm, or corporation owning lands adjoining the lands of any person, firm, or corporation which are or may be used for dairy purposes or for grazing milk cows, to dispose of or permit disposal of any animal, mineral, chemical, or vegetable refuse, sewage or other deleterious matter in such a way as to pollute the water on the lands so used or which may be used for dairy purposes or for grazing milk cows, or to render unfit or unsafe for use the milk produced from cows feeding upon the grasses and herbage growing on such lands. This section shall not apply to incorporated towns maintaining a sewer system. Anyone violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned for not more than thirty days, or both, and each day that such pollution is committed or exists shall constitute a separate offense. (1919, c. 222: C. S. 4501.)

Cross References.—As to pollution of waters for the purpose of killing or catching fish, see §§ 113-245 and 113-170. As to discharge of deleterious matter into waters, see § 113-172.

§ 14-383. Cutting timber on town watershed without disposing of boughs and debris; misdemeanor. —Any person, firm or corporation owning lands or the standing timber on lands within four hundred feet of any watershed held or owned by any city or town, for the purpose of furnishing a city or town water supply, upon cutting or removing the timber or permitting the same cut or removed from lands so within four hundred feet of said watershed, or any part thereof, shall, within three months after cutting, or earlier upon written notice by said city or town, remove or cause to be removed from such lands all such tree-tops, boughs, laps and other portions of timber not desired to be taken for commercial or other purposes, within four hundred feet of the boundary line of such part of such watershed as is held or owned by such town or city, so as to leave such space of four hundred feet immediately adjoining the boundary line of such watershed, so held or owned, free and clear of all such tree-tops, boughs and other inflammable material caused by or left from cutting such standing timber, so as to prevent the spread of fire from such cutover area and the consequent damage to such watershed. Any such person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor. (1913, c. 56; C. S. 4502.)

In General. —The section constitutes a valid exercise of the police power and is constitutional. State v. Perley, 173 N. C. 763, 92 S. E. 594.

The motive is immaterial and where the intent to violate the section is shown the defendant is punishable. Id.

§ 14-384. Injuring notices and advertisements. — If any person shall wantonly or maliciously mutilate, deface, pull or tear down, destroy or otherwise damage any notice, sign or advertisement, unless immoral or obscene, whether put up by an officer of the law in performance of the duties of his office or by some other person for a lawful purpose, before the object for which such
Notice, sign or advertisement was posted shall have been accomplished, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding twenty-five dollars or imprisoned not exceeding thirty days at the discretion of the court. Nothing herein contained shall apply to any person mutilating, defacing, pulling or tearing down, destroying or otherwise damaging notices, signs or advertisements put upon his own land or lands of which he may have charge or control, unless consent of such person to put up such notice, sign or advertisement shall have first been obtained, except those put up by an officer of the law in the performance of the duties of his office. (Rev., s. 3709; 1885, c. 302; C. S. 4503.)

Cross Reference.—As to the unlawful posting of advertisements, see § 14-145.

§ 14-385. Defacing or destroying public notices and advertisements.—If any person shall willfully and unlawfully deface, tear down, remove or destroy any legal notice or advertisement authorized by law to be posted by any officer or other person, the same being actually posted at the time of such defacement, tearing down, removal or destruction, during the time for which such legal notice or advertisement shall be authorized by law to be posted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3710; Code, s. 981; 1876-7, c. 215; C. S. 4504.)

§ 14-386. Erecting signals and notices in imitation of those of railroads.—No person, firm or corporation other than a railroad or street railway company shall, for advertisements or other purposes, erect and maintain on or near any highway any cross-arm post or other post or standard containing the words "Stop! Look! Listen!" or other such words or combinations of words in imitation of railroad signals or notices. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, in the discretion of the court. (1917, c. 230; C. S. 4505.)

§ 14-387. Operating automobile while intoxicated.—Any person who shall, while intoxicated or under the influence of intoxicating liquors or bit ters, morphine or other opiates, operate a motor vehicle upon any public highway or cartway or other road, over which the public has a right to travel, of any county or the streets of any city or town within this State, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, or both, at the discretion of the court, and the judge shall upon conviction, deny said person or persons the right to drive a motor vehicle on any of the roads defined in this section for a period of not more than twelve months nor less than ninety days. (1919, c. 234; 1925, c. 283; 1927, c. 230, s. 1; C. S. 4506.)


Cross Reference.—As to the revocation of driver's license for driving while intoxicated, see § 20-17.

Editor's Note.—This section was amended by Public Laws 1925, ch. 283 and cartways and other roads used by the public included herein. At the same time the provision, giving the judge the right to revoke for twelve months the right to drive an automobile, of any one found guilty of violating this section, was added. The section was again amended in 1927 when the revocation of license was made mandatory upon the judge.

§ 14-389. Sale of Jamaica ginger.—It shall be unlawful for any person, firm, or corporation to sell the compound known as Jamaica ginger except upon the prescription of a duly licensed and regularly practicing physician; the person, firm, or corporation selling Jamaica ginger upon prescription shall keep a list of said prescriptions, and shall allow said list to be examined by any officer of the law, and no prescription shall ever be filled but once; it shall be unlawful for any physician to give a prescription for Jamaica ginger except to a person directly under his care, and then only in good faith for medicinal purposes only. (1919, c. 288; Pub. Loc. 1913, c. 761; C. S. 4507.)

§ 14-390. Furnishing intoxicants, poisons or firearms to inmates of charitable and penal institutions.—If any person shall sell or give to any inmate of any charitable or penal institution any intoxicating drink or any narcotic, poison or poisonous substance, except upon the prescription of a physician, or shall give or sell to any such inmate any deadly weapon, or any cartridge or ammunition for firearms of any kind, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned at the discretion of the court; and if he be an officer or employee of any institution of the state, he shall be
§ 14-391. Usurious loans on household and kitchen furniture or assignments of wages.—Any person, firm or corporation who shall lend money in any manner whatsoever by note, chattel mortgage, conditional sale or otherwise, upon any article of household or kitchen furniture or upon any assignment or sale of wages, earned or to be earned, and shall take, receive, reserve or charge any assignment or sale of wages, earned or to be earned, shall be guilty of a misdemeanor, and in addition thereto shall forfeit double the interest which has been theretofore paid. (1907, c. 110; 1927, c. 72; C. S. 4509.)

Cross Reference.—As to interest in general, see § 24-1 et seq.

Editor's Note.—This section was broadened by the Public Laws of 1927, ch. 72, by the addition of the portion relating to the assignment of wages.

This section is constitutional. State v. Davis, 157 N. C. 648, 73 S. E. 130.

Interest Need Not Be Received.—The charge of the usurious interest constitutes the offense without the necessity of having received it. State v. Davis, 157 N. C. 648, 73 S. E. 130.

§ 14-392. Digging ginseng on another's land during certain months.—All persons shall be allowed to dig ginseng at any time of the year for the purpose of replanting the same. If any person dig ginseng, except on his own premises, or for the purpose of replanting the same, between the first day of April and the first day of September, he shall forfeit and pay the sum of ten dollars for each day's or part of a day's digging, and shall also be guilty of a misdemeanor. (Rev. ss. 3502, 3714; Code, s. 1053; 1866-7, c. 60; 1905, c. 211; C. S. 1310.)

Cross Reference.—As to the larceny of ginseng, see § 14-79.

§ 14-393. Purchase of ginseng; register to be kept; details.—Every person, firm or corporation buying ginseng in any quantity shall keep a register, and shall keep therein a true and accurate record of each purchase, showing the amount of the ginseng, the name and residence of the person from whom purchased, the source from which obtained, and amount paid for the same and the date of the purchase. A failure to comply with the above requirements, or the making of a false entry in regard to the purchasing of such ginseng, shall be a misdemeanor, punishable in the discretion of the court. (1923, c. 89; C. S. 4511(b).)

Editor's Note.—This section supplements section 14-392, relative to digging ginseng; and section 14-79, relative to the larceny thereof, by requiring the accurate record.

§ 14-394. Anonymous or threatening letters, mailing or transmitting.—It shall be unlawful for any person, firm, or corporation, or any association of persons in this state, under whatever name styled, to write and transmit any letter, note, or writing, whether written, printed, or drawn, without signing his, her, their, or its true name thereto, threatening any person or persons, firm or corporation, or officers thereof with any personal injury or violence or destruction of property of such individuals, firms, or corporations, or using therein any language or threats of any kind or nature calculated to intimidate or place in fear any such person, firms or corporations, or officers thereof, as to their personal safety or the safety of their property, or using vulgar or obscene language, or using such language which if published would bring such persons into public contempt and disgrace, and any person, firm, or corporation violating the provisions of this section shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 112; C. S. 4511(a).)

§ 14-395. Commercialization of American Legion emblem; wearing by non-members.—It shall be unlawful for any one not a member of the American Legion, an organization consisting of ex-members of the army, navy and marine corps, who served as members of such organizations in the recent world war, to wear upon his or her person the recognized emblem of the American Legion, or to use the said emblem for advertising purposes, or to commercialize the same in any way whatsoever; or to use the said emblem in display upon his or her property or place of business, or at any place whatsoever. Any one violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars ($50.00) or imprisoned not more than thirty days. (1923, c. 89; C. S. 4511(b).)

§ 14-396. Dogs on "Capitol Square" worrying squirrels.—It shall be unlawful for any owner or keeper of a dog to permit the same to run at large on the Capitol grounds known as "Capitol Square" or to be thereon unless on leash or otherwise in the immediate physical control of said owner or keeper, or to pursue, worry or harass any squirrel or other wild animal kept on said grounds. Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by fine not exceeding fifty dollars or imprisonment not exceeding thirty days. (1923, c. 289.)

§ 14-397. Use of name of denominational college in connection with dance hall.—It shall be unlawful for any person, firm, corporation, club or society, by whatsoever name called, to use in connection with any dance, or dance hall, by advertisement, announcement, or otherwise, the name of any college, or any class or organization of any college operated and conducted by a religious denomination, unless the written permission of the Dean of such college is given, permitting and allowing the use of the name of such denominational college, or a class or organization of the same in connection with such dance, or dance hall. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and subject to a fine of not less than one hundred dollars ($100) or imprisonment for not less than sixty days. (1927, c. 6.)

§ 14-398. Theft or destruction of property of public libraries, museums, etc.—Any person who shall steal or unlawfully take or detain, or wil-
fully or maliciously or wantonly write upon, cut, tear, deface, disfigure, soil, obliterate, break or destroy, or who shall sell or buy or receive, knowing the same to have been stolen, any book, document, newspaper, periodical, map, chart, picture, portrait, engraving, statue, coin, medal, apparatus, specimen, or other work of literature or object of art or curiosity deposited in a public library, gallery, museum, collection, fair or exhibition, or in any department or office of state or local government, or in a library, gallery, museum, collection, or exhibition, belonging to any incorporated college or university, or any incorporated institution devoted to educational, scientific, literary, artistic, historical or charitable purposes, shall, if the value of the property stolen, detained, sold, bought or received knowing same to have been stolen, or if the damage done by writing upon, cutting, tearing, defacing, disfiguring, soil, obliterating, breaking or destroying any such property, shall not exceed fifty dollars ($50.00), be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. If the value of the property stolen, detained, sold or received knowing same to have been stolen, or the amount of damage done in any of the ways or manners hereinabove set out, shall exceed the sum of fifty dollars ($50.00), the person committing same shall be guilty of a felony, and shall upon conviction be punished in accordance with the laws applicable thereto. (1935, c. 300; 1943, c. 543.)

Editor's Note.—The 1943 amendment increased the amounts mentioned in this section from twenty to fifty dollars.

§ 14-399. Placing trash, refuse, et cetera, within one hundred and fifty yards of hard-surfaced highway.—It is unlawful for any person, firm, organization or private corporation, or for the governing body, agents or employees of any municipal corporation, to place or leave or cause to be placed or left, temporarily or permanently, any trash, refuse, garbage, scrapped automobile, truck or part thereof, within one hundred and fifty yards of a hard-surfaced highway where the highway is outside of an incorporated town, unless the trash, refuse, garbage, scrapped automobile, truck or part thereof, is concealed from the view of persons on the highway.

This section does not apply to domestic trash or garbage placed for removal, nor to junk yards which are the property of bona fide junk dealers and which are properly screened or fenced from the view of persons on the highway.

The placing or leaving of the articles or matter forbidden by this section shall, for each day or portion thereof that the act is done, constitute a separate offense.

A violation of this section is punishable by a fine of not less than ten dollars ($10.00) and not more than fifty dollars ($50.00) for each offense.

This section shall not apply to the Counties of Alleghany, Ashe, Avery, Bertie, Brunswick, Buncombe, Cabarrus, Caswell, Columbus, Davidson, Duplin, Forsyth, Franklin, Gates, Granville, Guilford, Halifax, Hyde, Jackson, Lenoir, Lincoln, Macon, Madison, Martin, Mitchell, Montgomery, Moore, Person, Richmond, Rockingham, Rowan, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Vance, Warren, Watauga, Wilson, and Yancey. (1935, c. 457; 1937, c. 446; 1943, c. 543.)

Editor's Note.—The 1937 amendment struck out "Anson" from the list of excepted counties. The 1943 amendment wrote the section.

§ 14-400. Tattooing prohibited.—It shall be unlawful for any person or persons to tattoo the arm, limb, or any part of the body of any other person under twenty-one years of age. Any one violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1937, c. 112, ss. 1, 2.)

§ 14-401. Putting poisonous foodstuffs, etc., in certain public places, prohibited.—It shall be unlawful for any person, firm or corporation to put or place any strychnine, other poisonous compounds or ground glass on any beef or other foodstuffs of any kind in any public square, street, lane, alley or on any lot in any village, town or city or on any public road, open field or yard in the country. Any person, firm or corporation who violates the provisions of this section shall be liable in damages to the person injured thereby and also shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court.

This section shall not apply to the poisoning of insects or worms for the purpose of protecting crops or gardens by spraying plants, crops or trees, nor to poisons used in rat extermination. (1941, c. 181.)

Editor's Note.—For comment on this enactment, see 19 N. C. Law Rev. 479.

§ 14-401.1. Misdemeanor to tamper with examination questions.—Any person who purloins, steals, buys, receives, or sells, gives or offers to buy, give, or sell any examination questions or copies thereof of any examination provided and prepared by law before the date of the examination for which they shall have been prepared, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1917, c. 146, s. 10; C. S. 1933, s. 5638.)

§ 14-401.2. Misdemeanor for detective to collect claims, accounts, etc.—It shall be unlawful for any person, firm, or corporation, who or which is engaged in business as a detective, detective agency, or what is ordinarily known as "secret service work," or conducts such business, to engage in the business of collecting claims, accounts, bills, notes, or other money obligations for others, or to engage in the business known as a collection agency. Violation of the provisions hereof shall be a misdemeanor, punishable by a fine or imprisonment, or both, in the discretion of the court. (1943, c. 383.)

Art. 53. Sale of Weapons.

§ 14-402. Sale of certain weapons without permit forbidden.—It shall be unlawful for any person, firm, or corporation in this state to sell, give away, or dispose of, or to purchase or receive, at any place within the state from any other place within or without the state, unless a license or permit therefor shall have first been obtained by such purchaser or receiver from the clerk of the superior court of the county in which such pur-
§ 14-403. Applicant must be of good moral character; weapon for defense of home; clerk's fee.

Before the clerk of the superior court shall issue any such license or permit he shall fully satisfy himself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant therefore, and that such person, firm, or corporation requires the possession of the weapon mentioned for protection of the home. If said clerk shall not be so fully satisfied, he shall refuse to issue said license or permit: Provided, that nothing in this article shall apply to officers authorized by law to carry firearms. The clerk shall charge for his services upon issuing such license or permit a fee of fifty cents. (1919, c. 197, s. 3; C. S. 5108.)

§ 14-404. Record of permits kept by clerk.—The clerk of the superior court shall keep a book, to be provided by the board of commissioners of each county, in which he shall keep a record of all licenses or permits issued under this article, including the name, date, place of residence, age, former place of residence, etc., of each such person, firm, or corporation to whom or which a license or permit is issued. (1919, c. 197, s. 4; C. S. 5109.)

§ 14-405. Dealer to keep record of sales.—Every dealer in pistols, pistol cartridges and other weapons mentioned in this article shall keep an accurate record of all sales thereof, including the name, place of residence, date of sale, etc., of each person, firm, or corporation to whom or which such sales are made, which record shall be open to the inspection of any duly constituted state, county or police officer, within this state. (1919, c. 197, s. 5; C. S. 5110.)

§ 14-406. Weapons to be listed for taxes.—During the period of listing taxes in each year the owner or person in possession or having the custody or care of any weapon mentioned in this article is required to list the same specifically, as is now required for listing personal property for taxes. Any person listing any such weapon for taxes shall be required to designate his place of residence, including local street address. (1919, c. 197, s. 6; C. S. 5111.)

§ 14-407. Machine guns and other like weapons. —It shall be unlawful for any person, firm or corporation violating any of the provisions of §§ 14-406 or 14-407 to carry firearms. The clerk shall charge for his services upon issuing such license or permit a fee of fifty cents. (1919, c. 197, s. 7; C. S. 5112.)
CHAPTER 15. CRIMINAL PROCEDURE

on his reporting said ownership to the clerk of the superior court of the county in which said person lives.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than five hundred ($500.00) dollars, or imprisoned for not less than six months, or both, in the discretion of the court. (1933, c. 261, s. 1.)

Chapter 15. Criminal Procedure.

Sec. 15-1. How discharged from imprisonment.
15-35. Defendant may appeal.
15-37. Recognizance returned to superior court.

Art. 6. Arrest.
15-40. Arrest for felony, without warrant.
15-41. When officer may arrest without warrant.
15-42. Sheriffs and deputies granted power to arrest felons anywhere in state.
15-43. House broken open to prevent felony.
15-44. When officer may break and enter houses.
15-45. Persons summoned to assist in arrest.
15-46. Procedure on arrest without warrant.
15-47. Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.

Art. 7. Fugitives from Justice.
15-49. Fugitives from another state arrested.
15-50. Record kept, and copy sent to governor.
15-52. Person surrendered on order of governor.
15-53. Governor may employ agents, and offer rewards.
15-54. Officer entitled to reward.

Art. 8. Extradition.
15-56. Duty of governor as to fugitives from justice of other states.
15-57. Form of demand for extradition.
15-58. Governor may cause investigation to be made.
15-59. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.
15-60. Extradition of persons not present in demanding state at time of commission of crime.
15-63. Authority of arresting officer.
15-64. Rights of accused person; application for writ of habeas corpus.
15-65. Penalty for non-compliance with preceding section.
15-66. Confinement in jail when necessary.
15-67. Arrest prior to requisition.
15-68. Arrest without a warrant.
15-69. Commitment to await requisition; bail.
15-70. Bail in certain cases; conditions of bond.
CHAPTER 15. CRIMINAL PROCEDURE

Sec. 15-109. Extension of time of commitment; adjournment.
15-110. Forfeiture of bail.
15-111. Persons under criminal prosecution in this state at time of requisition.
15-112. Governor may recall warrant or issue alias.
15-113. Fugitives from this state; duty of governor.
15-114. Application for issuance of requisition; by whom made; contents.
15-116. Immunity from service of process in certain civil actions.
15-117. Written waiver of extradition proceedings.
15-118. Non-waiver by this state.
15-119. No right of asylum; no immunity from other criminal prosecution while in this state.

Art. 9. Preliminary Examination.

15-119. Procedure, when justice has not final jurisdiction.
15-120. Duty of examining magistrate.
15-121. Testimony reduced to writing; right to counsel.
15-122. Prisoner examined; advised of rights.
15-123. Witnesses for defendant examined.
15-124. Examination of prisoner not required in misdemeanors.
15-125. When prisoner discharged.
15-126. When prisoner held to answer charge.
15-127. Witnesses required to give security for appearance.
15-128. Investigation in case of lynching.
15-129. Witnesses in lynching not privileged.
15-130. Proceedings certified to court; used as evidence.
15-131. Penalty for failing to return.

Art. 10. Bail.

15-132. Officers authorized to take bail, before imprisonment.
15-133. Officers authorized to take bail, after imprisonment.
15-134. Recognizance filed with the clerk.
15-137. Sheriff or deputy may take bail.
15-138. Sheriff may take bail of prisoner in custody.
15-139. Bail on continuance before a justice.

Art. 11. Forfeiture of Bail.

15-140. In recognizance to keep the peace.
15-141. When recognizance deemed broken.
15-142. Recognizance prosecuted.
15-143. Notice of judgment nisi before execution.
15-144. What notice must contain.
15-145. Service of notice.
15-146. Judges may remit forfeited recognizances.

Sec. 15-117. Money refunded by clerk.
15-118. Money refunded by treasurer.
15-120. Judgment final, rendered and enforced.
15-121. Forfeiture over two hundred dollars before justice.
15-122. Right of bail to surrender principal.
15-123. New bail given upon surrender; liability of sheriff.
15-124. Defenses open to bail.

Art. 12. Commitment to Prison.

15-125. Order of commitment.
15-126. Commitment to county jail.

Art. 13. Venue.

15-128. In case of lynching.
15-129. In offenses on waters dividing counties.
15-130. Assault in one county, death in another.
15-131. Assault in this state, death in another.
15-132. Person in this state injuring one in another.
15-133. In county where death occurs.
15-134. Improper venue met by plea in abatement; procedure.


15-137. No arrest nor trial on presentment.
15-139. Subpoena for witnesses on presentment.

Art. 15. Indictment.

15-140. Waiver of bill of indictment.
15-141. Bills returned by foreman except in capital cases.
15-142. Substance of judicial proceedings set forth.
15-143. Bill of particulars.
15-144. Essentials of bill for homicide.
15-145. Form of bill for perjury.
15-146. Bill for subornation of perjury.
15-147. Former conviction alleged in bill for second offense.
15-149. Description in bill for larceny of money.
15-150. Description in bill for embezzlement.
15-151. Intent to defraud; larceny and receiving.
15-152. Separate counts; consolidation.
15-153. Bill or warrant not quashed for informality.
15-154. No quashal for grand juror's failure to pay taxes or being party to suit.
15-155. Defects which do not vitiate.

Art. 16. Trial before Justice.

15-156. In cases of final jurisdiction.
15-157. Trial by jury, if demanded.
15-158. What submitted to jury.
15-159. Commitment after judgment.
15-160. Parties entitled to copy of papers; bar to indictment.
Art. 17. Trial in Superior Court.
15-162. Prisoner standing mute, plea, "not guilty" entered.
15-163. Peremptory challenges of jurors by defendant.
15-164. Peremptory challenges by the state.
15-165. Challenge to special venire same as to tales jurors.
15-166. Exclusion of bystanders in trials for rape.
15-167. Term expiring during trial extended.
15-168. Identification as defense to libel.
15-169. Conviction of assault, when included in charge.
15-170. Conviction for a less degree or an attempt.
15-172. Verdict for murder in first or second degree.
15-173. Demurrer to the evidence.
15-174. New trial to defendant.
15-175. Nol. pros. after two terms; when capias and subpoenas to issue.
15-176. Prisoner not to be tried in prison uniform.

Art. 18. Appeal.
15-177. Appeal from justice, trial de novo.
15-178. Justice to return papers and findings to superior court.
15-179. When state may appeal.
15-180. Appeal by defendant to supreme court.
15-181. Defendant may appeal without security for costs.
15-182. Appeal granted; bail for appearance.
15-184. Appeal not to vacate judgment; stay of execution.
15-185. Judgment for fines docketed; lien and execution.
15-186. Procedure upon receipt of certificate of supreme court.

15-188. Manner and place of execution.
15-189. Sentence of death; prisoner taken to penitentiary.
15-190. A guard or guards or other person to be named and designated by the warden to execute sentence.
15-193. Notice of reprieve or new trial.
15-195. New trial granted, prisoner taken to place of trial.
15-196. Disposition of body.

Art. 20. Suspension of Sentence and Probation.
15-197. Suspension of sentence and probation.
15-198. Investigation by probation officer.
15-201. Establishment and organization of a state probation commission.
15-202. Duties and powers of the commission; meetings; appointment of director of probation; qualifications.
15-203. Duties of the director of probation; appointment of probation officers; reports.
15-204. Assignment and compensation and oath of probation officers.
15-205. Duties and powers of the probation officers.
15-206. Co-operation with commissioner of parole and officials of local units.
15-207. Records treated as privileged information.
15-208. Payment of salaries and expenses.
15-209. Accommodations for probation officers.

§ 15-1

§ 15-1 (1). Statute of limitations for misdemeanors.
—The crimes of deceit and malicious mischief, and the crime of petit larceny where the value of the property does not exceed five dollars, and all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards: Provided, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the state. (Rev., s. 3147; Code, s. 1177; R. C., c. 35, s. 8; 1826, c. 11; 1907, c. 408; 1943, c. 543; C. S. 4512.)

Cross Reference.—As to what are misdemeanors, see §§ 14-1 and 14-3 and annotations thereto.

Editor's Note.—The 1943 amendment rewrote the part of this section appearing before the proviso.

General Consideration.—The time between the commission of the offense and the bringing into court of the presentment should be estimated in determining whether the prosecution is barred. State v. Cooper, 104 N. C. 896, 891, 10 S. E. 310. The time stated in the indictment does not govern, State v. Newsom, 47 N. C. 173. The state can go back two years prior thereto although the indictment marks the beginning of the prosecution. State v. Williams, 151 N. C. 560, 56 S. E. 908. The statute does not begin to run from an entry of nol. pros. "with leave." Id.

Meaning of Malicious Misdemeanors.—When, in the former wording of this section, the Legislature used the words "other malicious misdemeanors," which immediately followed the words "malicious mischief," it evidently intended to describe offenses of which malice was a necessary ingredient to constitute the criminal act, as in the case of malicious mischief, and it was not the purpose to include within the exception from the operation of that section such offenses as would be misdemeanors, even in the absence of malice, and when malice, if present, would be only a circumstance of aggravation, which the Court might consider in imposing the punishment. State v. Friese, 142 N. C. 671, 675, 55 S. E. 723.

Meaning of "Secret Manner."—For construction of former proviso, see State v. Crowell, 116 N. C. 1052, 1057, 21 S. E. 503. See also, for example State v. Watts, 32 N. C. 309. "Deceit" as Used in Former Section.—There has never been such an indictable offence as "deceit" but the meaning of this section has always been that misdemeanors, the gist of which was a malice or deceit, were within the exception of the section as formerly appearing. In State v. Christianbury, 44 N. C. 46, it was held that there being no such offence as "deceit" it would apply to "cheating by false token" of which deceit was the gist but would not include "conspiracy to cheat," the gist of which offence is the conspiracy and the cheating but an aggravation. That decision did not restrict deceit to "cheating by false token"
but instance that as an offence coming within the general
description of misdemeanors by deceit. State v. Crowell,
104 N. C. 837, 10 S. E. 454.

What Offences Barred.—Slanderiong an innocent woman
is not barred within two years. State v. Clayworthy, 98 N.
C. 731, 5 S. E. 930. No length of possession can bar an
action to abate a public nuisance. State v. Holman, 104 N.
C. 860, 10 S. E. 750. Section is not barred. State v. Crowell,

A malicious assault cannot be the basis of an action two
years after commission. State v. Frisbee, 142 N. C. 671,
55 S. E. 722.

The section has no application to conspiracy which is a
felony. State v. Mallett, 125 N. C. 718, 34 S. E. 651. Bas-
tardy proceedings are not governed by this section. State v.
Tomlinson, 25 N. C. 32; State v. Hadden, 187 N.
C. 803, 805, 123 S. E. 65.

Where a warrant charging a misdemeanor is amended to
charge a felony, defendant’s plea of the statute of limitations
on the misdemeanor count becomes immaterial. State v.
Sanderson, 213 N. C. 381, 196 S. E. 324.

Penalty for Non-Included.—There is no saving clause in this section as to the effect of preliminary war-
rents before a justice of the peace or other committing magis-
trate, and the law must be construed and applied as
written. There must be a presentment or indictment within
one or more physicians to be summoned for the

Upon a trial on indictment for the sale of intoxicants
whether there was evidence of sales at undisclosed times, it
would not be presumed that such sales occurred more than

Whether or not the court below will allow the statute
of limitations as a defense to the action, where the same
has not been pleaded or mentioned until the argument be-
fore the jury, is a matter of discretion. Privett v. Cullo-
way, 75 N. C. 23.

Upon a trial on indictment for the sale of intoxicants
where there was evidence of sales at undisclosed times, it
would not be presumed that such sales occurred more than

Wrong Name in Bill of Indictment.—A bill of indictment
against a person by a wrong name, which is pleaded to in
abatement, and the plea found, is, nevertheless, the same
cause of action, and the elapse of two years is no bar to
prosecution. State v. Hailey, 51 N. C. 42.

§ 15-2. Issue and return of criminal process.—All
process, warrants and precepts, issued by any
judge or justice of the peace, or clerk of any court,
on any criminal prosecution, may issue at any
time, and be made returnable to any day of the term
of the court, to which such warrant, process, or
precept is returnable. (Rev., s. 3149; Code,
S. 1178; R. C., c. 35, s. 9; 1777, c. 115, s. 15; C. S.
4513.)

§ 15-3. Date of receipt and service indorsed on
process.—Every sheriff or other officer shall in-
dorse on all process and subpoenas issuing in
criminal cases, whether for the state or defendant,
the day when such process and subpoenas came
to hand, and also the day of their execution; and
on failure of any sheriff or other officer to perform
either of said duties he shall forfeit and pay the
sum of ten dollars for every case of neglect, to
be recovered for the use of the state, in the same
manner as forfeitures are recovered against
sherrifs by parties in civil suits for failure to make
due return of process delivered to them. (Rev., s.
3149; Code, s. 1179; R. C., c. 35, s. 10; 1850-1, c.
57; C. S. 151.)

Cross References.—As to forfeitures in civil actions, see
§§ 162-14 and 241. As to criminal liability for failure to
return process, see § 14-242.

§ 15-4. Accused entitled to counsel.—Every
person, accused of any crime whatsoever, shall be
entitled to counsel in all matters which may be
necessary for his defense. (Rev., s. 3150; Code,
S. 1482; R. C., c. 35, s. 13; 1777, c. 115, s. 86; C.
S. 4515.)

Cross References.—As to court’s power to limit argument,
see § 84-14. As to constitutional provisions for counsel, see
the N. C. Constitution, Art. I, § 11, and the sixth amend-
ment of the U. S. Constitution.

A Constitutional Right.—In all criminal prosecution every
man has the right * * * to have counsel for his defense.
see also State v. Hardy, 109 N. C. 799, 128 S. E. 152.

57, 24 L. Ed. 158, 84 A. L. R. 527.

§ 15-5. Fees allowed counsel assigned to defend
in capital case. — Whenever an attorney is ap-
pointed by the judge to defend a person charged
with a capital crime, he shall receive such fee for
performing this service as the judge may allow;
but the judge shall not allow any fee until he is satis-
fied that the defendant charged with the capi-
lar crime is not able to employ counsel. The fees
so allowed by the judge shall be paid by the
county in which the indictment was found. (1917,
c. 247; 1937, c. 226; C. S. 4516.)

Local Modification.—Buncombe: 1941, c. 206; Franklin: 1941,
c. 211; Wayne: 1941, c. 33.

Editor’s Note.—Prior to the 1937 amendment the fee al-
lowed was not to exceed twenty-five dollars.

§ 15-6. Imprisonment to be in county jail.—No
person shall be imprisoned by any judge, court,
justice of the peace, or other peace officer except
in the common jail of the county, unless otherwise
provided by law: Provided, that whenever the
sheriff of any county shall be imprisoned, he may
be imprisoned in the jail of any adjoining county.
(Rev., s. 3151; Code, s. 1174; R. C., c. 33, s. 6;
1797, c. 474, s. 3; 1829, c. 12; C. S. 4517.)

§ 15-7. Post-mortem examinations directed.—
In all cases of homicide, any officer prosecuting
for the state may, at any time, direct a post-mortem
examination of the deceased to be made by
one or more physicians to be summoned for the
purpose; and the physicians shall be paid a rea-
sensible compensation for such examination, the
amount to be determined by the court and taxed in
the costs, and if not collected out of the defend-
ant the same shall be paid by the county. (Rev.,
s. 3152; Code, s. 1214; R. C., c. 35, s. 49; C. S. 4518.)

Cross Reference.—See also, §§ 90-217 and 152-7, par-
graph 6.

Summary Valid.—This section is a valid exercise of the
police power of the state. Withers v. Board, 163 N. C. 341,
79 S. E. 615.

Left to Discretion of Trial Judge.—The board of commis-
sioners of every county are authorized to make
orders to a proceeding under this section, nor are they entitled to any notice of the

Coroner and physicians performing autopsy may be held
liable by father of deceased for wrongful mutilation when
the autopsy is ordered by the coroner on his own initiative
solely to ascertain the cause of death without suspicion
of foul play, since in such case the coroner is without author-
ity to order the autopsy, and his direction therefore can
§ 15-8. Stolen property returned to owner.—Upon the conviction of any person for robbing or stealing any money, goods, chattels, or other estate of any description whatever, the person from whom such goods, money, chattels or other estate were robbed or stolen shall be entitled to restitution thereof; and the court may award restitution of the articles so robbed or stolen, and make all such orders and issue such writs of restitution or otherwise as may be necessary for that purpose. (Rev., s. 3153; Code, s. 1201; R. C., c. 35, s. 34; 21 Hen. VIII, c. 11; 1943, c. 543; C. S. 4519.)

Editor's Note.—The 1943 amendment substituted in the first line the word “person” for the word “felon.”

§ 15-9. Magistrate may associate another with him.—Any magistrate, to whom any complaint may be made, or before whom any prisoner may be brought, as by law provided, may associate with himself any other magistrate of the same county; and the powers and duties herein mentioned may be executed by the two magistrates so associated. (Rev., s. 3154; Code, s. 1159; 1868-9, ch. 178, subc. 3, s. 28; C. S. 4520.)

Section Constitutional.—This section is in harmony with the provision of the Constitution, Art. IV, sec. 12, conferring power upon the General Assembly to allot and distribute judicial powers. State v. Flowers, 109 N. C. 841, 13 S. E. 324.

§ 15-10. Speedy trial or discharge on commitment for felony.—When any person who has been committed for treason or felony, plainly and especially expressed in the warrant of commitment, the judge of the court, upon notice in open court to be brought to his trial, shall not be indicted some time in the next term of the superior or criminal court ensuing such commitment, the judge of the court, upon notice in open court on the last day of the term, shall set possession said articles are may cause to be published one notice in some newspaper published in said county a notice to the effect that such articles are in the custody of such officer or department, and requiring all persons who may have or claim any interest therein to make and establish such claim or interest not later than thirty (30) days from the date of the publication of such notice or in default thereof, such articles will be sold and disposed of. Such notice shall contain a brief description of the said articles and such other information as the said officer or department may consider necessary or advisable to reasonably inform the public as to the kind and nature of the article about which the notice relates. (1939, c. 195, s. 1.)

§ 15-12. Publication of notice of unclaimed property.—Unless otherwise provided herein, whenever such articles in the possession of any sheriff, police department or constable have remained unclaimed by the person who may be entitled thereto for a period of one hundred eighty (180) days after such seizure, confiscation, or receipt thereof in any other manner, by such sheriff, police department or constable, the said sheriff, police department or constable in whose possession said articles are may cause to be published one notice in some newspaper published in said county a notice to the effect that such articles are in the custody of such officer or department, and requiring all persons who may have or claim any interest therein to make and establish such claim or interest not later than thirty (30) days from the date of the publication of such notice or in default thereof, such articles will be sold and disposed of. Such notice shall contain a brief description of the said articles and such other information as the said officer or department may consider necessary or advisable to reasonably inform the public as to the kind and nature of the article about which the notice relates. (1939, c. 195, s. 2.)

§ 15-13. Public sale thirty days after publication of notice.—If said articles shall remain unclaimed or satisfactory evidence of ownership thereof not be presented to the sheriff, police department or constable, as the case may be, for a period of thirty (30) days after the publication of the notice provided for in § 15-12, then the said sheriff, police department, or constable in whose custody such articles may be, is hereby authorized and empowered to sell the same at public auction for cash to the highest bidder, either at the courthouse door of the county, or at the police headquarters of the municipality in which the said articles of property are located, and at such sale to deliver the same to the purchaser or purchasers thereof. (1939, c. 195, s. 3.)

§ 15-14. Notice of sale.—Before any sale of said property is made under the provisions of this article, however, the said sheriff, police department, or constable making the same shall first advertise the sale by publishing a notice thereof in some newspaper published in the said county at least one time not less than ten days prior to the date of sale, and by posting a notice of the sale at the courthouse door and at three other public
§ 15-15. Disbursement of proceeds of sale.—

From the proceeds realized from the sale of said property, the sheriff, police department, constable, or other officer making the same shall first pay the costs and expenses of the sale, and all other necessary expenses incident to a compliance with this article, and any balance then remaining from the proceeds of said sale shall be paid within thirty days after the sale to the treasurer of the county board of education of the county in which such sale is made, for the benefit of the fund for maintaining the free public schools of such county. (1939, c. 195, s. 5.)

§ 15-16. Non-liability of officers.—No sheriff, police department, constable, or other officer, shall be liable for any damages or claims on account of any such sale or disposition of such property, as provided in this article. (1939, c. 195, s. 6.)

§ 15-17. Construction of article.—This article shall not be construed to apply to the seizure and disposition of whiskey distilleries, game birds, and other property or articles which have been or may be seized, where the existing law now provides the method, manner, and extent of the disposition of such articles or of the proceeds derived from the sale thereof. (1939, c. 195, s. 7.)

Cross References.—As to the disposition of liquor seized, see § 15-18. Who may issue warrant.—The following persons respectively have power to issue process for the apprehension of persons charged with any offense, and to execute the powers and duties conferred in this chapter, namely: The chief justice and the associate justices of the supreme court, the judges of the superior court, judges of criminal courts, presiding officers of inferior courts, justices of the peace, mayors of cities, or other chief officers of incorporated towns. (Rev., s. 3156; Code, s. 1132; 1868-9, c. 178, subc. 3, s. 1; C. S. 4532.)

Cross References.—As to coroner's power to issue warrants, see § 152-7 paragraph 4. As to warrant of arrest in cases of extradition, see § 15-61. As to power of hotel inspector to swear out warrants, see § 72-29. As to power of sheriffs to issue warrants, see § 120-380.

Mayor Pro Tem. May Issue.—The power conferred upon a mayor pro tem, "to exercise the duties" of mayor during his absence includes that of issuing warrants in criminal actions. State v. Thomas, 141 N. C. 791, 53 S. E. 522.

§ 15-19. Complainant examined on oath.—Whenever complaint is made to any such magistrate that a criminal offense has been committed within this state, or without this state and within the United States, and that a person charged therewith is in this state, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him. (Rev., s. 3157; Code, s. 1133; 1868-9, c. 178, subc. 3, s. 2; C. S. 4533.)

Oath Essential.—This section requires the Justice, before issuing a warrant to examine the complainant on oath. Merrimon v. Commissioners, 106 N. C. 369, 371, 11 S. E. 267.

Examination Must Show Commission of Offense.—It must appear by the examination that an offense has been committed before any warrant is issued. State v. Moore, 136 N. C. 581, 48 S. E. 573.

Sufficiency of Evidence.—It is the duty of a magistrate, before issuing a warrant upon a criminal charge, to have a super visum, to require evidence on oath amounting to a direct charge or creating a strong suspicion of guilt. Welch v. Scott, 27 N. C. 72.

Same—No Special Form Required.—It is not expected nor required, in the absence of special provision to the contrary, that an affidavit or complaint should be in any particular form or should charge the wrong with the fullness or particularity necessary in an information or indictment, 12 Cyc., 294. State v. Gupton, 166 N. C. 257, 262, 80 S. E. 989.

Appellate Court Cannot Look Behind Warrant.—The appellate court "can only look at the warrant, which is the complaint," and "cannot look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence." State v. Peters, 107 N. C. 879, 879, 12 S. E. 74; State v. Bryson, 84 N. C. 785.

§ 15-20. Warrant issued; contents. If it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation, and commanding the officer to whom it is directed forthwith to take the person accused of having committed the offense, and bring him before a magistrate, to be dealt with according to law. A justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county. (Rev., s. 3158; Code, s. 1134; 1901, c. 668; 1868-9, c. 178, subc. 3, s. 3; C. S. 4534.)

Editor's Note.—For article discussing requisites of warrant, see 15 N. C. L. Rev. 101.

General Consideration.—It is not necessary that a warrant as to sequestration should charge that the person and property described were seized upon a sworn complaint. State v. Price, 111 N. C. 703, 16 S. E. 414.

The facts constituting the offense must be set out with certainty. State v. Jones, 88 N. C. 671. But the warrant may mention the affidavit, State v. Yellowstone, 152 N. C. 793, 67 S. E. 489, as they will be construed together. State v. Gupton, 166 N. C. 257, 80 S. E. 989.

Appearance waives a defect in a warrant. State v. Cole, 150 N. C. 795, 57 S. E. 293. It is necessary in every case that no exception be taken in a statute. State v. Moore, 166 N. C. 284, 81 S. E. 294.

Amendment of Warrant.—On appeal to the superior court from a conviction before a justice of the peace, the court can allow an amendment of the warrant. State v. Koone, 108 N. C. 752, 12 S. E. 1002; State v. Carble, 70 N. C. 62. It is discretionary with the court whether it will exercise the power. State v. Vaughan, 91 N. C. 532; State v. Crook, 91 N. C. 536.

But a warrant cannot be amended so as to charge a different offense. State v. Taylor, 118 N. C. 1352, 24 S. E. 536; State v. Quick, 91 N. C. 533; State v. Cook, 61 N. C. 535.

An order directing an amendment to a warrant by the insertion therein of certain words is self-executing, and the words need not be actually inserted in the complaint or warrant. State v. Yellowstone, 152 N. C. 793, 67 S. E. 480; See also, State v. Winslow, 95 N. C. 649; State v. Davis, 111 N. C. 729, 16 S. E. 540; State v. Sharp, 125 N. C. 625, 37 S. E. 264; State v. Yoder, 113 N. C. 1111, 1112, 44 S. E. 689.

Officer Protected when Warrant Defective.—See State v. Gupton, 166 N. C. 257, 262, 80 S. E. 989; State v. Jones, 88 N. C. 671.

§ 15-21. Where warrant may be executed.—Warrants issued by any justice of the supreme court, or by any judge of the superior court, or of a criminal court, may be executed in any part of this state; warrants issued by a justice of the
peace, or by the chief officer of any city or incorporated town, may be executed in any part of the county of such justice, or in which such city or town is situated, and on any river, bay or sound forming the boundary between that and some other county, and not elsewhere, unless indorsed as prescribed in § 15-22. (Rev., s. 3159; Code, s. 1135; 1868-9, c. 178, subc. 3, s. 4; C. S. 4525.)

§ 15-22. Warrant indorsed and served in another county.—If the person against whom any warrant is issued by a justice of the peace or chief officer of a city or town shall escape, or be in any other county out of the jurisdiction of such justice or chief officer, it shall be the duty of any justice of the peace, or any other magistrate within the county where such offender shall be, or shall be suspected to be, upon proof of the handwriting of the magistrate or chief officer issuing the warrant, to indorse his name on the same, and thereupon the person, or officer to whom the warrant was directed, may arrest the offender in that county: Provided, that an officer to whom a warrant charging the commission of a felony is directed, who is in the actual pursuit of a person known to him to be the one charged with the felony, may continue the pursuit without such indorsement. The justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county, and such warrant when so indorsed as herein prescribed shall authorize and compel the sheriff or other officer of any county in the state, in which such indorsement is made, to execute the same. (Rev., s. 3160; Code, s. 1136; 1917, c. 30; 1901, c. 663; 1868-9, c. 175, subc. 3, s. 6; C. S. 4526.)

Restricted to Criminal Cases.—The provision of this section is restricted to criminal cases. Fisher v. Bullard, 109 N. C. 574, 13 S. E. 799.

Justice in County of Service Must Endorse.—A warrant issued in one county to be served in another is not given extraterritorial efficacy unless it has the endorsement of a justice of the peace or other authorized officer in the latter county. Stancill v. Underwood, 188 N. C. 475, 476, 124 S. E. 845.

§ 15-23. Magistrate not liable for indorsing warrant.—No magistrate shall be liable to any indictment, action for trespass or other action for having indorsed any warrant pursuant to the provisions of § 15-22, although it should afterwards appear that such warrant was illegally or improperly issued. (Rev., s. 3161; Code, s. 1137; 1868-9, c. 178, subc. 3, s. 6; C. S. 4527.)

Endorsing Officer Fully Protected.—If a warrant issues from competent authority and the extraterritorial efficacy provided by section 15-22 is imparted to it in the county wherein the accused party was arrested, the justification is full to the officer and all who co-operated with him, and no inquiry is admissible into the circumstances under which it was issued. State v. James, 80 N. C. 370, 372.

§ 15-24. Before what magistrate a warrant returned.—Persons arrested under any warrant issued for any offense, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant; or, if he be absent, or from any cause unable to try the case, before the nearest magistrate in the same county; and the warrant by virtue of which the arrest shall have been made, with a proper return indorsed thereon and signed by the officer or person making the arrest, shall be delivered to such magistrate. (Rev., s. 3162; Code, s. 1143; 1868-9, c. 178, subc. 3, s. 12; C. S. 4528.)

Mayor Pro Tem.—A warrant may be returnable before a mayor pro tem. State v. Thomas, 141 N. C. 791, 53 S. E. 532.

Authority of Magistrate Issuing Warrant. —The magistrate who issues the warrant has the authority to make the warrant returnable before himself, but shall not make the warrant returnable before any person having like jurisdiction, such a recorder to conduct the preliminary hearing. State v. Lord, 145 N. C. 479, 59 S. E. 656. Cited in State v. James, 78 N. C. 455, 457.

Art. 4. Search Warrants.

§ 15-25. In what cases issued, and where executed.—If any credible witness shall prove, upon oath, before any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, that there is a reasonable cause to suspect that any person has in his possession, or on his premises, any property stolen, or any and all personal property and all tickets, books, papers and documents used in connection with and operation of lotteries or any gaming or gambling, or any false or counterfeit coin resembling, or apparently intended to resemble, or pass for, any current coin of the United States, or of any other state, province or country, or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of any such coin; or any false and counterfeit notes, bills or bonds of the United States, or of the state of North Carolina, or of any other state or country, or of any county, city or incorporated town; or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of such note, bill or bond, it shall be lawful for such justice, mayor or chief magistrate of any incorporated town to grant a warrant, to be executed within the limits of his county or of the county in which such city or incorporated town is situated, to any proper officer, authorizing him to search for such property, and to seize the same, and to arrest the person having in possession or on whose premises may be found such stolen property, or any and all personal property and all tickets, books, papers and documents used in connection with and operation of lotteries or any gaming or gambling, counterfeit coin, counterfeit notes, bills or bonds, or the instruments, tools or engines for making the same, and to bring them before any magistrate of competent jurisdiction, to be dealt with according to law. (Rev., s. 3163; Code, s. 1171; 1868-9, c. 178, subc. 3, s. 38; 1914, c. 53; C. S. 4529.)

Cross References.—As to warrant authorizing search for liquor, see § 18-13.

Editor’s Note.—The 1941 amendment inserted the provisions relating to lotteries, etc.

At Common Law.—Warrants to search for stolen goods are authorized by the principles of the common law. State v. McDonald, 14 N. C. 468, 470.

§ 15-26. Nature of warrant and procedure thereon.—Such search warrant shall describe the article to be searched for with reasonable certainty, and by whom the complaint is made, and in whose possession the article to be searched for is supposed to be; it shall be made returnable as other criminal process is by law required to be, and the proceedings thereon shall be as required in other cases of criminal complaint. (Rev., s. 3164; Code, s. 1172; 1868-9, c. 178, subc. 3, s. 39; C. S. 4530.)

Cross References.—As to search warrants for deserting seamen, see § 14-551. As to constitutional prohibition against general warrants, see N. C. Constitution, Art. 1, § 15.
§ 15-27. Warrant issued without affidavit and examination of complainant or other person; evidence discovered thereunder incompetent. — Any officer who shall sign and issue or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examine or examine said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action. (1937, c. 329, s. 154.)

Editor's Note. — This section makes one important change in criminal procedure. Unlike the federal and the majority of state jurisdictions, North Carolina has always admitted evidence obtained by an illegal search. The new law provides that evidence obtained by a search made pursuant to an illegally issued search warrant cannot be admitted in evidence. This leaves open the question whether evidence obtained by an illegal search made without any search warrant would be admissible. 15 N. C. Law Rev. 241.

This section does not apply to evidence obtained by search without a warrant, the language of the statute being insufficient to the conclusion that the statute being in derogation of the common law rule. State v. McGee, 214 N. C. 184, 198 S. E. 616.

An affidavit for a search warrant signed by the chief of police is not the informant he is "some other person," and the statute does not require that the informant shall make the affidavit, or that the person signing the affidavit should state his informant is, and evidence obtained on a search warrant issued on such affidavit is competent. State v. Cradle, 213 N. C. 217, 195 S. E. 392.

Officer Need Not Make the Affidavit. — It is not required that the officer using a search warrant make the affidavit. State v. Shermey, 216 N. C. 719, 6 S. E. (2d) 529.

Affidavit Based on Information. — Where the search warrant in question was issued upon the sworn affidavit of a police officer which stated that the basis of the oath was "information," the affidavit does not negative the assumption that the police officer was examined as to the particulars of his information, and it is not required that the affidavit give in detail the source and extent of the information, and evidence procured in a search under the warrant is competent. State v. Eiler, 217 N. C. 111, 6 S. E. (2d) 840.

Art. 5. Peace Warrants.

§ 15-28. Officers authorized to issue peace warrants. — The following magistrates have power to cause to be kept all the laws made for the preservation of the public peace, and in execution of that power to require persons to give security to keep the peace, in the manner provided in this chapter, namely: The chief justice and associate justices of the supreme court, the judges of the superior courts, and of any special courts which may hereafter be created, the justices of the peace, the mayors or other chief officers of all cities and towns. (Rev. s. 3165; Code, s. 1216; 1868-9, c. 178, subc. 2, s. 1; C. S. 4531.)

A Criminal Action. — A peace warrant is a criminal action procured by a peace officer or other person, in derogation of the common law rule, to prevent an apprehended crime against his person or property, and is within the exclusive jurisdiction of a justice of the peace. State v. Oates, 88 N. C. 668; State v. Locust, 53 N. C. 574.

§ 15-29. Complaint and examination. — Whenever complaint is made in writing, and upon oath, to any such magistrate that any person has threatened to commit any offense against the person or property of another, it shall be the duty of such magistrate to examine such complainant and any witnesses who may be produced on oath, to reduce such examination to writing, and to cause the same to be subscribed by the parties so examined. (Rev. s. 3166; Code, s. 1217; 1868-9, c. 178, subc. 2, s. 2; C. S. 4582.)

Applicant Should Not Be Bound Over. — It is error for a justice of the peace to bind to the superior court an applicant for a peace warrant against whom no charge is made. State v. Bass, 75 N. C. 139.

§ 15-30. Warrant issued. — If it shall appear from such examination that there is just reason to fear the commission of any such offense by such person complained of, it shall be the duty of the magistrate to issue a warrant under his hand, with or without a seal, reciting the complaint, and commanding the officer to whom it is directed forthwith to apprehend the person so complained of, and bring him before such magistrate or some other magistrate authorized to issue such warrant. (Rev. s. 3167; Code, s. 1218; 1868-9, c. 178, subc. 2, s. 3; C. S. 4533.)

Warrant Should Contain Allegations. — A peace warrant in which is alleged no threat, fact or circumstance from which the court can determine whether the fear of the prosecutor is well founded, should be quashed. State v. Goram, 83 N. C. 664; State v. Cooley, 78 N. C. 538.

§ 15-31. To whom warrant directed. — The warrant shall be directed to the sheriff, coroner or any constable, each of whom shall have power to execute the same within his county; and if no sheriff, coroner or constable can conveniently be found, the warrant may be directed to any person whatever, who shall have power to execute the same within the county in which it is issued. No justice of the peace, or mayor, or other chief officer of any city or town shall direct his warrant to any officer outside the county of said justice or chief officer. (Rev. s. 3169; Code, s. 1219; 1868-9, c. 178, subc. 2, s. 3; C. S. 4532.)

Right of Private Person to Make Arrest. — A private person has no authority to make an arrest for a riot, rout, affray, or other breach of the peace, without warrant, except when such offenses are being committed in his presence, nor can a justice of the peace confer such authority by a mere verbal order or command. State v. Campbell, 107 N. C. 948, 12 S. E. 441.

Section Confers Extraordinary Power. — The power conferred by this section is the only extraordinary case in which a justice of the peace is authorized to depose one, who is not an officer, to execute process. Marsh v. Williams, 61 N. C. 371; State v. Jones, 48 N. C. 404; McVee v. Angel, 90 N. C. 60, 61, 62.

§ 15-32. Defendant recognized to keep the peace. — Whenever any person complained of on a peace warrant is brought before a justice of the peace, such person may be required to enter into a recognizance, payable to the state of North Carolina, in such sum, not exceeding one thousand dollars, as such justice shall direct, with one or more sufficient sureties, to appear before some justice of the peace within a period not exceeding six months, and not depart the court without leave, and in the meanwhile to keep the peace and be of good behavior toward all the people of the state, and particularly towards the person requiring such security. (Rev. s. 3170; Code, ss. 894, 1220; 1879, c. 98, s. 9; C. S. 4536.)

Jurisdiction Given to Justices. — This section gives to justices of the peace exclusive original jurisdiction of peace warrants and proceedings thereunder. State v. Oates, 88 N. C. 668, 670.

§ 15-33. Defendant discharged, or new recognizance required. — If the complainant does not appear, the party recognized shall be discharged, unless good cause be shown to the contrary. If the respective parties appear, the court shall hear their allegations and proofs, and may either discharge the recognizance taken or they may re- [715]
quire a new recognizance, as the circumstances of the case may require, for such time as may appear necessary, not exceeding one year. (Rev., s. 3171; Code, s. 1226; 1868-9, c. 178, subc. 2, s. 12; C. S. 4536.)

§ 15-34. Defendant imprisoned for want of security.—If such recognizance is given, the party complained of shall be discharged; if such person fails to find such security, it shall be the duty of the magistrate to commit him to prison until he shall find the same, specifying in the mittimus the cause of commitment and the sum in which such security was required. (Rev., s. 3172; Code, s. 1221; 1868-9, c. 178, subc. 2, s. 6; C. S. 4537.)

Prisoner Worked on Roads.—One committed under this section may be worked upon the roads. State v. Yandle, 119 N. C. 974, 25 S. E. 796.

§ 15-35. How discharged from imprisonment.—Any person committed for not finding sureties of his own purpose, without warrant, undertakes to make arrest of a party guilty of only a misdemeanor otherwise than in the cases and in the way pointed out by the section he may undertake to deprive of his liberty may resist him by such force as may be necessary to defend himself successfully. State v. Campbell, 107 N. C. 948, 954, 12 S. E. 441.

§ 15-36. Defendant may appeal.—In all proceedings on peace warrants the defendant may appeal from the decision of the justice of the peace to the superior court by giving the bond required by the justice of the peace to keep the peace, in addition to the appeal bond, when the case shall be heard by the judge holding the court in the county. (Rev., s. 3173; 1901, c. 66; C. S. 4539.)

Editor's Note.—Previous to the passage of this section it was several times held that there was no appeal in peace warrant proceedings from the justice of the peace to the superior court. See State v. Gregory, 118 N. C. 1199, 24 S. E. 441. This section makes these decisions obsolet.

§ 15-37. Breach of peace in presence of court.—Every person who in the presence of any magistrate specified in the first section of this article, or in the presence of any court of record, shall make any affray, or threaten to kill or beat another, or to commit any offense against his person or property; and all persons who, in the presence of such magistrate or court, shall contend with hot and angry words, may be ordered by such magistrate or court, with or without a binding oath to give such security as above specified, and in case of failure so to do, may be committed as above provided. (Rev., s. 3168; Code, s. 1224; 1868-9, c. 178, subc. 2, s. 9; C. S. 4540.)

§ 15-38. Recognizance returned to superior court.—Every recognizance taken pursuant to the provisions of this article shall be transmitted by the magistrate taking the same to the next term of the superior court for the county in which the offense is charged to have been committed. (Rev., s. 3175; Code, s. 1223; 1868-9, c. 178, subc. 2, s. 8; C. S. 4541.)

Art. 6. Arrest.

§ 15-39. Persons present may arrest for breach of peace.—Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders. (Rev., s. 3176; Code, s. 1124; 1868-9, c. 178, subc. 1, s. 1; C. S. 4542.)

Cross References.—As to arrest in civil cases, see § 1-409 et seq. As to arrest of tramps by persons who are not officers, see § 1-431.

Editor's Note.—For an article on the law of arrest in the State of North Carolina, see 15 NC. Law Rev., 101.

Authority Strictly Limited.—The authority given by this article to private persons to make arrests only extends to the offenses therein mentioned and committed under the conditions therein prescribed. State v. Campbell, 197 N. C. 948, 954, 12 S. E. 441.

Breach of Town Ordinance.—The violation of a town ordinance, even in the presence of a policeman, does not necessarily give him a right to arrest the offender. State v. Bell, 76 N. C. 449, 12 S. E. 441.

Same.—After offense committed. —After the offenses—misdemeanors—mentioned above have been committed, and the offenders have dispersed, a private person has no authority to arrest the offender, unless he apprehends that the person so arrested can go out to make such arrest by the mere order of justice of the peace or any officer. State v. Campbell, 107 N. C. 948, 954, 12 S. E. 441.

§ 15-40. Arrest for felony, without warrant.—Every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offense, and it shall be the duty of every sheriff, coroner, constable or officer of the police, upon information, to assist in such arrest. (Rev., s. 3177; Code, s. 1129; 1868-9, c. 178, subc. 1, s. 6; C. S. 4543.)

Right of Private Person to Arrest.—A private person may arrest the felon without a warrant, if he is present at the time the felony is committed. Martin v. Houck, 141 N. C. 317, 321, 54 S. E. 291. In such case, he may and ought to arrest and, as soon as practicable, take him before a proper officer, to the end that he may be duly held to answer for the offense. In such case, the private person would not be justified unless a felony had actually been committed. It is better and safer to obtain a warrant when this may be promptly done. State v. Roane, 13 N. C. 58; Brodway v. Crawford, 48 N. C. 433; State v. Bryant, 65 N. C. 327; State v. Shelton, 79 N. C. 605; Neal v. Joyner, 89 N. C. 287; State v. Campbell, 107 N. C. 948, 954, 12 S. E. 441; Martin v. Houck, 141 N. C. 317, 321, 54 S. E. 291.

In State v. Stancill, 128 N. C. 606, 609, 38 S. E. 925, 928, the court says: "A private citizen has the right to arrest a felon, whether he is present when the felony is committed or not. When he is not present, it devolves on him to show that the felony, for which he arrested, had been committed." 15 NC. Law Rev., 101.

As to what constitutes reasonable ground for believing that accused has committed a felony in the presence of the person making the arrest, see State v. Blackwelder, 182 N. C. 569, 109 S. E. 644.

Party Arresting Must State His Purpose.—A private citizen, attempting to arrest a felon without warrant, must make his purpose known, and for what offense he is attempting arrest. And unless he notifies the felon of his purpose and reason for the arrest, he must then proceed in a peaceable manner to make the arrest, and if he is resisted he may use such force as is necessary to overcome the resistance, if used for that purpose alone. 2 Am. and Eng. Enc., 906, note 2. But this is put upon the ground that the party attempting to make the arrest becomes personally involved, and he has the right to defend himself. State v. Stancill, 128 N. C. 606, 610, 38 S. E. 926.
§ 15-41. When officer may arrest without warrant.—Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest. (Rev., s. 3178; Code, s. 1126; 1868-9, c. 178, subc. 1, s. 3; C. S. 4544.)

Cross References.—As to power of bank examiner to arrest, § 67-112. As to state forest wardens, see § 113-49. As to arrest of persons escaped from penal and correctional institutions, see § 153-184. As to arrest for violations of the fishery laws, see §§ 113-141. As to arrest by appointees of superintendents of the state hospitals for the insane, see § 122-31. As to arrest of persons violating the laws regulating intoxicating liquors, see §§ 18-6 and 18-23. As to arrest by the commanding officer of militia, see § 127-106. As to arrest of parolee from the state prison whose parole has been revoked, see § 148-63. As to arrest to arrest for violation of the weights and measures laws, see § 81-12.

Editor's Note.—For a discussion of arrest without warrant, see § 15 N. C. Law Rev., 191.

Common Law Provisions.—At common law there is this distinction between a private individual and a constable in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that an actual felony has been committed. Whereas, a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until an inquiry shall be made by the proper authorities. Neal v. Joyner, 89 N. C. 267, 290.

An Emergency Measure — The arrest of a person by an officer without a warrant is allowed upon emergency. Hobbs v. Washington, 188 N. C. 293, 84 S. E. 391.

Powers of Police Officer.—A police officer was not known to the common law, and therefore he can exercise powers only within the town limits. Martin v. House, 141 N. C. 317, 221, 54 S. E. 291. And is guilty of assault when he arrests without a warrant outside such limits. Sossaman v. Cruse, 133 N. C. 470, 45 S. E. 757. Nor can a police officer recover under the Workmen's Compensation Act for injuries sustained in the performance of his duties if the alleged cause of his injuries was outside town limits. Wilson v. Mooresville, 222 N. C. 283, 23 S. E. (2d) 907.

The superintendent of a convict gang is not such an officer as contemplated by the section. State v. Stancill, 128 N. C. 606, 610, 38 S. E. 926.

§ 15-42. Sheriffs and deputies granted power to arrest felons anywhere in state.—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flees the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State. (1935, c. 204.)


§ 15-43. House broken open to prevent felony.—All persons are authorized to break open and enter a house to prevent a felony about to be committed therein. (Rev., s. 3179; Code, s. 1127; 1868-9, c. 178, subc. 1, s. 4; C. S. 4545.)

§ 15-44. When officer may break and enter houses.—If a felony or other infamous crime has been committed, or a dangerous wound has been given and there is reasonable ground to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff, coroner, constable, or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief. (Rev., s. 3180; Code, s. 1128; 1868-9, c. 178, subc. 1, s. 5; C. S. 4546.)

Where an officer comes armed with process founded on a breach of the peace, he may, after demand of admittance to the premises, make search of the house, and search for the occupant to open the doors of a house, lawfully break them in order to effect an entrance and if he act in good faith in doing so, both he and his posse comitatus will be protected. (15 N. C. Law Rev., 125, citing State v. Moore, 115 N. C. 709, 20 S. E. 182.)

§ 15-45. Persons summoned to assist in arrest.—Every person summoned by a judge, justice, mayor, intendant, chief officer of an incorporated
town, sheriff, coroner or constable, to aid in suppressing any riot, rout, unlawful assembly, affray or other breach of the peace, or to arrest the persons engaged in the commission of such offenses, or to prevent the commission of any felony, breach of the peace, larceny which may be threatened or begun, shall do so. (Rev., s. 3181; Code, s. 1125; 1868-9, c. 178, subc. 1, s. 2; C. S. 4547.)

Cross Reference.—As to liability for failure to aid police officers, see § 14-224.

Protection of Persons Assisting.—This section makes it imperative on the person so summoned to aid, whether he be present at the perpetration of the offense when the officer is summoned, or not, State v. Campbell, 107 N. C. 948, 953, 12 S. E. 441. The protection extends to persons aiding. State v. McMahon, 103 N. C. 379, 392, 9 S. E. 48.

Limits Imposed by Section. — The power conferred upon officers by this section is limited to the cases mentioned in the section, and while they are actually being perpetrated, or are imminent. It does not go to the extent of authorizing the persons thus summoned to make arrests, without warrant, where the offense has been accomplished and the offenders have dispersed. State v. Campbell, 107 N. C. 946, 12 S. E. 441.

Policeman Given Same Authority as Sheriff within Town Limits. — A policeman has the authority under general statute to depopulate a citizen to aid him in serving a warrant for breach of the peace, a policeman being given the same authority, within the town limits, in making arrests as a sheriff. Tomlinson v. Norwood, 208 N. C. 716, 182 S. E. 659.

§ 15-46. Procedure on arrest without warrant. —
Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law. (Rev., s. 3182; Code, s. 1130; 1868-9, c. 178, subc. 1, s. 7; C. S. 4548.)

Proper Compliance Protects Justice. — If the justice shall comply with this section by carefully examining the complainant, on oath, before issuing his warrant, few cases would arise in which he would not have judgment for his fees. Merrimon v. Commissioners, 106 N. C. 369, 371, 11 S. E. 197.

Liability of Officer for Wrongful Delay. — A warrant must be procured as soon after the arrest as possible and, where it appears that this was not done, the officer responsible for the delay would be answerable in damages. Hobbs v. Washington, 168 N. C. 293, 94 S. E. 391.

Custody of Prisoner. — If offender is arrested at a time and under such circumstances as he cannot be carried immediately before a justice, the officer may keep him in custody, commit him to jail or the lock-up, or even tie him, according to the nature of the offense and the necessity of the case. 15 N. C. Law Rev., 127, citing State v. Freeman, 86 N. C. 663.

§ 15-47. Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends. — Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this state, with or without warrant, it shall be the duty of the officer making the arrest to forthwith inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied.

Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. (1937, c. 257, ss. 1, 3.)

Cross Reference.—As to bail generally, see § 15-102 et seq.

The violation of this section, in regard to bail and the manner of detention of defendant under arrest, would not render defendant's voluntary confession incompetent. State v. McCurn, 213 N. C. 16, 195 S. E. 7.

When the defendant, upon his arrest, is informed of the charge against him, and "there is no evidence in the record tending to show that after his arrest and while he was in the custody of the sheriff the defendant demanded of the sheriff that he be permitted to communicate with friends or with counsel", the provisions of this section are not applicable. State v. Exum, 213 N. C. 16, 195 S. E. 7.

Art. 7. Fugitives from Justice. § 15-48. Outlawry for felony. — In all cases where any two justices of the peace, or any judge of the supreme, superior, or criminal courts shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of the law, the judge, or the two justices, being justices of the county, wherein such person is supposed to lurk or conceal himself, are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also, when issued by any judge, empowering and requiring the sheriff of any county in the state in which such fugitive shall be, and when issued by two justices, empowering and requiring the sheriff of the county of the justices, to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the judge or justices shall direct; and if any person against whom proclamation has been thus issued, continue to stay out, lurk and conceal himself, and do not immediately surrender himself, any citizen of the state may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation or impeachment of any crime. (Rev., s. 3183; Code, s. 1131; 1868-9, c. 178, subc. 1, s. 8; 1866, c. 62; C. S. 4549.)

Cross Reference.—As to extradition, see § 15-55 et seq. and Appendix V. 177.

Fugitive from Justice. — A fugitive from justice is one who, having committed a crime in one jurisdiction, flees therefrom in order to evade the law and escape punishment. State v. Hauf, 128 N. C. 181, 56 S. E. 107.

Outlaws Must Be Warned. — "So careful is the law to protect those who have not been tried and convicted, that the 'outlaws' are entitled to be called upon and warned to surrender' before they are allowed to be slain." State v. Stanfill, 128 N. C. 606, 611, 38 S. E. 926, in dissenting opinion by Cook, J.

§ 15-49. Fugitives from another state arrested. —Any justice of the supreme court, or any judge of the superior court or of any criminal court, or any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, on satisfactory information laid before him that any fugitive or other person in the state has committed, out of the state and within the United States,
any offense which, by law of the state in which the offense was committed, is punishable either capi
tally or by imprisonment for one year or upwards in any state prison, has full power and authority, and is hereby required, to issue a warrant for such fugitive or other person and commit him to any jail within the state for the space of six months, and is sooner demanded by the public authorities of the state wherein the offense may have been committed, pursuant to the act of congress in that case made and provided. If no demand be made within that time the fugitive or other person shall be liberated, unless sufficient cause be shown to the contrary. (Rev., s. 3184; Code, s. 1165; 1895, c. 103; 1868-9, c. 178, subc. 3, s. 34; C. S. 4550.)

Editor's Note.—See Editor's Note under § 15-132. The same defendants, who were freed in the case discussed in that note were rearrested and held under the provisions of this section which then provided for the arrest of "any fugitive in the state" etc. Upon a petition by the defend
ants for habeas corpus it was decided in State v. Hall, 115 N. C. 811, 20 S. E. 729, that they were not fugitives and hence could not be held for extradition. This section has since been amended by adding after the words "any fugi
tive" the words "or other person" which seem to make the statute broad enough to cover a case like that above.

For a discussion of this and pertinent sections in con
nection with the law of arrest in this state, see 15 N. C. Law Rev., 101.

In General.—This section prescribes the manner in which criminals escaping from other States may be restored to that having jurisdiction of the offense, and its directions can not be disregarded. It provides fully a method by which the statute may be punished, and at the same time guards and preserves the personal security of the citizen from lawless invasion. State v. Shelton, 79 N. C. 605, 608.

Process Necessary.—No one has authority, without pro
cess of court, to arrest a person charged with crime in another state and fleeing here for refuge. Such an arrest makes the parties engaged in it guilty of an assault and battery. State v. Shelton, 79 N. C. 605.

Departure after Crime Is Flight from Justice.—Departure from a jurisdiction after the commission of the act, in furtherance of the crime subsequently consummated, is a flight from justice, within the meaning of the law. In re Seaver, 115 N. C. 57, 19 S. E. 555. Cited in In Re Veasey, 196 N. C. 662, 663, 146 S. E. 599.

§ 15-50. Record kept, and copy sent to govern
nor.—Every magistrate committing any person under section 15-49, shall keep a record of the whole proceedings before him, and immediately transmit a copy thereof to the governor for such action as he may deem fit therein under the law. (Rev., s. 3185; Code, s. 1166; 1868-9, c. 178, subc. 3, s. 35; C. S. 4551.)

§ 15-51. Duty of governor.—The governor shall immediately inform the governor of the state or territory in which the crime is alleged to have been committed, or the president of the United States, if it be alleged to have been committed within the District of Columbia, of the proceedings had in such case. (Rev., s. 3186; Code, s. 1167; 1868-9, c. 178, subc. 3, s. 36; C. S. 4552.)

§ 15-52. Person surrendered on order of govern
nor.—Every sheriff or jailer in whose custody any person so committed shall be, upon the order of the governor, shall surrender him to the person named in such order. (Rev., s. 3187; Code, s. 1168; 1868-9, c. 178, subc. 3, s. 37; C. S. 4553.)

§ 15-53. Governor may employ agents, and offer rewards.—The governor, on information made to him of any person, whether the name of such per
son be known or unknown, having committed a felony or other infamous crime within the state, and of having fled out of the jurisdiction thereof, or who conceals himself within the state to avoid arrest, or who, having been convicted, has escaped and cannot otherwise be apprehended, may either employ a special agent, with a sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding four hundred dollars, according to the nature of the case, as in his opinion may be suf
ficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed. (Rev., s. 3188; Code, s. 1169; 1891, c. 421; R. C., c. 35, s. 4; 1886, c. 561; 1886, c. 28; 1868-9, c. 52; 1870-1, c. 15; 1871-2, c. 29; 1925, c. 275, s. 6; C. S. 4554.)

Editor's Note.—This section formerly contained at the end a clause authorizing the governor to issue warrants on the state treasurer for sufficient money to carry out the provisions of the section. This clause made the section an exception to section 147-68, which provided that no monies shall be paid out of the treasury except on the warrant of the auditor.

By sec. 6, ch. 275, Public Laws 1925 the provision authorizing warrants by the governor was stricken out. By the same act C. S. § 4556, which contained a similar provision was repealed. See Burton v. Furman, 115 N. C. 166, 171, 20 S. E. 443.


§ 15-54. Officer entitled to reward.—Any sheriff or other officer who shall make an arrest of any person charged with crime for whose apprehen
sion a reward has been offered, is entitled to such reward, and may sue for and recover the same in any court in this state having jurisdiction: Pro
vided, that no reward shall be paid to any sheriff or other officer for any arrest made for a crime committed within the county of such sheriff or officer making such arrest. (1913, c. 132; 1917, c. 8; C. S. 4553.)

Local Modification.—Wake: C. S. 4555.

Editor's Note.—See 13 N. C. Law Rev., 15, as to whom an offer may be made.

Law Giving Reward to Sheriff Valid.—In view of this and the preceding section, Public Local Laws of 1925, ch. 313, sec. 3, providing that the board of commissioners should pay a reward to the sheriff or other police officers for arresting violators of the prohibition law, is a valid exercise of the police power of the State and not contrary to public policy. Hutchins v. Commissioners, 193 N. C. 659, 137 S. E. 711.

Art. 8. Extradition.

§ 15-55. Definitions.—Where appearing in this article the term "governor" includes any per
son performing the functions of governor by au
thority of the law of this state. The term "execu
tive authority" includes the governor, and any person performing the functions of governor in a state other than this state. The term "state," re
ferring to a state other than this state, includes any other state or territory, organized or unor
ganized, of the United States of America. (1937, c. 273, s. 1.)

Cross Reference.—As to rules of practice of the execu
tive department of North Carolina in making requi
tions, see appendix VI.

Editor's Note.—The former extradition law, Public Laws 1931, c. 124, was repealed by Public Laws 1937, c. 273, s. 29, a part of the present extradition statute. The repealed law seemed to provide for extradition proceedings only when the crime with which the accused was charged was punishable—in the state where committed—by death or im
prisonment for more than one year in the state's prison.
or where the crime consisted of abandonment of wife or children. However, the supreme court indicated in the case of In re Hubbard, 201 N. C. 472, 160 S. E. 569, 61 A. L. R. 547, that a person could be extradited for any crime. The new extradition law is in accord with In re Hubbard, specifically providing for the extradition of a person accused of any crime, whether felony or misdemeanor. Furthermore, provision is made for return to a demanding state of a person who intentionally commits an act outside of the demanding state resulting in a crime in the demanding state. At last the extradition laws cover a situation such as existed in State v. Hall, 115 N. C. 511, 20 S. E. 795. The new act provides that the governor of this state may call up any person who is charged with crime in another state and who has left the demanding state involuntarily. The new extradition law is substantially the same as the 1931 law. 15 N. C. Law Rev., 343, 344.

§ 15-56. Duty of governor as to fugitives from justice of other states.—Subject to the provisions of this article, the provisions of the constitution of the United States controlling, and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this state. (1937, c. 273, s. 2.)

Cross Reference.—See also, U. S. Constitution, Art. IV, § 2, cl. 1.

§ 15-57. Form of demand for extradition.—No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under section 15-60, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon, or by a copy of judgment of conviction or of sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand. (1937, c. 273, s. 3.)

§ 15-58. Governor may cause investigation to be made.—When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered. (1937, c. 273, s. 4.)

§ 15-59. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.—When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in section 15-77 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily. (1937, c. 273, s. 5.)

§ 15-60. Extradition of persons not present in demanding state at time of commission of crime.—The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 15-57 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this article not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom. (1937, c. 273, s. 6.)

Cross Reference.—As to criminal liability in this state for acts injurious one in another, see § 15-132.

§ 15-61. Issue of governor's warrant of arrest; its recitals.—If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance. (1937, c. 273, s. 7.)

§ 15-62. Manner and place of execution of warrant.—Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state, and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this article to the duly authorized agent of the demanding state. (1937, c. 273, s. 8.)

§ 15-63. Authority of arresting officer.—Every such peace officer or other person empowered to make the arrest shall have the same authority, in arresting the accused, to command assistance therein as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance. (1937, c. 273, s. 9.)

Cross Reference.—As to liability for refusing to assist, see § 14-224.

§ 15-64. Rights of accused person; application for writ of habeas corpus. — No person arrested upon such warrant shall be delivered over
to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such application is made, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state. (1937, c. 273, s. 10.)

Cross Reference.—As to application for writ of habeas corpus, see § 17-3 et seq.

§ 15-65. Penalty for non-compliance with preceding section.—Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in wilful disobedience to § 15-64, shall be guilty of a misdemeanor and, on conviction, shall be fined not more than one thousand dollars ($1,000.00) or be imprisoned not more than six months, or both. (1937, c. 273, s. 11.)

§ 15-66. Confinement in jail when necessary. —The officer or person executing the governor's warrant of arrest, or the agent of the demanding state, who is passing through this state with such a prisoner, may be chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered for extradition proceedings in another state, or to whom a prisoner may have been delivered after awaiting extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

Where a justice of the peace of this State issues a warrant for the arrest of a person based upon an affidavit that such person was a fugitive from justice from another state, and the warrant is regular and valid, as provided by this section, may not be lawfully delivered to the authorities of such other state until the Governor of this State has honored a requisition for such person from the Governor of such other state. Id.

§ 15-68. Arrest without a warrant.—The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed, and complaint must be made against him under oath setting forth the ground for the arrest as in § 15-67; and thereafter his answer shall be heard as if he had been arrested on a warrant. (1937, c. 273, s. 14.)

§ 15-69. Commitment to await requisition; bail. —If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under § 15-60, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state hav-
§ 15-70. Bail in certain cases; conditions of bond.—Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the governor of this state. (1937, c. 273, s. 16.)

§ 15-71. Extension of time of commitment; adjournment.—If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed sixty days, or a judge or magistrate may again take bail for his appearance and surrender, as provided in § 15-70, but within a period not to exceed sixty days after the date of such new bond. (1937, c. 273, s. 17.)

§ 15-72. Forfeiture of bail.—If the prisoner is admitted to bail and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds given by the accused in criminal proceedings within this state. (1937, c. 273, s. 18.)

§ 15-73. Persons under criminal prosecution in this state at time of requisition.—If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state. (1937, c. 273, s. 19.)

§ 15-74. Guilt or innocence of accused, when inquired into.—The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime. (1937, c. 273, s. 20.)

§ 15-75. Governor may recall warrant or issue alias.—The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper. (1937, c. 273, s. 21.)

§ 15-76. Fugitives from this state; duty of governors.—Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed. (1937, c. 273, s. 22.)

§ 15-77. Application for issuance of requisition; by whom made; contents.—I. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said prosecuting attorney, the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

II. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

III. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition. (1937, c. 273, s. 23.)

§ 15-78. Costs and expenses.—When the crime shall be a felony, the expenses shall be paid out of the state treasury, on the certificate of the governor and warrant of the auditor; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall
be the actual traveling and subsistence costs of the agent of the demanding state, together with such legal fees as were paid to the officers of the state on whose governor the requisition is made. In every case the officer entitled to these expenses shall itemize the same and verify them by his oath for presentation, either to the governor of the state, in proper cases, or to the board of county commissioners, in cases in which the county pays such expenses. (1937, c. 273, s. 24.)

§ 15-78. Immunity from service of process in certain civil actions.—A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned until he has been convicted in the criminal proceeding or, if acquitted until he has had reasonable opportunity to return to the state from which he was extradited. (1937, c. 273, s. 25.)

§ 15-80. Written waiver of extradition proceedings.—Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in §§ 15-61 and 15-62 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state: Provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in § 15-64. If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent: Provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state. (1937, c. 273, s. 25a.)

§ 15-81. Non-waiver by this state.—Nothing in this article contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this article which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever. (1937, c. 273, s. 25b.)

§ 15-82. No right of asylum; no immunity from other criminal prosecution while in this state.—After a person has been brought back to this state by, or after waiver of extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition. (1937, c. 273, s. 26.)

§ 15-83. Interpretation.—The provisions of this article shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it. (1937, c. 273, s. 27.)

§ 15-84. Short title.—This article may be cited as the Uniform Criminal Extradition Act. (1937, c. 273, s. 30.)

Art. 9. Preliminary Examination.

§ 15-88. Waiver of examination.—If any person arrested desires to waive examination and give bail, it is the duty of the officer making the arrest to take him before any magistrate of the county in which the offense is charged to have been committed, or before any judge of the supreme or superior court. (Rev., s. 2190; Code, ss. 1138, 1139; 1868-9, c. 178, subc. 3. ss. 7, 8; C. S. 4557.)

Cross References.—As to bail in criminal proceedings, see § 15-102 et seq. As to hearing by the coroner in lieu of other preliminary hearings, see § 15-710.

§ 15-86. Procedure, where justice has not final jurisdiction.—In all cases where a justice of the peace has not final jurisdiction of the offense, he shall desist from any final determination of the action or complaint, and proceed as hereinafter provided. (Rev., s. 3191; Code, ss. 896; 1868-9, c. 178, subc. 4. s. 7; 1879, c. 302, s. 2; C. S. 4558.)

Cross Reference.—As to jurisdiction of a justice in criminal actions, see § 7-129 and notes.

When Jurisdiction of Justice Ends.—The justice has no jurisdiction of a case after he has bound the defendant to court and taken his recognizance. State v. Lucas, 139 N. C. 567, 51 S. E. 1021.

§ 15-87. Duty of examining magistrate.—The magistrate before whom any such person shall be brought shall proceed, as soon as may be, to examine the complainant and the witnesses produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offense charged, and in regard to any other matters connected with such charge which such magistrate may deem pertinent. The defendant shall be allowed a reasonable time before the hearing begins in which to send for and advise with counsel. (Rev., s. 3192; Code, ss. 1144, 1145; 1868-9, c. 178, subc. 3, s. 13; C. S. 4559.)

Person Charged Must Be Present.—There can be no examination in the absence of the person charged. Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 434, 40 S. E. 191.

Rights of Accused.—The present wise and beneficent policy of the law allows a prisoner under arrest time for deliberation and an opportunity to obtain correct legal advice, so that the statements which he may make on an examination are made of his own free will and with full knowledge of the nature and consequences of his confessions. State v. Mathis, 150 N. C. 106, 111.

§ 15-88. Testimony reduced to writing; right to counsel.—The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively. If desired by the person arrested, his counsel shall be
present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution. (Rev., s. 3193; Code, ss. 1146, 1150; 1868-9, c. 178, subc. 3, ss. 14, 15; C. S. 4560.)

Cross Reference.—As to the testimony being used as evidence, see § 15-100 and notes.

Exact Words Not Required to Be Written.—The magistrate is not required to write down the very words of the witness as they are uttered. It is sufficient if he allows the testimony of the witness as he intends it upon the subject matter of inquiry. State v. Bridgers, 87 N. C. 562, 564.

Notes Not Conclusive.—The notes of evidence made by a committing magistrate upon the hearing are not conclusive as to the testimony of witnesses examined. State v. Hooper, 151 N. C. 646, 65 S. E. 613.

Magistrate Can Give Parol Testimony.—It is competent for a magistrate to state what a witness swore before him in regard to a homicide, although he afterwards committed the statement to writing. State v. Adair, 66 N. C. 298.

Unwritten Testimony.—The written statement can only be referred to, to refresh his memory, and is properly treated as a memorandum, State v. Adair, 66 N. C. 298, unless the witness is dead, or too ill to be present, or insane, or has removed from the State at the instigation or consent of the accusing party, State v. Simpson, 133 N. C. 676, 45 S. E. 567.

§ 15-89. Prisoner examined; advised of rights.—
The magistrate shall then proceed to examine the prisoner in relation to the offense charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed by the magistrate of the charge made against him, and that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings. (Rev., s. 3194; Code, ss. 1145, 1146; 1868-9, c. 178, subc. 3, ss. 14, 15; C. S. 4561.)

Cross Reference.—As to the right of a prisoner to testify as a witness, see § 8-54.

Purpose of Section.—It was intended by this section to safeguard prisoners who are accused of crime, and to afford him every protection against imposition, oppression, or undue influence, so that what he may say in any investigation in regard to the accusation against him may be entirely voluntary. State v. Parker, 132 N. C. 1014, 1017, 43 S. E. 830. For the accused, without the caution, might, before the magistrate, feel compelled to answer questions put to him, and such answers as he might make, might not be voluntary. State v. Conrad, 95 N. C. 666, 670.

Prisoner Must Not Be Sworn.—It was the purpose and intent that the person under examination, who is accused of crime, should feel free to admit or deny his guilt, and the oath which is forbidden by statute deprives him of this perfect freedom. State v. Parker, 132 N. C. 1014, 1018, 43 S. E. 830.

Section Extends to Coroner's Inquest.—The reason of the section extends to an inquest by a coroner. In this respect he is examining magistrate. State v. Matthews, 66 N. C. 106.

Confession to Prisoner Is Essential.—This caution is not a mere matter of form: it is a substantial right, necessary for the protection of prisoners who are too poor to employ counsel and too ignorant to conduct their own defense. State v. Rorie, 74 N. C. 148, 150.

And in the opinion of the Court in State v. Matthews, 66 N. C. 106, "this caution is an essential part of the proceedings, and must be given to the prisoner under arrest to make his examination admissible in evidence." State v. Rorie, 74 N. C. 148, 150. Thus where a confession is made before the cautions required by the section were given it is inadmissible. State v. Matthews, 66 N. C. 106, 113.

Caution Applies to Whole Examination.—The purpose of the section is, that the prisoner shall be advised by the magistrate of his right to refuse to answer all questions that may be put to him as to the charge made against him, without prejudice, during the whole examination, and not simply so much of it as applies to him personally. State v. Conrad, 95 N. C. 666, 670.

When Caution to Be Given.—The commencement of the examination is properly, when, after the warrant of arrest is returned executed, the accused is present before the magistrate, and the latter having called and noticed the matter of the charge, proceeds to read the warrant or state the substance of the charge orally. It is then the caution to which the prisoner has a right to insist, and should be given before the examination inadmissible in evidence. If the magistrate has taken official notice of the charge and the accused, and what he does and says, and then the latter must take notice of the magistrate and be under his jurisdiction and control when he is before the court, and the examination is begun. State v. Conrad, 95 N. C. 666, 669.

It is not necessary to competency of an extra judicial confession to a police officer that defendant be warned he is not compelled to answer. State v. Grier, 203 N. C. 556, 166 S. E. 955.

Exact Words of Section Not Required.—It is not necessary that a committing magistrate at the commencement of the examination of a prisoner shall use the precise words of the section in giving the caution therein prescribed, but it is sufficient if there be a substantial compliance with the requirement of the section. State v. Rogers, 112 N. C. 874, 17 S. E. 297; State v. DeGraff, 113 N. C. 688, 18 S. E. 507; State v. King, 162 N. C. 580, 581, 77 S. E. 301.

Same.—What Is Sufficient.—Both the letter and spirit of the statute require that the defendant should be advised of his right to refuse to answer all questions that may be put to him, and that his refusal to answer shall not be used to his prejudice. State v. Parker, 132 N. C. 1014, 43 S. E. 830; State v. Simpson, 133 N. C. 676, 45 S. E. 567; State v. Vaughan, 156 N. C. 615, 71 S. E. 108.

Same.—Insufficient Compliance.—Where the prisoner was brought before the magistrate and he was told by that official that he was charged with a crime, and that if he wanted to tell anything he could do so; but it was just as he chose." This was not sufficient compliance. State v. Rorie, 74 N. C. 148, 150.

Judges Must Find Proper Caution.—Where the record of a committing magistrate merely states that the prisoner was cautioned and the trial court holds such admission competent, with no other evidence before him except this statement, it is error, as the trial judge should have found that if the prisoner was advised he was not compelled to answer all questions that may be put to him, and that his refusal to answer shall not be used to his prejudice. State v. Davis, 175 N. C. 723, 95 S. E. 567.


§ 15-90. Exclusion of witnesses at examination.—
The witnesses produced on the part either of the prisoner or of the prosecution shall not be present at the examination of the prisoner; and while any witness is under examination the magistrate may exclude from the place in which such examination is had all witnesses who have not been examined, and may cause the witnesses to be kept separate and apart from each other until they shall have been examined. (Rev., s. 3195; Code, s. 1149; 1868-9, c. 178, subc. 3, ss. 18; C. S. 4562.)

Cross Reference.—As to exclusion of bystanders in trials for rape, see § 15-106.

Judge Has Discretion to Exclude.—Exclusion is a matter of which the presiding judge must judge, and except in cases of abuse of his discretion, his decision cannot be reversed. Because then, the Lee v. Thornton, 174 N. C. 388, 299, 93 S. E. 788; State v. Hodge, 142 N. C. 676, 682, 55 S. E. 791; State v. Lowry, 170 N. C. 730, 734, 78 S. E. 62; State v. Davis, 173 N. C. 723, 95 S. E. 567.

§ 15-91. Answers in writing, read to prisoner, signed by magistrate.—The answer of the prisoner to the foregoing interrogatories shall be reduced to writing by the magistrate, or under his direction. They shall be read to the prisoner, who may correct or add to them; and when made
conformable to what he declares is the truth, shall be certified and signed by the magistrate. (Rev., s. 3196; Code, s. 1147; 1868-9, c. 178, subc. 3, s. 16; C. S. 4563.)

Seal Not Necessary.—This section does not require the examination of a witness to be given by the magistrate to be certified under seal. State v. Presley, 30 N. C. 710.

§ 15-92. Witnesses for defendant examined.—After the examination of the prisoner is complete, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination. (Rev., s. 3197; Code, s. 1148; 1868-9, c. 178, subc. 3, s. 17; C. S. 4564.)

§ 15-93. Examination of prisoner not required in misdemeanors.—Nothing contained in the preceding sections shall be construed to require any magistrate, before whom a prisoner charged with a misdemeanor shall be brought, to take the examination of such prisoner, except where such magistrate shall deem it material so to do, or where such examination shall be required by the prisoner. (Rev., s. 3198; Code, s. 1153; 1868-9, c. 178, subc. 3, s. 22; C. S. 4565.)

Cross Reference.—As to the right of the prisoner to be examined as a witness, see § 8-54.

§ 15-94. When prisoner discharged.—If, upon examination of the whole matter, it shall appear to the magistrate either that no offense has been committed by any person or that there is no probable cause for charging the prisoner therewith, he shall discharge such prisoner. (Rev., s. 3199; Code, s. 1151; 1868-9, c. 178, subc. 3, s. 20; C. S. 4566.)

§ 15-95. When prisoner held to answer charge.—If it shall appear that an offense has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, if the offense be bailable, and the prisoner offers sufficient bail, such bail shall be taken and the prisoner discharged; if no bail be offered, or the offense be not bailable, the prisoner shall be committed to prison. (Rev., s. 3200; Code, ss. 1152, 1156; 1868-9, c. 178, subc. 3, ss. 21, 25; C. S. 4567.)

Cross References.—As to bail generally, see § 15-92 et seq. As to commitment, see § 15-125 et seq.

§ 15-96. Witnesses against prisoner recognized.—The magistrate shall bind by recognizances the prosecutor and all the material witnesses against such prisoner to appear and testify at the next term of the court having jurisdiction for the county in which the offense is alleged to have been committed. (Rev., s. 3203; Code, s. 1153; 1868-9, c. 178, subc. 3, s. 21; C. S. 4568.)

§ 15-97. Witnesses required to give security for appearance.—Whenever the magistrate is satisfied by the proof that there is good reason to believe that any such witness will not fulfill the conditions of the recognizance unless security be required, he may order the witness to enter into a recognizance with such sureties as he shall deem meet for his appearance at such court. (Rev., s. 3204; Code, s. 1154; 1868-9, c. 178, subc. 3, s. 23; C. S. 4569.)

Bond for Appearance before Justice Not Permitted.—There is no statute which authorizes a Justice of the Peace or magistrate to require of a witness to give bond for his appearance before such Justice or magistrate. Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 434, 40 S. E. 191.

§ 15-98. Investigation in case of lynching.—Whenever the solicitor of any judicial district ascertains that the crime of lynching has been committed in any county in his judicial district, it is his duty to go to such county at the earliest possible moment, and at once institute proceedings for the investigation of the crime before the coroner of the county, some judge of the superior court, or justice of the peace, and for the apprehension of the offender. In the performance of this duty he shall cause to be issued subpoenas or other process to compel the attendance of witnesses and examine such witnesses on oath as to their knowledge or information touching the crime being investigated. In all cases where, upon preliminary investigation, it appears probable that any person is guilty of such crime, it shall be the duty of the coroner, judge or justice before whom the case is heard to bind such person, with good security, for his appearance at the next ensuing term of the superior or criminal court of some county adjoining the county in which the crime was committed for trial, and in default of bail to commit him to the jail of such adjoining county for safekeeping, and all necessary witnesses shall be recognized to appear at such term as witnesses for the state. (Rev., s. 3200; 1893, c. 461, s. 2; C. S. 4570.)

Cross References.—As to venue in case of lynching, see § 15-128. As to cost of investigating lynchings, see § 6-43.

Editor's Note.—Venue in case of lynching is discussed in State v. Lewis, 142 N. C. 620, 55 S. E. 60. See also section 15-128.

§ 15-99. Witnesses in lynching not privileged.—In all investigations before a justice of the peace, coroner, judge, grand jury, or courts and jury, on the trial of the case, as authorized by § 15-98 or under existing law, no person shall be excused from testifying touching his knowledge or information in regard to the offense being investigated, upon the ground that his answer might tend to subject him to prosecution, pains or penalties, or that his evidence might tend to criminate himself; but no discovery made by such witness upon any such examination shall be used against him in any court or in any penal or criminal prosecution, and he shall, when so examined as a witness for the state, be altogether pardoned of any and all participation in any crime arising under the provisions of § 15-98, or under existing law, concerning which he is required to testify. (Rev., ss. 1638, 3201; 1893, c. 461, s. 5; C. S. 4571.)

Editor's Note.—Section 8-55 provides for compelling witnesses to testify in certain criminal investigations and extends immunity to those thus testifying. As those provisions are analogous to the provisions of this section many of the notes thereunder will be useful in considering this section.

For a general discussion of the limits to self-incrimination, see 15 N. C. Law Rev., 229.

Witness Pardoned Though Testimony Does Not Inerimi-
§ 15-100

Proceedings certified to court; used as evidence.—All examinations and recognizances taken pursuant to the provisions of this chapter shall be certified to the court at which the witnesses are bound to appear, within twenty days after the taking of such examinations and recognizances: Provided, that any criminal case tried within twenty days before the sitting of criminal court shall be returned on Saturdays before the court convenes. The examinations taken and subscribed as herein prescribed may be used as evidence before the grand jury, and on the trial of the accused, provided he was present at the taking thereof and had an opportunity to hear the same and to cross-examine the deposing witness, if such witness be dead or so ill as not to be able to travel, or by procuration or connivance of the defendant has removed, from the state, or is of unsound mind. (Rev., s. 3205; Code, s. 1157; 1913, c. 24; 1868-9, c. 178, subc. 3, s. 26; C. S. 4572.)

In General.—Our various statutes relating to the introduction of testimony at the second trial of evidence introduced in the preliminary hearing of a criminal action do not affect the common-law rule, but they are extensions of its principle, making it applicable to the statutory provisions as to the making of the written record, its correction, signature by the witness, etc., have been complied with, to sufficiently identify the record for its admission as evidence upon the second trial. State v. Maynard, 184 N. C. 653, 113 S. E. 682.

Examinations Must Accord with Preceding Sections.—When the examinations are offered as substantive evidence bearing upon the criminal charge, they can only admit evidence under this section, when taken according to the requirements of the preceding sections. State v. Pierce, 91 N. C. 606, 610; State v. Jordan, 110 N. C. 491, 495, 14 S. E. 752.

Reason for Witness' Absence Must Appear.—In order for examiner to offer parol evidence as to what a witness testified to as evidence of a witness who merely does not respond to the examination as substantive evidence it must be shown that witness is absent because of one of reasons given in this section. State v. Pierce, 91 N. C. 606, 610.

No foundation has been laid for the introduction of the evidence of a witness who merely does not respond to the obligations of the subpoena, and is simply proved to have "run away," and not that any effort has been made to secure his presence. State v. King, 86 N. C. 603, 605.

When Parol Evidence Admissible.—On the trial in the superior court it is competent for purposes of contradiction, to introduce parol evidence to show what a witness testified to upon such preliminary examination. State v. Hooper, 151 N. C. 646, 65 S. E. 613; State v. Wright, 75 N. C. 439; State v. Roberts, 81 N. C. 605; State v. Lyon, 81 N. C. 609.

The right to introduce parol evidence as to the confession of a prisoner before an examining magistrate, it must appear affirmatively that there was no examination recorded as required by law. State v. Schenck, 138 N. C. 500, 565, 49 S. E. 917.

§ 15-101. Penalty for failing to return.—If any magistrate shall refuse or neglect to return to the proper court any such examination or recognizance by him taken, he may be compelled by rule of court forthwith to return the same, and in case of disobedience of such rule, may be proceeded against by attachment as for contempt of court as provided by law. (Rev., s. 3206; Code, s. 1158; 1868-9, c. 178, subc. 3, s. 27; C. S. 4573.)

Art. 10. Bail.

§ 15-102. Officers authorized to take bail, before imprisonment.—Officers before whom persons charged with crime, but who have not been committed to prison by an authorized magistrate, may be brought, have power to take bail as follows:

1. Any justice of the supreme court, or a judge of a superior court, in all cases.

2. Any justice of the peace or chief magistrate of any incorporated city or town, in all cases of misdemeanor, and in all cases of felony not capital. (Rev., s. 3209; Code, s. 1160; 1868-9, c. 178, subc. 3, s. 29; 1871-2, c. 37; C. S. 4574.)

Cross References.—As to constitutional provisions against excessive bail, see N. C. Const., Art. I, § 14 and U. S. Const., Amend. VIII. As to authority of the arresting officer to allow bail, see § 15-47. As to arrest and bail in civil cases, see § 1-409 et seq. As to bail after habeas corpus proceeding, see §§ 17-33 and 17-36.

Editor's Note.—In State v. Herndon, 107 N. C. 934, 12 S. E. 268, the meaning and effect of this and the following sections are discussed at pages 939-944 by Merrimon, C. J., in a dissenting opinion.

§ 15-103. Officers authorized to take bail, after imprisonment.—Any justice of the supreme court or any judge of a superior court has power to bail persons committed to prison charged with crime in all cases; any justice of the peace or chief magistrate of any incorporated city or town has the same power in all cases where the punishment is not capital. (Rev., s. 3210; Code, s. 1161; 1868-9, c. 178, subc. 3, s. 30; C. S. 4575.)

§ 15-104. Recognizance filed with the clerk.—Whenever a prisoner is bailed by any officer under § 15-103, such officer shall immediately cause the recognizance taken by him to be filed with the clerk of the superior court of the county to which the prisoner is recognized. (Rev., s. 3211; Code, s. 1162; 1868-9, c. 178, subc. 3, s. 31; C. S. 4576.)

§ 15-105. Bail allowed on preliminary examination.—If the offense charged in the warrant be not punishable with death, the magistrate may take from the person so arrested a recognizance with sufficient sureties for his appearance at the next term of the court having jurisdiction, to be held in the county where the offense is alleged to have been committed. (Rev., s. 3207; Code, s. 1139; 1868-9, c. 178, subc. 3, s. 8; 1871-2, c. 37, s. 1; C. S. 4577.)

Cross References.—As to bail for persons arrested for extradition, see § 15-76. As to bail upon appeal from a superior to the supreme court, see §§ 15-182 and 15-183.

Recognizance Explained.—The taking of a recognizance consists in making and attesting a memorandum of the acknowledgment of a debt due the State, and of the conditions on which it is to be defeated. State v. Smith, 66 N. C. 453; State v. Houston, 74 N. C. 549, 550.

A recognizance is a debt of record acknowledged before a court of competent jurisdiction, with condition to do some particular act. State v. Smith, 66 N. C. 620; State v. White, 164 N. C. 408, 410, 79 S. E. 297.

Same.—A Matter of Record.—A recognizance is a matter of record, and can only be discharged by a record or some thing of equal solemnity. State v. Moody, 69 N. C. 539.

Same.—Need Not Be Executed by Parties.—A recognizance need not be executed by the parties, but is simply acknowledged by the person by the acknowledgment is entered by the court. State v. Edwards, 108 N. C. 463, 471; State v. White, 164 N. C. 409, 410, 79 S. E. 297.


Editor's Note.—In State v. Herndon, 107 N. C. 934, 12 S. E. 268, the meaning and effect of this and the following sections are discussed at pages 939-944 by Merrimon, C. J., in a dissenting opinion.

[726]
§ 15-106. Duty of magistrate granting bail.—
Any magistrate taking bail shall certify on the warrant the fact of his having let the defendant to bail, and shall deliver the same as aforesaid with the recognizance taken by him, to the officer or other person having charge of the prisoner, who shall deliver the same without unnecessary delay to the clerk of the court in which the prisoner has been recognized to appear. (Rev., s. 3213; Code, s. 1140; 1888-9, c. 178, subc. 3, s. 9; C. S. 4578.)

§ 15-107. Sheriff or deputy may take bail.—
When any sheriff or his deputy arrests the body of any person, in consequence of the writ of capias issued to him by the clerk of a court of record on an indictment found, the sheriff or deputy, if the crime is bailable, shall recognize the offender, and take sufficient bail in the nature of a recognizance for his appearing at the next succeeding court of the county where he ought to answer, which recognizance shall be returned with the capias; and the sheriff shall in no case become bail himself.

No sheriff, deputy sheriff, constable, jailer or assistant jailer shall in any case become bail for any prisoner for money or property; nor shall any sheriff, deputy sheriff, constable, jailer or assistant jailer, or their wives become bail as agents for any bonding company or professional bondsmen. Any violation of this paragraph shall constitute a misdemeanor punishable by a fine or by imprisonment in the discretion of the court, or by both such fine and imprisonment; provided that the provisions of this paragraph shall not apply to Caswell, Currituck, Dare, Granville, Greene, Hertford, Hyde, Lenoir, Martin, Moore, Nash, Pamlico, Perquimans, Person, Pitt, Rockingham, Stokes, Transylvania and Warren counties. (Rev., s. 3208; Code, s. 1189; R. C., c. 35, s. 11; 1797, c. 474, s. 4; 1939, c. 47; C. S. 4579.)

Cross Reference.—As to attorney becoming bail, see Art. 11, Part II, § 70.

Editor's Note.—The 1939 amendment added the second paragraph.

§ 15-108. Sheriff may take bail of prisoner in custody.—If any person for want of bail shall be lawfully committed to jail at any time before final judgment, the sheriff, or other officer having him in custody, may take sufficient justified bail and discharge him; and the bail bond shall be regarded, in every respect, as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (Rev., s. 3228; Code, s. 1232; R. C., c. 11, s. 8; C. S. 4580.)

§ 15-109. Bail on continuance before a justice.—
Upon the continuance of any criminal action returned before any justice of the peace for trial, in which the justice is authorized to take bail on a finding of probable cause or in which he has final jurisdiction, it is the duty of the justice of the peace to take bond for his appearance, payable to the state, on the same being tendered by the accused, with such surety as in his opinion will be sufficient to insure the appearance of the accused for trial at a time and place mentioned in the bond. (Rev., s. 3213; 1859, c. 133; C. S. 4581.)

Cross Reference.—As to mortgage in lieu of security for appearance, see § 109-25.

Section Giving New Remedy.—Before this section was passed a justice of the peace had no power to allow a party accused of an offense of which he had not final jurisdiction to give bail during the postponement of the examination. If the delay at the examination was necessary, the accused was to be kept in the custody of the officer; or the officer might release the accused from the custody of the law until the examination was resumed. State v. Jones, 100 N. C. 438, 6 S. E. 655; State v. Jenkins, 121 N. C. 607, 54, 28 S. E. 413.

Art. 11. Forfeiture of Bail.

§ 15-110. In recognizance to keep the peace.—
Every person who shall have entered into a recognizance to keep the peace shall be liable according to the obligation thereof; and if he fail to appear the court shall forfeit his recognizance and order it to be prosecuted, in the manner provided by law, unless reasonable excuse for his default be given. (Rev., s. 3214; Code, s. 1235; 1886-9, c. 178, subc. 2, s. 10; C. S. 4582.)

Cross Reference.—As to recognizance, see also notes under § 15-105.

Recognizance Binds to Three Things.—It is said by the highest authority that a recognizance (or bail bond) in general binds to three things: (1) to appear and answer to such matters as may be objected to, or to a specified charge or to such matters as may be objected; (2) to stand and abide the judgment of the court; and (3) to depart without leave of the court; and that each of these particulars are distinct and independent. State v. Schenk, 138 N. C. 560, 563, 49 S. E. 917; State v. Eure, 172 N. C. 874, 875, 89 S. E. 788.

When Time and Place Specified.—If the recognizance specify time and place the defendant cannot be held to be in default for not appearing at some other time or place. State v. Houston, 74 N. C. 174, 176.

Thus a recognizance, conditioned that the defendant appear at the court-house in C, on the eighth Monday after the fourth Monday in March, is not forfeited by the defendant's failure to appear on 22 February. State v. Houston, 74 N. C. 174.

Same.—Effect of Subsequent Law.—A recognizable conditioned for the appearance of a party at one day, is not forsworn by his failure to appear on another day, to which the holding of the Court was changed by a law passed after the taking of the recognizance, the law containing no provision that recognizances should be returned and parties appear on that day. State v. Melton, 44 N. C. 436.

When Appearance at Next Term Specified.—A recognizance for the appearance of the defendant at the next term of the Court to be held for a given county is valid and binds the defendant to appear at the court-house, although neither time nor place be specifically named: because every one knows, or is presumed to know, the time and place of holding the court. State v. Houston, 74 N. C. 176.

Same.—If Term Not Held.—A defendant bound over to answer a criminal charge at a regular term of the Superior Court, which term is not held in consequence of the absence of the Judge, is required to attend at an intervening special term subsequently appointed and held. State v. Horton, 123 N. C. 1095, 31 S. E. 216.

Continuance a Remedy Not Release.—The continuance of a criminal case does not release the recognizance given for the appearance of the defendant. State v. Morgan, 136 N. C. 591, 48 S. E. 668.

Proceedings When Recognizance Broken.—Where the condition of a recognizance is broken it is competent for the justice to declare the same to be forfeited and order it to be prosecuted at the court having jurisdiction of the penal sum. State v. Oates, 88 N. C. 668.

Defendant Must Appear Until Discharged.—An appearance bond by its terms, and under the uniform ruling of the Court, contemplates that the defendant appear term after term until he is discharged on a verdict of acquittal or by order of the court. An appearance bond is in lieu of custody in jail, in which case the defendant can only be released until discharged by order of the court. State v. Eure, 172 N. C. 874, 89 S. E. 788.

Agreement by Solicitor Will Not Relieve.—An agreement by solicitor to discharge a defendant if it would become a state's witness against defendant, will
§ 15-111. When recognition deemed broken.—No recognition taken under this chapter shall be deemed to be broken except in the failure of the principal in such recognizance to appear and answer according to the obligation thereof, unless such principal be convicted of some offense amounting in judgment of law to a breach of such recognizance. (Rev., s. 3215; Code, s. 1227; 1868-9, c. 178, subc. 2, s. 12; C. S. 4583.)

Surety Not Relieved.—The liability of a surety upon an appearance bond is a continuing one until discharged by renewal of bond or production and surrender of principal. (See sections 15-129, 15-132.) He is not released by the principal being drunk and under arrest when his case was called in court and continued, and by the principal having since become a fugitive from justice under charge of a different offense. State v. Holt, 145 N. C. 450, 59 S. E. 64.

§ 15-112. Recognizance prosecuted.—Whenever evidence of such conviction shall be produced in the court in which the recognizance is filed, it shall be the duty of such court to order the recognizance to be prosecuted, and the solicitor shall cause the matter to be proceeded to on the recognizances to be thereupon taken. (Rev., s. 3216; Code, s. 1228; 1868-9, c. 178, subc. 2, s. 13; C. S. 4584.)

Independent Proceeding Unnecessary.—The judgment that the recognizance has been forfeited must be entered in the court, and in the cause, in which said recognizance was filed and it is not required that the prosecution for the forfeiture of the recognizance be begun by an independent proceeding. State v. Sanders, 153 N. C. 624, 626, 69 S. E. 272.

Proceedings When Forfeiture Is Moved for.—When the recognizance is moved for, if all the matters are of record, the judge decides without the intervention of a jury. But when the answer raises an issue of fact, the defendant is entitled to have the matter passed upon by a jury. State v. Sanders, 153 N. C. 624, 626, 69 S. E. 272, and cases cited.

Entry of Forfeiture Not Traversed by Answer to Scire Facias.—The entry of the forfeiture of a recognition in a criminal case cannot be contradicted or traversed by an answer or a plea to a scire facias issued to enforce the forfeiture. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

Effect of Answer to Scire Facias.—Where the recognizance in which the surety is bound, or any part of the recognizances of the court as forfeited, and scire facias is issued to enforce the forfeitures, an answer denying the truth of the record, though informal, is equivalent to a motion to set aside the entry, when that appears to have been the intention of the defendants. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

§ 15-113. Notice of judgment nisi before execution.—No execution shall issue upon a forfeited recognizance, or to collect a fine imposed nisi, until a notice has issued against the person who has forfeited his recognizance or upon whom the fine has been imposed, and his sureties. (Rev., s. 3217; Code, s. 1208; R. C., c. 35, s. 43; 1777, c. 115, s. 48; C. S. 4586.)

Local Modification.—Forsyth: 1915, c. 83.

Notice Must Be Given.—This section has made it imperative that notice be given out execution on a forfeited recognizance, a scire facias shall issue, and judgment be had thereon. State v. Mills, 19 N. C. 552, 554.

Object of Notice.—The object of a scire facias is to notify the surety that the recognizance is forfeited, and to give him the opportunity before the cognize should not have execution acknowledged, and the surety being a party to the recognizance and his liability being primary, direct and equal with that of the principal, judgment absolute may be had against the surety on the scire facias, with more form or substance of the scire facias, upon the appearance of the defendant. State v. Heel Bond Co. v. Krider, 218 N. C. 361, 11 S. E. (2d) 291, followed in State v. Brown, 218 N. C. 368, 11 S. E. (2d) 294.

§ 15-114. What notice must contain.—When any recognizance, acknowledged by a principal and sureties, shall be forfeited by two or more of the recognizors, the notice issued thereon shall be jointly against them all, designating which of them are principals and which sureties, and when they are bound in different sums, stating the amount forfeited by each one, and the clerk shall have no greater fee on such notice than is due when it is issued against one defendant. (Rev., s. 3218; Code, s. 1209; R. C., c. 35, s. 44; 1812, c. 836, s. 1; C. S. 4586.)

§ 15-115. Service of notice.—All notices issuing upon forfeited recognizances shall be executed by leaving a copy with each of the defendants, or at his present place of abode. And in case he cannot be found, and has no known place of abode, and the matter be returned, then a notice shall issue, and on the like return the same shall be deemed duly served. (Rev., s. 3219; Code, s. 1210; R. C., c. 35, s. 43; 1512, c. 836, s. 2; C. S. 4587.)


§ 15-116. Judges may remit forfeited recognizances.—The judges of the superior courts may hear and determine the petition of all persons who conceivably merit relief on their recognizances forfeited; and may lessen, or absolutely remit, the same, and do all and anything therein as they shall deem just and right and consistent with the welfare of the state and the persons praying such relief, as well before as after final judgment entered and execution awarded. (Rev., s. 3220; Code, s. 1205; R. C., c. 35, s. 38; 1788, c. 292, s. 1; C. S. 4588.)

Trial Judge Has Discretion.—The power given by this section is a matter of judicial discretion in the judges below, which cannot be reviewed except for some error in a matter of law or legal inference. State v. Moody, 74 N. C. 73, 75; State v. Morgan, 136 N. C. 593, 48 S. E. 604.

Whether a judgment nisi will be made absolute, or whether it will be stricken out, either upon condition or otherwise, rests in the discretion of the judge of the superior court. State v. Clarke, 222 N. C. 744, 24 S. E. (2d) 619.

Court May Remit Penalty without Setting Aside Forfeiture.—Where a motion is made to set aside the entry of forfeiture of a recognizance, its refusal does not prevent the court from reducing or remitting the penalty. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

Petition and Final Judgment.—The surety on a bail bond may, under this section, present a petition for relief to the judge of the superior court, notwithstanding that a final judgment has been rendered. State v. Bradsher, 189 N. C. 401, 2 S. E. (2d) 340.

The Superior Courts have authority, under this section, to lessen or remit forfeited recognizances, upon the petition of the surety and of the principal before or after final judgment. State v. Moody, 74 N. C. 73, 75.

Solicitor Has No Vested Right to Fee.—Under this section the solicitor has no vested right to his fee under an absolute judgment upon a forfeited recognizance which was subsequently set aside by the court in the exercise of his discretionary power. State v. King, 143 N. C. 677, 57 S. E. 516.

Injunction to Restrain Enforcement of Execution.—A motion by the surety asking that the forfeiture that has been entered upon the appearance bond be stricken out for that defendant had been subsequently arrested under a capias is addressed to the sound discretion of the court in the exercise of its power to remit the forfeiture, and does not serve
§ 15-117. Money refunded by clerk.—The clerk of the superior court, on the remission of any forfeited recognizance which has been paid into his office, shall refund the same, or so much thereof as shall be remitted. (Rev., s. 3221; Code, s. 1206; R. C., c. 35, s. 39; 1705, c. 442, s. 1; C. S. 4599.)

§ 15-118. Money refunded by treasurer.—If the money has been paid to the county treasurer, he shall refund it to the person entitled, on his producing an attested copy of the record from the clerk of the court, certifying that such recognizance has been remitted or lessened, signed with his own proper name, with the seal of the court affixed thereto. (Rev., s. 3222; Code, s. 1207; R. C., c. 35, s. 40; 1705, c. 442, s. 2; C. S. 4500.)

§ 15-119. Forfeiture of bond before justice.—On the failure of the accused to appear at the time and place mentioned in any bond taken by any justice of the peace for a continuance of any cause pending before him, and answer the charge, or, having appeared, on his departing the court without leave thereof first had and obtained, it shall be the duty of the justice of the peace then presiding to enter judgment nisi against the principal and his sureties in the bond for the amount mentioned therein, if the sum does not exceed the sum of two hundred dollars; and immediately issue notice to the principal and the sureties in the bond, giving ten days time, specifying time and place, to appear and show cause, if any they have, why the judgment nisi shall not be made final. (Rev., s. 3223; 1889, c. 133, s. 2; C. S. 4501.)

§ 15-120. Judgment final, rendered and enforced.—If the defendant shall fail to appear and show satisfactory reasons for not complying with the provisions of the bond, it shall then be the duty of the justice of the peace to render a final judgment thereon for the amount of the same, and immediately make and transmit to the clerk of the superior court a transcript thereof, which shall be entered upon the judgment docket of the court, and the clerk shall issue execution on the final judgment against the principal and his sureties for the collection of the amount thereof as in other judgments in behalf of the state. (Rev., s. 3224; 1889, c. 133, s. 3; C. S. 4502.)

§ 15-121. Forfeiture over two hundred dollars before justice.—If the bond shall exceed the sum of two hundred dollars, and the accused shall fail to appear as therein provided to answer the charge, or, having appeared, shall depart the court without leave first had and obtained, it shall be the duty of the justice to have the accused called, and enter upon the bond that the defendant was called and failed to answer, and immediately return the original papers in the case, together with the bond, to the clerk of the court having jurisdiction to try such action, who shall immediately enter the case upon the criminal docket of his court and enter judgment nisi for the amount of the bond, and issue notice to the accused and his sureties to appear at the next term to show cause why the judgment should not be made final and proceeded in as other cases of forfeited bonds in behalf of the state in such court. The entry on the bond by the justice of the peace shall be prima facie evidence that the principal therein had been called and failed to answer. Nothing in this section shall be so construed as to prevent justices of the peace from remitting the penalty of the bond or the right of appeal from the justice of the peace to the superior court by the defendant or his surety. (Rev., s. 3225; 1889, c. 133, s. 4; C. S. 4503.)

§ 15-122. Right of bail to surrender principal.—The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued, or to the sheriff having such process to return, during the session, or in the recess of such court, the principal, in discharge of himself; and such bail shall, at any time before such execution awarded, have full power and authority to arrest the body of his principal, and secure him until he shall have an opportunity to surrender him to the sheriff or court as aforesaid; and the sheriff is hereby required to receive such surrender, and hold the body of the defendant in custody as if bail had never been given: Provided, that in criminal proceedings the surrender by the bail, after the recognizance has been forfeited, shall not have the effect to discharge the bail, but the forfeiture may be remitted in the manner provided for. (Rev., s. 3226; Code, s. 1230; R. C., c. 11, s. 5; 1777, c. 115, s. 20; 1848, c. 7; C. S. 4504.)

In General.—The conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff. This is done, in our practice at least, by an order from the court, given of its own motion or on application of the solicitor, and the court, when it passes judgment upon a defendant and he appeals, can direct that he be not taken into custody immediately, but be permitted to find security for the costs of his appeal and for his appearance at the next term, and if he fails afterwards to appear when called during the term, and perfect his appeal and give the necessary security for his appearance, or in default thereof to surrender to the court or of the sheriff, but, to enter judgment, he may be called, and his forfeitures entered. State v. Schenck, 138 N. C. 500, 564, 49 S. E. 917.

Compliance with Section Protects Surety.—Where a defendant surrenders his principal to the open court in discharge of himself as bail, he is acting in the clear exercise of an undoubted legal right. Under this section the entry of the fact made on the record, the record, the Court was therefore proper, and the court should not have by its own action, deprive the defendant of the benefit of it. Underwood v. McLaurin, 49 N. C. 17, 18.

When Condition of Bond Performed.—The condition of a bond is not performed by the appearance, conviction, and sentence of the defendant. The conviction does not, by virtue of its own force, put the defendant in the custody of the state or of the sheriff; and the surety the defendant must submit to such punishment as shall be adjudged. State v. Schenck, 138 N. C. 506, 49 S. E. 917.

Discharge of Bail.—The arrest of defendant in a criminal [ 729 ]
proceeding upon a capias and his trial and conviction does not discharge the original forfeiture of his appearance bond, and judgment absolute against the surety may be entered upon the sc. fa. after defendant has been arrested under the capias. This section has no application, since in such case the defendant is not arrested and surrendered by the surety, and further, even if the statute were applicable, it provides that surrender by the bail after re- cognizance is forfeited does not discharge the bail, but is merely addressed to the discretionary power of the court to refuse or remit the for- feiture. Tar Heel Bond Co. v. Krider, 218 N. C. 361, 11 S. E. (2d) 291, followed in State v. Brown, 218 N. C. 365, 11 S. E. (2d) 294.

Bail Not Exonerated During Defendant's Detention in Prison on Other Charges.—Upon the failure of defendant to appear when his case was called, judgment of the court, after re- cognizance is forfeited does not discharge the bail, but is merely addressed to the discretionary power of the court to refuse or remit the for- feiture, that surety had secured capias and filed same with the officials of the state's prison so that defendant would be delivered to the court to stand trial upon the expiration of his sentence. Held: Notwithstanding that § 1-433 relates only to bonds executed in arrest and bail pro- cedure, the bail will not be exonerated during defendant's detention in prison on other charges, and such surety may not be discharged by deliver- ing the body of defendant, and judgment absolute against the surety should be stricken out and hearing on the sc. fa. continued until the surety has had opportunity to pro- duce defendant after his release from prison. State v. El- ler, 218 N. C. 365, 11 S. E. (2d) 295.

§ 15-123. New bail given upon surrender; liability of sheriff.—Any person surrendered in the manner specified in § 15-122, shall have liberty, at any time before final judgment against him, to give bail; and in case of such surrender, the sheriff shall take the bail bond or recognizance to the succeeding court; and in case the sheriff shall release such person without bail, or the bail returned be held insufficient, on exception taken, the same term to which such bail bond shall be re- turned, and allowed by the court, the sheriff, hav- ing due notice thereof in criminal cases, shall for- feit to the state the sum of one hundred dollars, to be recovered on motion in like manner as forfeitures for not returning process, and be subject to be in- dicted for misdemeanor in office; and it shall be the duty of the prosecuting officer to collect the for- feiture; and, in case of a release, the sheriff shall be liable for an escape, and may be prosecuted and punished as provided for in the chapter entitled Criminal Law. (Rev. s. 3227; Code, s. 1231; R. C., c. 11, s. 6; 1897, c. 40; C. S. 4030.)

Cross References.—As to criminal liability for an escape, see § 14-239. As to recovery of the penalty, see § 162-14 and annotation thereto.

§ 15-124. Defenses open to bail. —Every matter which would entitle the principal to be discharged from arrest may be pleaded by the bail in exon- eration of his liability. (Rev. s. 3229; Code, s. 1233; R. C., c. 11, s. 9; C. S. 4506.)

Art. 12. Commitment to Prison.

§ 15-125. Order of commitment.—Every commit- ment to a person charged with crime shall state: 1. The name of the person charged. 2. The character of the offense with which he is charged. 3. The name and office of the magistrate committing him. 4. The manner in which he may be discharged; if upon giving recognizance or bail, the amount of the recognizance, the condition on the performance of which it shall be discharged, and the persons or magistrate before whom the bail may justify.

5. The court before which the prisoner shall be sent for trial. (Rev. s. 3230; Code, s. 1163; 1868-9, c. 178, subc. 3, s. 32; C. S. 4597.)

Cross Reference.—As to order of commitment after judg- ment by a justice, see § 15-159.

Verbal Order Invalid. —A verbal order of a justice of the peace sending a person to prison before or after the examination on the warrant, is not a sufficient authority for the officer to whom the order is given. State v. James, 78 N. C. 415.

§ 15-126. Commitment to county jail.—All persons committed to prison before conviction shall be committed to the jail of the county in which the examination is had, or to that of the county in which the offense is charged to have been com- mitted: Provided, if the jails of these counties are un- safe, or injurious to the health of prisoners, the committing magistrate may commit to the jail of any other convenient county. And every sheriff or jailer to whose jail any person shall be committed by any court or magistrate of competent jurisdic- tion shall receive such person and give a re- ceipt for him, and be bound for his safe-keeping as prescribed by law. (Rev. s. 3231; Code, s. 1184; 1868-9, c. 178, subc. 2, s. 33; C. S. 4598.)

§ 15-127. Commitment of witnesses.—If any witness required to enter into a recognizance, either with or without sureties, shall refuse to com- ply with such order, it shall be the duty of such magistrate to commit him to prison until he shall comply with such order, or be otherwise dis- charged according to law. (Rev. s. 3232; Code, s. 1155; 1868-9, c. 178, subc. 3, s. 24; C. S. 4599.)

Cross Reference.—As to when witnesses are required to give security for appearance, see § 15-97.

Art. 13. Venue.

§ 15-128. In case of lynching,—The superior court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime and the offender to the same extent as if the crime had been committed in the bounds of such adjoining county; and whenever the solicitor of the district has information of the commission of such a crime, it shall be his duty to furnish such information to the grand jury of all adjoining counties to the one in which the crime was com- mitted from time to time until the offenders are brought to justice. (Rev. s. 3333; 1893, c. 461, s. 4; C. S. 4600.)

Cross References.—As to venue in civil cases, see § 1-76 et seq. As to removal for fair trial, see § 1-84 et seq.

Section Constitutional. — This section is a constitutional exercise of legislative power. State v. Lewis, 142 N. C. 626, 55 S. E. 600; State v. Rumpf, 178 N. C. 717, 190 S. E. 622.

Purporte of Section. —Owing to the prejudice or sympathy which in cases of lynching usually and naturally pervades the county where that offense is committed, the General Assembly, upon grounds of public policy, deemed it wise to transfer the investigation of the charge to the grand jury of an adjoining county. State v. Lewis, 142 N. C. 626, 630, 55 S. E. 600.

Bill Need Not Be Found In County Where Offense Com- mitted.—In an indictment for lynching it was error to quash the bill on the ground that it was found in the county where it was alleged that the bill that the offense charged was not committed in the county in which the bill was found, but in an adjoining county. State v. Lewis, 142 N. C. 626, 55 S. E. 600.

§ 15-129. In offenses on waters dividing coun- ties.—When any offense is committed on any wa-
ter, or water-course, whether at high or low water, which water or water-course, or the sides or shores thereof, divides counties, such offense may be dealt with, inquired of, tried and determined, and punished at the discretion of the court, in either of the two counties which may be nearest to the place where the offense was committed. (Rev., s. 3233; Code, s. 1193; R. C., c. 35, s. 24; C. S. 4601.)

Cross Reference.—As to venue of civil offenses committed on waters, see § 1-77.

§ 15-130. Assault in one county, death in another.—In all cases of felonious homicide when the assault has been made in one county within the state, and the person assaulted dies in any other county thereof, the offender shall be indicted and punished for the crime in the county wherein the assault was made. (Rev., s. 3235; Code, s. 1190; R. C., c. 35, s. 27; 1831, c. 22, s. 1; C. S. 4602.)

No New Offense Created by Section.—This section received a judicial construction in S. v. Dunkley, 25 N. C. 116, and it was held that it did not create any new offense, but merely removed a difficulty which existed as to the place of the trial. State v. Hall, 114 N. C. 909, 19 S. E. 602.

This section and the following were part of chapter 22 of the Public Laws 1831 and hence this construction applies equally to the latter section as well. Note. For meaning of "assault," see note under following section.

§ 15-131. Assault in this state, death in another.—In all cases of felonious homicide, when the assault has been made within this state, and the person assaulted dies without the limits thereof, the offender shall be indicted and punished in this state. (Rev., s. 3236; Code, s. 1197; R. C., c. 35, s. 28; 1831, c. 22, s. 2; C. S. 4603.)

Section Is Valid.—The validity of sections similar to this seems to be undisputed, and indeed it has been held in many jurisdictions that such legislation is but in accordance of the common law. State v. Hall, 114 N. C. 909, 913, 19 S. E. 602.

No new offense created by section, see note to preceding section.

Meaning of "Assault."—The assault mentioned in this section and the preceding section evidently means not a mere attempt, but such an injury inflicted in this State as he would be if the effect had taken place in another State. State v. Hall, 114 N. C. 909, 920, 19 S. E. 602.

Acts Causing Death Must Take Place in State.—This section plainly contemplates that every part of the offense, except the death, must have occurred in this State. State v. Hall, 114 N. C. 909, 920, 19 S. E. 602.

Shooting Person in Adjoining State.—See section 15-132 and note thereto.

§ 15-132. Person in this state injuring one in another.—If any person, being in this state, unlawfully and willfully puts in motion a force from the effect of which any person is injured while in another state, the person so setting such force in motion shall be guilty of the same offense in this state as he would be if the effect had taken place within this state. (Rev., s. 3237; 1895, c. 169; C. S. 4604.)

Editor's Note.—This section was passed in 1895 as a result of the decision in State v. Hall, 114 N. C. 899, 19 S. E. 602. In that case, decided in 1894, the defendants while in North Carolina shot across the State line and killed a person in Tennessee. It was held that they were not guilty of the crime charged in the absence of a statute like the present. Section 15-131 was discussed and held not applicable since the stroke producing death was given not in North Carolina but in Tennessee.

§ 15-133. In county where death occurs.—If a mortal wound is given or other violence or injury inflicted or poison is administered on the high seas or land, either within or without the limits of this state, by means whereof death ensues in any county thereof, the offense may be prosecuted and punished in the county where the death happens. (Rev., s. 3238; 1891, c. 68; C. S. 4605.)

Section Constitutional.—This section is constitutional and applies to foreigners as well as to citizens of this State who have inflicted mortal wounds elsewhere. State v. Caldwell, 115 N. C. 794, 20 S. E. 533.

§ 15-134. Improper venue met by plea in abatement; procedure.—Because the boundaries of many counties are either undetermined or unknown, by reason whereof high offenses go unpunished; therefore, for the more effectual prosecution of offenses committed on land near the boundaries of counties, in the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement, the truth whereof shall be duly verified on oath or otherwise both as to substance and fact, wherein shall be set forth the proper county in which the supposed offense, if any, was committed; whereupon the court may, on motion of the state, commit the defendant, who may enter into recognizance, as in other cases, to answer the offense in the county averred by his plea to be the proper county; and, on his prosecution in that county, it shall be deemed, conclusively, to be the proper county. But if the state, upon the plea aforesaid, will join issue, and the matter be found for the defendant, he shall have his right to set into recognizance as in other cases to answer the offense in the county averred by his plea to be the proper county, provided the offense be bailable; and, if not bailable, he shall be committed for trial in the county; and, if it be found for the state, the court in all offenses or misdemeanors shall proceed to pronounce judgment against the defendant, as upon conviction; and, in all cases of felony, the defendant shall be at liberty to plead to the indictment, and be tried on his plea of not guilty. (Rev., s. 3239; Code, s. 1194; R. C., c. 35, s. 25; C. S. 4606.)

Cross Reference.—As to venue in indictment for stealing rides on trains, see § 60-104. As to venue in indictment for receiving stolen goods, see § 14-71. As to venue in case of discrimination against the Atlantic and North Carolina Railroad, see § 60-8. As to venue in case of bribery of baseball players, see § 14-378. As to venue in trial of accessory, see §§ 14-5 and 14-7. As to venue in cases of bigamy, see § 14-183. As to sale and delivery of intoxicating liquors, see § 18-9. As to offenses by officers of state institutions, see § 140-116. As to venue in cases of bastardy, see § 49-5. As to venue in cases of bigamy, see § 14-183.

Purpose of Section.—This section was evidently intended to provide relief in difficulties originating in doubt entertained in good faith as to the county in which the offense was committed. It was not intended to modify the common law beyond the reasonable scope of its manifest purpose. State v. Mitchell, 202 N. C. 439, 445, 163 S. E. 581.

Power of Legislature to Enact.—In order to meet the exigencies of the case, the Legislature enacted § 15-134. The section is very broad in its terms. State v. Outerbridge, 82 N. C. 618, 622.

Old Rule Reversed.—It reverses the rule which seems to have obtained on the trial of criminal cases before its enactment. State v. Lyle, 117 N. C. 799, 801, 33 S. E. 476.

Applies to All Crimes.—In felonies, as in misdemeanors, the objection can only be taken by plea in abatement. State v. Outerbridge, 82 N. C. 618, 622.

[ 731 ]
The offenses referred to in this section are those committed within the borders of the State, for our courts cannot take cognizance of the violation of the criminal laws of other States; and would have no right to recognize offenses and try them before their judicial tribunals. State v. Mitchell, 83 N. C. 674, 676.

Laws Regulating Jurisdiction Not a Part of Offense.—Laws conferring, withdrawing or limiting jurisdiction over particular offenses do not become a constituent part of the offenses to which they apply. State v. Lewis, 142 N. C. 626, 630, 55 S. E. 600; State v. Allen, 107 N. C. 805, 811 S. E. 106.

The crime of offering a bribe to a juror is committed in the county where the offer is communicated to the juror, and the venue is the county in which the juror was serving and in which the defendant's offer was communicated to him by his wife, although defendant communicated with the juror after the offer was made and in the county of his residence. State v. Noland, 204 N. C. 329, 168 S. E. 412.

Objection to Venue Waived.—Objection to venue is waived unless objection is taken in time by plea in abatement. State v. Outerbridge, 123 N. C. 710, 31 S. E. 219; State v. Holder, 133 N. C. 719, 711, 45 S. E. 862.

Thus where a prisoner is charged with killing the deceased in the county which the indictment is found, the State need not prove that the offense was committed in that county. Such allegation is to be taken as true unless the prisoner denies the same by plea in abatement. State v. Williams, 81 N. C. 540, 541.

Plea in Abatement.—An indictment charging that defendant had offered a bribe to a grand juror to influence him by his wife, although defendant communicated with the juror after the offer was made and in the county of his residence, was held not subject to defendant's plea in abatement on the ground that the evidence stated, and present matters which will defeat the further prosecution of the present action, if proven or admitted. State v. Chappell, 148 N. C. 327, 62 S. E. 411.

Failure to Mark Names of Witnesses on Bill.—Section 15-138 provides that the record showed that defendant was bound over to the county court of Craven county with no record of his having been tried in that court or that there was any appeal pending by him by his wife, although defendant communicated with the juror after the offer was made and in the county of his residence, was held not subject to defendant's plea in abatement on the ground that the evidence stated, and present matters which will defeat the further prosecution of the present action, if proven or admitted. State v. Chappell, 148 N. C. 327, 62 S. E. 411.
and examined before the jury is directory merely, and the omission of the foregoing to comply therewith is no ground for quashing the bill, where the proof is that the witnesses were sworn. State v. Hines, 84 N. C. 810.

§ 15-139. Subpoena for witnesses on presentment.—In issuing subpoenas for witnesses whose names are indorsed on presentments made by the grand jury, the clerk of the court shall name therein the first Tuesday of the term of court as the time for such witnesses to appear and give evidence. And no clerk shall issue a subpoena for any such witness to appear on Monday, except upon written order of the solicitor of the district. (1913, c. 168; C. S. 4609.)

Art. 15. Indictment.

§ 15-140. Waiver of bill of indictment.—No waiver of the finding and return into court of a bill of indictment in any criminal action shall be allowed in the superior courts of this state except in cases wherein the offense charged is a misdemeanor or which does not include or contain the element of fraud, deceit or malice; nor shall such waiver be made in the case of an indictment upon a plea of guilty, or a submission, or a plea of nolo contendere by the defendant in the same. No such waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel in such action, who shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court; which service by an attorney so appointed by the court shall be rendered without fee or reward. (1907, c. 71; C. S. 4610.)

Section Constitutional.—This section, authorizing the waiver of an indictment in the Superior Court by the defendant bound over from an inferior court, is constitutional and valid. Constitution, Art. IV, sec. 13. State v. Jones, 181 N. C. 543, 186 S. E. 827.


§ 15-141. Bills returned by foreman except in capital cases.—Grand juries shall return all bills of indictment in open court through their acting foreman, except in capital felonies, when it shall be necessary for the entire grand jury, or a majority of them, to return their bills of indictment in open court in a body. (Rev., s. 3242; 1889, c. 29; C. S. 4611.)

Indictment to Be Returned in Open Court.—It is the returning of the bill or indictment, publicly, in open court and its being there recorded, that makes it effectual. State v. Cox, 28 N. C. 440.

Indictment Need Not Be Signed.—It has been often held that an indictment need not necessarily be signed by any one. State v. Mace, 86 N. C. 668; State v. Pitt, 166 N. C. 268, 269, 80 S. E. 1000; State v. Cox, 28 N. C. 440, 446. No endorsement of the name of the person who prepares the same is essential to the validity of an indictment, which has been duly returned into court by the grand jury under this section, and entered upon its records. State v. Avant, 202 N. C. 680, 683, 133 S. E. 896.

§ 15-142. Substance of judicial proceedings set forth.—In every indictment, information, or impeachment, which by law may be necessary to set forth at length the judicial proceedings had in any case then or formerly pending in any court, civil or military, or before any justice of the peace, it is sufficient to set forth the substance only of the proceedings, or the substance of such part thereof as makes, or helps to make, the offense prosecuted. (Rev., s. 3243; Code, s. 1184; R. C. C. 35, s. 15; C. S. 4612.)

Power of Legislature.—The legislature has the undoubted right to modify old forms of bills of indictment, or establish new forms, provided the grand jury is to be afforded the defendant with reasonable certainty of the nature of the crime of which he stands charged. State v. Harris, 145 N. C. 455, 458, 59 S. E. 115.

Purpose of Section.—The purpose of this section and section 15-153 is to render unnecessary merely useless refinements and technicalities in pleading that once prevailed. State v. Murphy, 101 N. C. 697, 701, 8 S. E. 142.

Object of an Indictment.—The object of the offices of an indictment is to inform the defendant with sufficient certainty of the charge against him to enable him to prepare his defense. State v. Gardner, 107 N. C. 322, 334, 12 S. E. 119.

Refinements Abolished.—The technical and useless refinements of the common law, formerly required in drawing bills of indictment in criminal cases, have been all abolished by statute 1889, c. 29; State v. Hawley, 18 N. C. 433, 437; State v. Arnold, 107 N. C. 861, 864, 11 S. E. 990.

Statement Required.—In every indictment, the facts and circumstances must be stated with such certainty that the defendant may judge whether they constitute an indictable offense or not. State v. Lewis, 93 N. C. 581. And thus where an indictment sets forth the substance of the offense charged "in a plain, intelligible and explicit manner," with a fullness of details as to the nature of the crime charged, and it gave the defendant such information as was necessary to enable him to make defense on the trial and to prepare a subsequent prosecution, it is sufficient under this section and section 15-153. State v. Murphy, 101 N. C. 697, 701, 8 S. E. 142.

Omission of Caption Does Not Vitiate.—While every indictment properly should have a caption, it is no part of the indictment, and its omission does not vitiate the proceeding. State v. Waaden, 4 N. C. 596; State v. Brickell, 8 N. C. 354; State v. Lane, 26 N. C. 113; State v. Dula, 9 N. C. 668; State v. Arnold, 107 N. C. 861, 864, 11 S. E. 990.

Mistake in Caption.—A misrecital of the county in the caption is not ground for arrest of judgment. State v. Ragland, 65 N. C. 463; State v. Arnold, 107 N. C. 861, 864, 11 S. E. 990.

Signature of Solicitor Not Requisite.—It is regular and orderly to have the bill to be signed by the solicitor, but such signing is not essential to its validity. State v. Mace, 86 N. C. 668; State v. Cox, 28 N. C. 440; State v. Arnold, 107 N. C. 861, 864, 11 S. E. 990.

§ 15-143. Bill of particulars.—In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters. (Rev., s. 3244; C. S. 4013.)

In General.—This provision as to a bill of particulars had previously prevailed as to civil actions, and was by this section made expressly applicable to criminal cases, to which the court had applied it in State v. Brady, 107 N. C. 622, 13 S. E. 335. State v. Stephens, 170 N. C. 745, 748, 87 S. E. 111.

Purpose of Section.—This section intended to make all indictments alike in regard to dispensing with the insertion of the means and methods by which any offense was committed. State v. Brookens, 170 N. C. 745, 748, 87 S. E. 111.

Object of Bill of Particulars.—The whole object of a bill of particulars is to enable the defendant to properly prepare his defense. The bill is for the use of the court, and is not a substitute for the defendant's right to a fair opportunity to procure his witnesses or prepare his defense. State v. Seaboard Air Line R. Co., 149 N. C. 508, 511, 74 S. E. 377.

State Confined to Particulars Stated.—The granting of a bill of particulars on an indictment for a criminal offense is primarily to inform the accused of the charges against him, and secondarily to enable him to prepare his defense. The bill does not afford defense to the particular offense charged as to other criminal offenses not included in the bill to show the scietor or quo animo in relation to the particulars enumerated and coming within the scope of those generally charged in the indictment. State v. Waldorf, 194 N. C. 335, 139 S. E. 608.
§ 15-144

Former Details Not Now Charged in Indictment.—It is no longer charged whether a murder was committed with a knife or a pistol, nor the length and breadth and depth of a wound, and the same is true as to all other offenses. In lieu of this, we have adopted this section which provides for a bill of particulars. State v. Stephens, 170 N. C. 745, 747, 87 S. E. 131.

What Bill Will Not Supply.—A bill of particulars will not supply any matter required to be charged in the indictment, as an ingredient of the offense. State v. Long, 143 N. C. 670, 671, 676, 57 S. E. 349. See also, State v. Johnson, 220 N. C. 773, 782, 18 S. E. (2d) 358 (dis. op.).

The deficiency of a bill of particulars cannot supply a deficiency in an indictment when the language of the indictment fails to adequately charge the essential concomitants of the offense. State v. Cole, 202 N. C. 592, 163 S. E. 594. See also, State v. Johnson, 202 N. C. 592, 163 S. E. 594.

Granting Order Is within Court's Discretion.—The granting of an order for a bill of particulars is in the discretion of the court, and the question of sufficient compliance in an indictment when the language of the indictment fails to adequately charge the essential concomitants of the offense. State v. Cole, 202 N. C. 592, 163 S. E. 594. See also, State v. Johnson, 202 N. C. 592, 163 S. E. 594.

Cross Reference.—As to homicide generally, see §§ 14-17, 14-18 and notes thereto.

Section Constitutional.—The power of the Legislature to prescribe the form of indictment for murder is upheld in State v. Moore, 104 N. C. 743, 10 S. E. 183; State v. Brown, 106 N. C. 645, 10 S. E. 976; State v. Arnold, 107 N. C. 861, 863, 11 S. E. 990.

Willfully Not Necessary in Indictment for Murder.—The word “willfully” is not essential to the validity of an indictment for murder, nor is it essential to common law nor under this section. State v. Arnold, 107 N. C. 861, 863, 11 S. E. 990; State v. Kirkman, 104 N. C. 911, 10 S. E. 312; State v. Harris, 106 N. C. 682, 11 S. E. 377, cited and approved.

What Is Sufficient under Section.—This section declares an indictment containing certain words “sufficient,” but it does not make those words essential, nor by any reasonable construction can it be held to make technical and “sacred” words necessary to the indictment. State v. Fogleman, 204 N. C. 401, 168 S. E. 536.

Insufficient for Failure to Allege Whether the Person Killed Was a Man or Woman.—An indictment for murder charged, a man or woman, or whether the mortal wound was inflicted by stabbing, shooting or killing. State v. Pate, 121 N. C. 707, 709, 86 S. E. 997. The omission of the word “wound” in an indictment for murder was held not fatal, long before the adoption of the present short form of indictment for murder under this section. State v. Suiter, 199 N. C. 199, 201, 154 S. E. 72.

§ 15-144. Essentials of bill for homicide.—In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment “with force and arms,” and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be. (Rev., s. 3245; 1887, c. 58; C. S. 4614.)

Motion to Quash Not Proper Remedy.—Where the criminal indictment sufficiently charges all the essential facts of murder as required by this section, is sufficient to sustain the court's charge based upon the evidence in the case relative to murder committed in the perpetration of robbery or other felony. State v. Fogleman, 157 N. C. 619, 621, 72 S. E. 1071; State v. Kirkman, 104 N. C. 911, 10 S. E. 312; State v. Harris, 106 N. C. 682, 11 S. E. 377, cited and approved.

Statement of Facts. —An indictment does not constitute murder in the first degree, and defendant's remedy, if he desires more specific information is by motion for a bill of particulars under this section, but a motion in arrest of judgment after verdict where he attempts to reserve his judgment for perjury is in ignorance of the particulars of the offense, as the case may be. State v. Fogleman, 157 N. C. 619, 621, 72 S. E. 1071; State v. Kirkman, 104 N. C. 911, 10 S. E. 312; State v. Harris, 106 N. C. 682, 11 S. E. 377, cited and approved.

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Insufficient for Failure to Allege Whether the Person Killed Was a Man or Woman.—An indictment for murder charged, a man or woman, or whether the mortal wound was inflicted by stabbing, shooting or killing. State v. Pate, 121 N. C. 707, 709, 86 S. E. 997.
Variance in Time Not Fatal.—Where an indictment for murder charged the killing to have taken place December fifth, while the defendant showed on trial that the decedent was wounded on that day, he died three days thereafter, and before the bill of indictment was found. Held, that the variance was not fatal. State v. Pate, 121 N. C. 659, 28 S. E. 554.

Indictment under Section Held to Give Full Information of Crime.—Where an indictment was drawn according to this section the defendant was given full information of the change on which he was being tried. There was nothing indefinite or uncertain about the bill of indictment. It was in the alternative, but this was merely two counts in one bill of indictment. State v. Puckett, 211 N. C. 65, 190 S. E. 575.


It is necessary to prove in what court, or before whom, the oath was taken (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed. In indictments for perjury the following form shall be sufficient, to wit:

"The jurors for the state, on their oath, present, that A, of , , County, did unlawfully commit perjury upon the trial of an action in , court, in , County, wherein , was plaintiff and , was defendant, by falsely asserting, on oath (or solemn affirmation) (here set out the statement or statements alleged to be false), knowing the same to be false, or that the same is necessary to prove in what court, or before whom, the oath was taken. State v. Peters, 107 N. C. 876, 12 S. E. 74; State v. Hawley, 186 N. C. 435, 119 S. E. 888 overruling State v. Cline, 150 N. C. 854, 64 S. E. 591; State v. Gates, 107 N. C. 832, 12 S. E. 319. "Perjury feloniously committed upon a trial in the Court of a Justice of the Peace." State v. Bunting, 118 N. C. 1200, 24 S. E. 118 and State v. Shaw, 117 N. C. 764, 23 S. E. 246, which were indictments for perjury, was expressly held that the term "feloniously" was required to make a conviction of perjury certain.

Both of them, too, were on indictments instituted after the adoption of this section which established the form for indictment for perjury. The court, however, in rendering these decisions was evidently not conversant with the statute above referred to, for the reason probably that it does not appear in the general Code of 1883, and was, therefore, not called to its attention; the statutes having been enacted at a subsequent session and being chapter 83, Laws of 1889. State v. Harris, 145 N. C. 456, 458, 59 S. E. 115.

But this section does not make the word "feloniously" a part of the bill, and it does not appear in the form of acts, and the same, is, therefore, no longer required. State v. Harris, 145 N. C. 456, 457, 59 S. E. 115; State v. Holder, 151 N. C. 809, 59 S. E. 179.

Sufficient Avornment of Jurisdiction.—The jurisdiction of the court of the peace at the examination whereof the alleged perjury was committed is sufficient to aver where it occurred, that the justice had power to administer the oath. State v. Davis, 69 N. C. 495.

Style of the Court.—The style of the court before which the perjury is alleged to have been committed must be legally set forth. State v. Street, 5 N. C. 155, 3 Am. Dec. 638.

Proceedings Not Set Out.—Where an indictment for perjury alleges that the false oath was taken before a justice of the peace, the provisions in a bill of indictment are necessary to set forth the proceedings in which the false oath was alleged to have been made. State v. Roberson, 98 N. C. 544, 189 S. E. 511.

Indictment Not需 Charge Materiality of False Testimony.—Prior to the adoption of this section it was settled that in indictments for perjury the indictment must charge that the false testimony was material to the issue. See State v. Davis, 69 N. C. 495; State v. Fordham, 211 N. C. 413, 190 S. E. 758; State v. Godwin, 211 N. C. 419, 190 S. E. 761; State v. Smith, 211 N. C. 796, 20 S. E. (2d) 313.

No Change In Proof Required.—This section has merely applied in State v. Kirkman, 208 N. C. 179, 182 S. E. 498; State v. Dills, 210 N. C. 178, 193 S. E. 677; State v. Hudson, 213 N. C. 199, 10 S. E. (2d) 640, 61 S. B. 522.

It is necessary to prove in what court, or before whom, the oath was taken (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed. In indictments for perjury the following form shall be sufficient, to wit:

"The jurors for the state, on their oath, present, that A, of , , County, did unlawfully commit perjury upon the trial of an action in , court, in , County, wherein , was plaintiff and , was defendant, by falsely asserting, on oath (or solemn affirmation) (here set out the statement or statements alleged to be false), knowing the same to be false, or that the same is necessary to prove in what court, or before whom, the oath was taken."

Cross Reference.—As to perjury generally, see § 14-209 et seq.

In General.—A person charged with perjury must be indicted by the grand jury as the offense is a felony. A trial without an indictment is contrary to the Constitution, Art. 1, sec. 12. State v. Hyman, 164 N. C. 411, 79 S. E. 284.

But a defendant certainly can derive no just benefit from the insertion in the charge of the minuteness of what would constitute perjury. The use of such phraseology was indeed always illogical, and the experience of ages has been that it served not so much to enlighten the defendant as to hinder the trial of the cause upon its merits and very often caused a miscarriage of justice. State v. Cline, 146 N. C. 847, 64 S. E. 591, though decided in 1909 evidently overlooked the provisions of this section as well as the cases previously construing it and held in accordance with the former view that the materiality of the false testimony must be charged in the indictment. This case was expressly overruled by the court in State v. Hawley, supra.

"The said statement to be false," or that "he was ignorant whether or not said statement was true," is defective, the court should not quash it, but the defendant should be held until a proper indictment is had. State v. Flowers, 12 N. C. 519.

Variance Held Fatal.—Where an indictment for perjury charged that the false oath was taken at one term of a court in a trial between A and B and the records of that court showed that at a term other than the one alleged in the indictment there was such a trial, the court should not quash it, but the defendant should be held until a proper indictment is had. State v. Lewis, 93 N. C. 581.

Not Quashed for Omissions. — Although an indictment for perjury, which fails to allege that the defendant "knew the said statement to be false," or that "he was ignorant whether or not said statement was false," is defective, the court should not quash it, but the defendant should be held until a proper indictment is had. State v. Flowers, 12 N. C. 519.

Surplusage. — Where perjury was alleged to have been committed in the trial of a "suit, controversy, or investigation," without a definite statement of the nature of the proceeding, the words, "suit, controversy, or investigation," under this section, may be regarded as surplusage in a bill of indictment charging perjury, and a motion to quash upon these grounds therefrom in a court of justice before the bill of indictment has been cast is not a ground for quashing the nature of the proceeding will not be sustained. State v. Hawley, 186 N. C. 433, 119 S. E. 888.

An indictment for perjury, alleged to have been committed in the trial of a "suit, controversy, or investigation," without a definite statement of the nature of the proceeding, the words, "suit, controversy, or investigation," under this section, may be regarded as surplusage in a bill of indictment charging perjury, and a motion to quash upon these grounds therefrom in a court of justice before the bill of indictment has been cast is not a ground for quashing the nature of the proceeding will not be sustained. State v. Hawley, 186 N. C. 433, 119 S. E. 888.

No Change In Proof Required.—This section has merely simplified the form of the indictment for perjury, and the constituent elements of the offense remain unchanged and require the same proof to establish the commission of the offense.

§ 15-146. Bill for subornation of perjury.—In every indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit willful and corrupt perjury, it is sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceeding, and without setting forth the commission or authority of the court or other person by whom the perjury was committed or was agreed or promised to be committed. (Rev., s. 3248; Code, s. 1186; R. C., c. 35, s. 17; 1842, c. 49; s. 2; C. S. 4616.)

§ 15-147. Former conviction alleged in bill for second offense.—In any indictment for an offense which, on the second conviction thereof, is punished with other or greater punishment than on the first conviction, it is sufficient to set forth the place and time of the commission of the offense charged, without otherwise describing the previous offense; and a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction. (Rev., s. 3249; Code, s. 1187; R. C., c. 35, s. 18; C. S. 4617.)

In General.—When a second conviction is punished with other or greater punishment than for a first conviction, the first conviction shall be charged as required by this section. State v. Davidson, 124 N. C. 839, 32 S. E. 957.

Amount Should be Charged.—The charge of the theft of "$5 in the money of the value of $5" is good under this section and is sustained by the proof of the theft of any kind of coin or treasury or bank notes without proof of the particular kind of coin or treasury or bank note. State v. Carter, 113 N. C. 639, 18 S. E. 517.

Variance Allowed.—Where an indictment charged the larceny of "thirty dollars in money," and the proof was that defendant stole "three ten dollar bills" it was held, no variance. State v. Freeman, 89 N. C. 469.

§ 15-148. Manner of alleging joint ownership of property.—In any indictment wherein it is necessary to state the ownership of any property whatsoever, whether real or personal, which belongs to, or is claimed by, the person charged with embezzlement more than one person, whether such persons be partners in trade, joint tenants or tenants in common, it is sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others as the case may be; and whenever, in any such indictment, it is necessary to mention, for any purpose whatsoever, any partners, joint tenants or tenants in common, it is sufficient to describe them in the manner aforesaid; and this provision shall extend to all joint-stock companies and trustees. (Rev., s. 3250; Code, s. 1188; R. C., c. 35, s. 19; C. S. 4618.)

Apparent Variance Cured.—Where property is charged in an indictment for larceny as belonging to A and another, and it is proved on trial to be the property of A and B, a firm well known in the community, the apparent variance is cured by this section. State v. Capps, 71 N. C. 91. There it appears that a crop of cotton on the plantation of B, under a verbal agreement that B is to have half of it, was sold, that in an indictment for larceny the cotton was properly charged to be the property of A and another. State v. Hill, 79 N. C. 657.

Variance Not Cured.—Upon the trial of an indictment for injury to livestock, it was held, to be a variance where the property was laid in "L. S. and others," and the proof was that L. S. was the exclusive owner. State v. Hill, 79 N. C. 657.

Words "And Another or Others" Invalidates.—An indictment for larceny, which charges the thing taken to be the property of J. R. D. "and another or others" is fatally defective under this section. State v. Harper, 64 N. C. 129.

§ 15-149. Description in bill for larceny of money.—In every indictment in which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it is sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the money, shall be sustained by proof of any amount of coin, or treasury note, or bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall not be proven. (Rev., s. 3251; Code, s. 1190; 1876-7, c. 67; C. S. 4619.)

Purpose of Section.—An indictment, before 1877, for stealing "money" without further description could not have been sustained, and the Legislature, to remedy the difficulty of describing and identifying bank bills, treasury notes, etc., which may be stolen, passed this section. State v. Reese, 83 N. C. 637, 639.

Variance Not Cured.—Upon the trial of an indictment for stealing "the value of ten dollars," it was held, no variance. State v. Capps, 71 N. C. 93, 94.


Variance Allowed.—Where an indictment charged the larceny of "thirty dollars in money," and the proof was that defendant stole "three ten dollar bills" it was held, no variance. State v. Freeman, 89 N. C. 469.

§ 15-150. Description in bill for embezzlement.—In indictments for embezzlement, except when the offense relates to a chattel, it is sufficient to allege the embezzlement to be of money, without describing any particular kind of money or security; and such allegation, so far as regards the description of the property embezzled, is surplusage, and will not vitiate an indictment otherwise sufficient. State v. Fain, 106 N. C. 760, 11 S. E. 593.

Surplusage Which Does Not Vitiate.—An allegation in an indictment for embezzlement of a sum of money of the value of five dollars, is sufficiently specific. State v. Fain, 106 N. C. 760, 11 S. E. 593.

Variance.—In a prosecution for embezzlement the failure of proof of embezzlement of the whole sum charged in the bill of indictment does not constitute a fatal variance between the indictment and the evidence. State v. Dula, 206 N. C. 745, 175 S. E. 80.

§ 15-151. Intent to defraud; larceny and receiving.—In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense whatever, it is sufficient to allege
in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city, town, or parish, or body corporate, or any public officer in his official capacity, or any copartnship or member thereof, or any particular person. The defendant may be charged in the same indictment in several counts with the separate offenses of receiving stolen goods, knowing them to be stolen, and larceny. (Rev., s. 3253; Code, s. 1191; R. C., c. 35, ss. 21, 23; 1853, c. 87, s. 2; 1874-75, c. 62; C. S. 4621.)

Cross Reference.—As to larceny and receiving stolen goods generally, see § 14-70 et seq.; and § 53-129.

In General.—An indictment charging the employee with the indictable offense of making a false entry on the books of a bank in which he was employed need not necessarily specify all those whom he has thereby intended to defraud; and where it has named the officers of the bank and a depositor, “and other persons to the jurors unknown,” it is sufficient to show that the false entry was entered to deceive the bank examiners in concealing his defalcation, who were presumably making an examination of his bookkeeping under the common law and the statute. State v. Hedgecock, 185 N. C. 714, 117 S. E. 47.

Separate Counts.—On trial of an indictment for larceny and receiving, etc., the two counts are consolidated without objection, and varied to meet the probable proofs, the court will not order the Solicitor to elect upon which count he will proceed. State v. Morrison, 85 N. C. 561.

General Verdict Correct.—A general verdict of guilty upon an indictment of two counts—one for stealing and the other for receiving stolen goods of a value less than five dollars—is correct and if convicted, the defendant will be taken upon the good count, and there may be judgment. State v. Bailey, 73 N. C. 70; State v. Leak, 80 N. C. 403.

§ 15-152. Separate counts; consolidation.—When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more counts are found in such cases, the court will order them to be consolidated. Provided, that in such consolidating cases the defendant shall be taxed the solicitor’s full fee for the first count, and a half fee for only one subsequent count upon which conviction is had or plea of guilty entered: Provided, this section shall not be construed to reduce the punishment or penalty for such offense or offenses. (1917, c. 168; 1921, c. 100; C. S. 4622.)

Cross Reference.—As to the amount of solicitors’ fees, see § 6-12. As to writing separate counts in violation of laws regulating intoxicating liquors, see § 18-10. Public Laws of 1921 the first proviso to this section, regarding the fees of the solicitor, was amended. The former wording provided that the defendant should be taxed half fee for each subsequent count upon which conviction was had. The amendment in addition to allowing the half fee on but one subsequent count added at the end of the proviso the words “or plea of guilty.”

General Verdict Covers Several Counts.—Where there are several counts in a criminal complaint (called indictment in this case), and each is for a distinct offense, a general verdict for any one of them shall be sufficient, and shall not be deemed a variance, if it appears to be an intent to defraud the United States, or any state, county, city, town, or parish, or body corporate, or any public officer in his official capacity, or any copartnship or member thereof, or any particular person. The defendant may be charged in the same indictment in several counts with the separate offenses of receiving stolen goods, knowing them to be stolen, and larceny. (Rev., s. 3253; Code, s. 1191; R. C., c. 35, ss. 21, 23; 1853, c. 87, s. 2; 1874-75, c. 62; C. S. 4621.)

Obstructing Highway and Injury to Property.—It is not only proper but it is the duty of the court to consolidate cases where defendant is charged with obstructing a highway and with wanton injury to personal property by placing nails in the highway. State v. Malpass, 189 N. C. 349, 127 S. E. 646.

Delivering Liquor and Keeping for Sale.—Under this section consolidation of charges of delivering and keeping for sale under the Turtleling Act is proper. State v. Jarrett, 189 N. C. 516, 127 S. E. 590.

Arson and House Burning.—Where the grand jury has found two separate indictments, one charging the defendant with the other the less offense of house burning, both arising from the same transaction, the two may be consolidated and a separate judgment of conviction of the less offense will be sustained on appeal. State v. Brown, 182 N. C. 761, 131 S. E. 257.

Housebreaking and Larceny.—When not subject to legal objection, a motion by the solicitor to consolidate two criminal actions for trial is addressed to the discretion of the trial judge, and where prosecutions for burglary and larceny on two occasions during the same night against two defendants are consolidated without objection, and the charges are so connected in both plans of evidence of guilt in one action is competent in the other, the order of the trial judge consolidating the actions will not be held for error on appeal. State v. Combs, 200 N. C. 671, 158 S. E. 252.

Manslaughter of One Person and Assault upon Another.—Upon the trial under one indictment charging the one with murder of M., it is reversible error to the defendant’s prejudice for the trial judge upon his own motion, after a subsequent part of the evidence had been introduced to consolidate the action with another action under a separate indictment charging the prisoner with an assault with a dead weapon upon D., the prisoner being afforded no opportunity to pass upon the competency of the jury upon the assault charge or an opportunity to plead to the charge. State v. Rice, 202 N. C. 411, 163 S. E. 112.

Separate Acts of Rape.—Where the evidence tended to show that defendant, a negro, was walking through woods while defendant, a negro, and another negro had sexual intercourse with him against his will, that defendant met a white girl in the company of two white boys, who forced her to have sexual intercourse with him against her will, while defendant was still in company with the colored girl, he met a white girl in the company of two white boys, and after an altercation with the white boys, he and the colored girl left the white girl with defendant and that he forced her to have sexual intercourse with him against her will, the consolidation of the prosecutions for the purpose of trial was not error. State v. Chapman, 221 N. C. 157, 19 S. E. (2d) 250.

Rape and Carnal Knowledge of Female.—A charge of rape and that of carnally knowing a female person between the ages of twelve and sixteen years, under § 14-36, were properly joined in one count under this section, since they are related in character and grow out of the same transaction. State v. Hall, 214 N. C. 639, 193 S. E. 398.

Burglary and Rape.—A motion, made before the introduction of any evidence, to require the State to elect between two separate counts in the bill of indictment, one charging burglary in the first degree and the other rape, is properly denied, the two offenses being of the same kind and nature, under this section may be joined in one indictment in separate counts, and it being within the sound discretion of the trial judge as to whether he shall hold evidence of guilt in one of the counts and, if so, at what stage of the trial. State v. Smith, 201 N. C. 494, 160 S. E. 577.

Offenses Related to Operation of Automobile.—A charge of driving an efficiency driving automobile while under the influence of intoxicating liquor and of assault with an automobile may be properly joined in one indictment as separate counts charging distinct offenses of the same class growing out of the same transaction, and separate judgments may be entered upon the
A joint indictment of two defendants for murder charged that defendants "of his malice aforethought" committed the act. Held: The use of the word "his" instead of "their" is immaterial; the indictment should charge all the defendants as charged in the bill of indictment.

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§ 15-154. Defects which do not vitiate.—No indictment shall be quashed nor shall judgment thereon be arrested by reason of the fact that any member of the grand jury finding such bill of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue. (1907, c. 36; C. 4624.)

Cross Reference.—As to when exceptions for disqualification of grand jurors should be made, see § 9-26.

§ 15-155. No quashal for grand juror's failure to pay taxes or being party to suit.—No indictment shall be quashed nor shall judgment thereon be arrested by reason of the avertment of any matter unnecessary to be proved, nor for omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statutes" instead of the words "against the form of the charge," or vice versa, nor for the omission of the words "against the form of the charge," or "against the form of the statutes," nor for omitting to state the time at which the offense was committed in any case for arrest of judgment, and it seems that such an indictment would be sufficient in the absence of evidence to impeach it.
§ 15-156. CH. 15. CRIMINAL PROCEDURE § 15-159

where time is not of the essence of the offense, nor for stating the time imperfectly, nor for not affecting the merits of the case. Hence judgments and not to be stayed or reversed for nonessential or minor defects. State v. Howard, 92 N. C. 772, 778.

Other Expressions Omitted.—Omitting the statement, that the "prisoner, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil," and the further omission of an averment that the "deceased was in the peace of God and the State," are not fatal defects. State v. Howard, 92 N. C. 772, 778.

When Time Need Not Be Charged.—When time is not of the essence of the offense the charge and averment that time is immaterial by this section, though the allegation of time can do no harm. State v. Arnold, 107 N. C. 851, 856, 11 S. E. 990; State v. Peters, 107 N. C. 875, 883, 12 S. E. 74; State v. Sisson, 83 N. C. 602, 603; State v. Williams, 117 N. C. 753, 23 S. E. 290.

Thus time is not of the essence of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. State v. Spencer, 185 N. C. 765, 177 S. E. 803.

Failure to specify a particular day in an indictment for abandonment is not fatal especially in view of an instruction so that the jury only such evidence as a conclusive proof to show that the defendant violated the statute after a particular date. State v. Jones, 201 N. C. 424, 160 S. E. 468.

Time of Birth in Bastardy Proceeding.—Indictment, in a bastardy proceeding, which states that the child was born on August 13, 1891, was not a fatal defect, because the evidence was that the birth occurred on November 13, 1940, is not fatally defective. State v. Moore, 222 N. C. 356, 23 S. E. (2d) 31.

Conclusion Simplified.—The formal conclusion, "against the body and dignity of the State," etc., are not necessary in an indictment for any offense whatever, but are mere surplusage. State v. Kirkman, 104 N. C. 911, 10 S. E. 312, overruling State v. Jones, 85 N. C. 669, 670, 75 S. E. 313; State v. Sykes, 104 N. C. 694, 10 S. E. 191; State v. Dudley, 182 N. C. 822, 109 S. E. 63.

That an indictment concludes against the form of the statute, it is no ground for an arrest of judgment. State v. Smith, 63 N. C. 234.

An indictment concluding against the "force" instead of the "form" of the statute is sufficient under this section. State v. Davis, 80 N. C. 285.

Variance.—In a prosecution of defendant for being an accessory before the fact of murder, variance of a few days between the indictment and proof as to the day the murder was committed is not fatal under this section. State v. Gore, 207 N. C. 648, 178 S. E. 290.

It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches itself, and not to the act of the man, and a variance between allegation and proof as to time is not material between statute of limitations is involved. State v. Trippe, 222 N. C. 610, 24 S. E. (2d) 340.

Jurisdiction.—Where the jurisdiction of the court is not ousted on the face of the indictment the position that the court does not have jurisdiction is not available on a plea in abatement. State v. Davis, 203 N. C. 13, 14, 164 S. E. 737.

A charge in a murder prosecution in the alternative was not a vitiating defect, see § 15-125, the motion in arrest after verdict was properly denied, such motion being available only for vitiating defects upon the record proper. State v. Packett, 211 N. C. 66, 169 S. E. 183.


Art. 16. Trial before Justice.

§ 15-156. In cases of final jurisdiction.—When the justice is satisfied that he has jurisdiction, if no jury is asked for, he shall proceed to determine the case, and shall either acquit the accused or find him guilty, and sentence him to such punishment as the case may require, not to exceed in any case a fine of fifty dollars or imprisonment in the county jail for thirty days. (Rev., s. 3256; Code, s. 897; 1868-9, c. 178, subc. 4, s. 8; C. S. 4626.)

Cross References.—As to jurisdiction of justice in criminal actions, see § 7-129 and notes. As to divesting inferior courts of exclusive original jurisdiction in certain criminal actions, see § 7-64.
the sufficiency of the mittimus, which is to terminate his duties. State v. Armistead, 106 N. C. 639, 10 S. E. 872.

Same.—Where Prisoner Taken from Officer.—It is a criminal offense to take, by force, from the custody of an officer a prisoner legally committed to his charge, to convey him to jail, and it is no defense that the mittimus does not comply, in all respects, with the requirements of this section. State v. Armistead, 106 N. C. 639, 10 S. E. 872.

§ 15-160. Parties entitled to copy of papers; bar to indictment.—The justice shall give to either party on request, and on payment of his lawful fee, a copy of the complaint and of his finding and sentence. Such finding and sentence may be pleaded in bar of any indictment subsequently found for the same offense. (Rev., s. 3260; Code, ss. 902, 903; 1868-9, c. 178, subc. 4, ss. 13, 14; C. S. 4630.)

Collusive Conviction Not a Bar.—The conviction of a person defending a justice of the peace which is collusive and not adversary is not sufficient to sustain a plea of former conviction. State v. Moore, 136 N. C. 581, 48 S. E. 573.

§ 15-161. Justice to make return of cases to superior court.—It is the duty of each justice of the peace on or before Monday of every term of the superior court of his county, to furnish the clerk of the court with a list of the names and offenses of all parties tried and finally disposed of by such justice of the peace, together with the papers in each case, in all criminal actions, since the last term of the superior court. The clerk of the court shall hand a copy of such list to the solicitor and to the grand jury at each term of court; and no indictment shall be found against any party whose case has been so finally disposed of by any justice of the peace:

Provided, that this section shall not be deemed to extend or enlarge or otherwise affect the jurisdiction of justices of the peace, except as provided by law. (Rev., s. 3261; Code, c. 906; 1869-70, c. 110; C. S. 4631.)

Cross Reference.—As to liability for failure to make return of cases to superior court, see § 14-211.

§ 15-162. Prisoner standing mute, plea "not guilty" entered.—If any person, being arraigned upon or charged in any indictment for any crime, shall stand mute of malice or will not answer directly to the indictment, the court shall order the plea of "not guilty" to be entered on behalf of such person; and the plea so entered shall have the same force and effect as if such person had pleaded the same. (Rev., s. 3262; Code, s. 1198; R. C., c. 33, s. 29; R. S., c. 35, s. 16; C. S. 4632.)

Deaf Mutes.—Where, upon the arraignment of one for murder, it was suggested that the accused was a deaf mute, and was incapable of understanding the nature of a trial, and its incidents and his rights under it, it was held proper for the judge to understand the inter- pret of these suggestions, for the court to decline putting the prisoner on trial. State v. Harris, 53 N. C. 136.

In State v. Early, 211 N. C. 189, 189 S. E. 668, the court, upon finding that defendant was a deaf mute, subpoenaed an interpreter, who after being duly sworn and after the reading of the indictment, interpreted and explained the indictment to defendant. After defendant had indicated to the interpreter that he understood the indictment, the interpreter translated the solicitor's question of whether defendant was guilty or not guilty, and upon a negative reply given through the interpreter, a plea of not guilty was entered. It was held that there was no error on the arraign-
Ch. 15. CRIMINAL PROCEDURE

§ 15-164. Peremptory challenges by the state.—In all capital cases the prosecuting officer on behalf of the state shall have the right to challenge peremptorily six jurors for each defendant, but shall not have the right to stand any jurors at the foot of the panel. The challenge must be made before the juror is tendered to the prisoner, and if he will challenge more than six jurors he shall assign for his challenge a cause certain; and in all other cases of a criminal nature a challenge of four jurors shall be allowed in behalf of the state for each defendant, and challenge also for a cause certain, and in all cases of challenge for cause certain the same shall be inquired of according to the custom of the court. (Rev., s. 3264; Code, s. 1206; 1913, c. 31, s. 4; 1907, c. 415; 1887, c. 53; R. C., c. 35, s. 33; 1827, c. 10; 1832, c. 4; 1935, c. 475, s. 3; C. S. 4634.)

Cross Reference.—See notes under § 15-164.

Editor's Note.—The number of challenges was increased in capital cases from four to six, and in other cases from two to four by the Public Laws of 1935.

Construed with Section 9-15.—The effect of section 9-15, to permit a party to a criminal action to make inquiry as to the fitness and competency of a juror before the adverse party would be permitted to admit the cause and have him stood aside therefor, and this course cannot now be pursued, except where the challenging party, after making such inquiry, states that the juror is challenged for cause; and this section, abolishing the established practice permitting the solicitor to place jurors, upon the trial of capital felony, at the foot of the panel, does not affect the application of section 9-15, to the trial of such felonies. State v. Ashburn, 187 N. C. 717, 122 S. E. 833.

Judge Cannot Extend Time.—The discretionary power of the trial judge in respect to challenges is confined to challenges for cause, and he has no more authority to extend the time for making peremptory challenges beyond the limit fixed by this section than he has to allow more than four jurors in cases of such challenges. State v. Fuller, 114 N. C. 885, 19 S. E. 797.

§ 15-165. Challenge to special venire same as to tales jurors.—In the trial of all criminal cases, where a special venire shall be ordered, the same causes of challenge to the jurors summoned on the special venire shall be allowed as exist to tales jurors. (Rev., s. 3265; 1887, c. 53; C. S. 4635.)

Cross References.—As to grounds for challenging tales jurors, see § 9-11. As to special venire in general, see § 9-29 et seq.


§ 15-166. Exclusion of bystanders in trials for rape.—In the trial of cases for rape and of assault with the intent to commit rape, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the court-room all persons except the officers of the court, the defendant and those engaged in the trial of the case; and upon the preliminary hearing before a justice of the peace of the offenses above named, that officer may adopt a like course. (1907, c. 21; C. S. 4038.)

§ 15-167. Term expiring during trial extended.—In case the term of a court shall expire while a trial for felony shall be in progress, and before judgment shall be given therein, the judge shall continue the term as long as in his opinion it shall be necessary for the purposes of the case; and he may in his discretion exercise the same power in the trial of any other cause under the same circumstances, except that he shall not be permitted to extend the term beyond after Thursday of the last week (Rev., s. 3266; Code, s. 1920, c. 1393, s. 226; C. C. P., s. 397; R. C., c. 31, s. 16; 1830, c. 22; C. S. 4637.)

§ 15-168. Justification as defense to libel.—Every defendant who is charged by indictment with the publication of a libel may prove on the trial for the same the truth of the facts alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge. (Rev., s. 3267; Code, s. 1103; R. C., c. 35, s. 26; C. S. 4638.)

Cross Reference.—As to effect of publication in good faith and retraction by a newspaper, see § 99-2.

Truth of Entire Charge Must Be Proved.—Where the matter set out in the indictment is libellous, in order for the defendant to justify he must show that the entire charge in the indictment is libellous, the court is not to limit itself to the one false fact alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge. (Rev., s. 3267; Code, s. 1103; R. C., c. 35, s. 26; C. S. 4638.)

Cross Reference.—As to effect of publication in good faith and retraction by a newspaper, see § 99-2.

Proof of Specific Charge Necessary.—Proof of the specific charge comprised in the indictment is insufficient. In an indictment for a libel, it is not competent for the defendant to justify by proving that there was, and long had been, a general report in the neighborhood, of the truth of his charge. State v. White, 29 N. C. 180.

§ 15-169. Conviction of assault, when included in charge.—On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character. (Rev., s. 3266; 1845, c. 68; C. S. 4639.)

Section Refers to Assault Generally.—This section does not describe the kind of assault, but refers to an assault generally and without regard to its degree of punishment under the law. State v. Smith, 17 N. C. 377.

When Section Applicable.—This section and § 15-170 are applicable only where there is evidence tending to show that defendant is guilty of a crime of lesser degree than that charged in the indictment. State v. Jackson, 199 N. C. 321, 1899, C. S. 402.

What Indictment Includes.—An indictment for any offense
against the criminal law includes all lesser degrees of the same crime, known to the law; and conviction may be had of the lesser offense when the charge is inclusive of both. State v. Williams, 185 N. C. 685, 116 S. E. 736.

The provisions of this section in regard to conviction of a less degree of the same crime charged in the indictment applies only where there is evidence of guilt of the less degree, and where burglary in the first and second degree is charged in the indictment, and the question as to guilt on the charge of first degree or of second degree is not presented to the court on all degrees of the crime thus encompassed. State v. Brown, 113 N. C. 645, 18 S. E. 51.


d_§ 15-170. Conviction for a less degree or an attempt—When the trial of any of the indictment the prisoner may be convicted of the crime charged there in or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. (Rev., s. 3269; 1891, c. 205, s. 2; C. S. 4604.)

Application of Section.—Where there are several counts in a bill, a conviction of the defendant guilty on one count and not on another will, in the absence of a request, authorize the court to instruct the jury that the defendant was guilty of a greater degree of the crime charged in the indictment. State v. Canary, 222 N. C. 231, 42 S. E. (2d) 272.

§ 15-170. Conviction for a less degree or an attempt—When the trial of any of the indictment the prisoner may be convicted of the crime charged there in or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. (Rev., s. 3269; 1891, c. 205, s. 2; C. S. 4604.)


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being tried, it is not required that he charge upon the principles of an assault with a deadly weapon or manslaughter what is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of a human being. State v. Luterbach, 188 N. C. 412, 124 S. E. 752.

In instructions as to Second Degree Murder Where Evidence Shows First Degree.—Where upon the trial for murder the evidence shows beyond a reasonable doubt that the defendant is guilty, he is guilty of the crime of murder in the first degree, the failure of the trial court to charge upon the law of murder in the second degree or manslaughter not changing the verdict. State v. Ferrell, 205 N. C. 640, 172 S. E. 186.

Same—Assault.—Where the evidence tended to show a simple assault and a defendant procured with intent to kill, the court's instruction that the jury might find providing murder into degrees shall be construed to within the provisions of this section, permitting the jury to twelve and sixteen years are of such a nature as to come assault with a deadly weapon, if they so found beyond a reasonable doubt. State v. Lee, 206 N. C. 472, 174 S. E. 266.

In prosecution for assault with a deadly weapon with intent to kill, the court's instruction that the jury might find defendant guilty of a less degree of the crime, including assault with a deadly weapon, if they so found beyond a reasonable doubt is entitled to be considered without error. State v. Elmore, 212 N. C. 531, 194 S. E. 713.

Rape and carnally knowing a female between the age of twelve and sixteen years are of such a nature as to come within the provisions of this section, permitting the jury to find the defendants guilty of the lesser crime, if they do not deem the evidence sufficient to warrant a conviction on the first degree. State v. Hobbs, 214 N. C. 619, 641, 200 S. E. 749.

An attempt to commit barratry is an offense in this state and a defendant may be convicted of an attempt to commit the offense upon an indictment charging the common-law offense of barratry. State v. Batson, 220 N. C. 411, 417 S. E. (2d) 511, 139 A. R. 614.

New Trial Must Be on Full Charge.—Upon an appeal from a conviction for a lesser offense than that charged in the indictment, a new trial, if granted, must be upon the full charge in the bill. State v. Matthews, 142 N. C. 621, 55 S. E. 342.

Quoted in State v. Hairsell, 222 N. C. 455, 23 S. E. (2d) 685.


§ 15-171. Burglary in the first degree charged, verdict for second degree.—When the crime charged in the bill of indictment for burglary is burglary in the first degree the jury, upon the finding of facts sufficient to constitute burglary in the first degree as defined by statute, may elect to render a verdict of guilty of burglary in the second degree if they deem it proper so to do. The judge in his charge shall so instruct the jury. (Rev. s. 3270; 1889, c. 434, s. 3; 1941, c. 7, s. 1; C. S. 4641.)

Editor's Note.—For comment on the 1941 amendment to this section, see 19 N. C. L. Rev. 476.

All of the following cases were decided prior to the 1941 amendment.

Conviction in Second Degree Unauthorized.—Where, in the trial of an indictment for burglary, the evidence showed that the dwelling place was not inhabited at the time, a conviction of burglary in the second degree is not authorized by this section, since a felonious entry under such circumstances is by section 14-171 N. C. 813, 817, 89 S. E. 58.

Applies to All Indictments for Murder.—This section applies to all indictments for murder, whether committed by poison, or means of poisoning, lying in wait, imprisonment, starvation, torture, or otherwise. State v. Matthews, 142 N. C. 622, 55 S. E. 342.

Just Must Determine Degree.—For a conviction of murder in the first degree under this section and section 14-17, the jury must find specially under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under Constitutional Mandate, Const. Art. I, sections 13, 17, which right may not be waived. State v. Bazemore, 193 N. C. 336, 137 N. C. 176.

By this section it is made the duty of the jury alone to determine in their verdict whether the crime is murder in the first or second degree. State v. Gadberry, 117 N. C. 811, 23 S. E. 477; State v. Bagley, 158 N. C. 608, 73 S. E. 955; State v. Whaley, 165 N. C. 614, 139 S. E. 589; State v. Minges, 171 N. C. 813, 817, 89 S. E. 58. See also, State v. Wiggins, 171 N. C. 683, 73 S. E. 995.

Failure To Determine Degree.—Where the degree of murder is not expressed in the verdict, the judge should tell the jury to reconsider their finding, for the purpose of specifying the crime, and upon response being made by them of murder in the first degree, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty. State v. Wiggins, 171 N. C. 683, 73 S. E. 995.

Judge May Exclude Second Degree in Charge.—When the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the murder was committed either by lying in wait or in an attempt to perpetrate a felony, and the controverted question is the identity of prisoner as the murderer, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty. State v. Wiggins, 171 N. C. 683, 73 S. E. 995.

Verdict Conducted According to Charge.—The verdict must be conducted according to the charge and the evidence and when these make it certain beyond question, the law has been complied with. State v. Gilchrist, 113 N. C. 673, 18 S. E. (2d) 423; State v. Wiggins, 122 N. C. 659, 43 S. E. 247.

Mere Killing Presumes Second Degree Murder.—Since the Act of 1893, the killing being proved, and nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree. State v. Hicks, 125 N. C. 635, 639, 43 S. E. 247.

"In all indictments for homicide, when the intentional killing is established or admitted, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder (not only of the second degree) if the jury shall be of the opinion from the jury of the truth of facts which justify or excuse his act, or mitigate it to manslaughter." State v. Lane, 166 N. C. 333, 339, 81 S. E. 630.

Verdict of murder in the first degree may be had upon sufficient circumstantial evidence. State v. Bazemore, 193 N. C. 336, 137 S. E. 172; State v. Melton, 187 N. C. 481, 122 S. E. 430; State v. Matthews, 66 N. C. 10.

When First Degree Presumed.—A homicide committed in the perpetration of, or in an attempt to perpetrate, a robbery will be deemed murder in the first degree, the jury being governed by the evidence under proper instructions in finding that the offense is a less offense. State v. Lane, 166 N. C. 333, 334, 81 S. E. 630.

In an indictment for murder, when the homicide is shown or admitted to have been intentionally committed by lying in wait, poisoning, starvation, imprisonment, or torturing, the law raises the presumption of murder in the first degree, but none the less if the jury convict of a less offense, it is within their power so to do under the statute.
and the prisoner has no cause to complain that he was not convicted of the higher offense. State v. Matthews, 142 N. C. 631, 55 S. E. 342.

A defendant will not be permitted to plead guilty to murder in the first degree under this section, and this rule applies to all indictments for murder, including murder perpetrated by means of poison, lying in wait, imprisonment, starving, torture or otherwise. State v. Blue, 219 N. C. 612, 20 S. E. (2d) 635.

Evidence.—Where all the evidence at a trial for murder tends to show murder in the first degree in that the murder was committed by poisoning, starvation, lying in wait, imprisonment, torture, or in the perpetration or attempt to perpetrate a felony, the State as a rule cannot rely on premeditation and deliberation beyond a reasonable doubt. State v. Goodwin, 211 N. C. 419, 190 S. E. 761; State v. Goodwin, 196 N. C. 710, 146 S. E. 806.

§ 15-173. Demurmer to the evidence.—When on the trial of any criminal action in the superior court, or in any criminal court, the state has produced its evidence and rested its case, the defendant may move to dismiss the action or for judgment of nonsuit. If the motion is allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of "not guilty" as to such defendant. If the motion is refused, the defendant may except; and if the defendant introduces no evidence, the case shall be submitted to the jury as in other cases, and the defendant shall have the benefit of his exception on appeal to the supreme court.

Nothing in this section shall prevent the defendant from introducing evidence after his motion for nonsuit has been overruled; and he may again move for judgment of nonsuit after all of the evidence in the case is concluded. If the motion is then refused, upon consideration of all of the evidence, the defendant may except; and, after the jury has rendered its verdict, he shall have the benefit of such latter exception on appeal to the supreme court. If defendant’s motion for judgment of nonsuit be granted, or be sustained on appeal to the supreme court, it shall in all cases have the force and effect of a verdict of "not guilty." (1913, c. 73; Ex. Sess. 1913, c. 32; C. S. 4643.)

Cross References.—As to demurmer to the evidence in civil cases, see § 1-183. As to motions in civil actions heard at common law, see § 7-453.

Commentary.—This section serves, and was intended to serve, the same purpose in criminal prosecution as is accomplished by section 1-183, in civil actions. State v. Fulcher, 184 N. C. 663, 665, 113 S. E. 769; State v. Fulcher, 190 N. C. 687, 130 S. E. 854; State v. Ormond, 211 N. C. 437, 191 S. E. 22; State v. Norris, 206 N. C. 191, 173 S. E. 14.

On motion to nonsuit, the court is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment. State v. Landin, 209 N. C. 20, 182 S. E. 689. See also, State v. Lefever, 216 N. C. 494, 5 S. E. (2d) 552.

A defendant’s motion as of nonsuit should be denied if there is any evidence tending to prove the fact in issue, or which reasonably conduces the conclusion of guilt as a fairly logical and legitimate deduction, but evidence which merely raises a suspicion or conjecture of the fact of guilt is insufficient to be submitted to the jury. State v. Stephenson, 218 N. C. 258, 10 S. E. (2d) 819.

Sufficiency of Evidence May Be Challenged if Motion Timely Made.—If the defendant, on trial for murder, wishes to challenge the sufficiency of the evidence to show premeditation and deliberation beyond a reasonable doubt, motion to nonsuit under this section, on the capital charge, should be lodged at the close of the State’s evidence, excepted to, and if overruled, the defendant to be entitled to a new trial on appeal, if the evidence is insufficient to be submitted to the jury. State v. Stephenson, 218 N. C. 258, 10 S. E. (2d) 819.

A motion for judgment of nonsuit, under this section, must be made at the close of the State’s evidence in order for a motion thereunder made at the close of all the evidence to be considered. State v. Ormond, 211 N. C. 437, 439, 191 S. E. 22.

Motion Must Be Renewed.—A motion as of nonsuit upon the evidence will not be considered when it is not renewed after the conclusion of all the evidence as this section requires. State v. Helms, 181 N. C. 566, 107 S. E. 282. See also, State v. Kiziah, 217 N. C. 399, 9 S. E. (2d) 474.

Same.—Waiver.—Where the defendant in a criminal action moves for the dismissal or for judgment as of nonsuit after the close of the State’s evidence, and thereafter elects to introduce his own evidence, his failure to renew his motion after the whole evidence has been introduced is a waiver of his right to make such exception on appeal, and it is not subject to review in the Supreme Court on appeal. State v. Hayes, 187 N. C. 400, 122 S. E. 13. See also, State v. Harrett, 196 N. C. 697, 146 S. E. 801; State v. Chapman, 221 N. C. 456.

Only inquiring evidence need be considered upon defendant’s motion as of nonsuit under this section, and contradictions in the inculpatory testimony and equivocations of the defendant as to his weight or credibility of the evidence but not its competency, need not be taken into account in determining whether there is any competent evidence to sustain the verdicts or the indictment. State v. Matthews, 142 N. C. 118, 175 S. E. 466. See also, State v. Moses, 207 N. C. 199, 176 S. E. 317.

When Motion Denied.—If the motion to dismiss or as of nonsuit upon the evidence in a criminal case, will be denied if the evidence is sufficient, considered in the light most favorable to the State, to prove guilt of the defendant beyond a reasonable doubt. State v. Sigmon, 190 N. C. 684, 130 S. E. 854.

Where evidence is conflicting in a criminal case and where, considering the evidence in the light most favorable to the State, the jury might find the defendant guilty, a motion as of nonsuit is properly denied. State v. Carr, 196 N. C. 129, 130, 144 S. E. 698.

Exempting Entire Evidence.—Where defendant in a criminal action desires to except to the sufficiency of the evidence to convict him, his excepting, under this section, at the close of the State’s evidence, and upon the overruling of his motion to nonsuit, excepting at the close of all the evidence, brings his exception to the Supreme Court on appeal upon the sufficiency of the entire evidence to convict, and is the proper procedure for that purpose. State v. Kiziah, 217 N. C. 399, 9 S. E. (2d) 474.

Consideration of Entire Evidence on Appeal.—In State v. Pasour, 183 N. C. 793, 794, 111 S. E. 779, the court said: "Both before and after he had introduced evidence, the defendant moved to dismiss the prosecution as of non-suit, but the court sustained the motion only, and did not order the dismissal. The exceptions, therefore, require a consideration of the entire evidence."

An exception to a motion to dismiss in a criminal action takes effect after the close of the State’s evidence, and renewed by defendant after the introduction of his own evidence, does not constitute the appeal to the State’s evidence alone, and a conviction will be sustained under the second exception if there is any sufficient evidence on the whole record of the defendant’s guilt. State v. Brinkley, 183 N. C. 720, 110 S. E. 783.

An appeal from the denial of a motion as of nonsuit in a criminal action, review of the evidence is not confined to the State’s evidence, renewed after all the evidence has been introduced, does not confine its sufficiency to

[745]
Section 15-173. CRIMINAL PROCEDURE

The time of the first motion, and will be denied if there is in the evidence in the State's behalf, viewing all of the evidence in its entirety, State v. Earp, 196 N. C. 164, 145 S. E. 23.

When upon the trial of a criminal action, the State produces its evi-idence and rests, and the defendant preserves his exception to the sufficiency of his motion for judgment as of nonsuit, and, after offering evidence and the case closed, defendant renews his motion for judgment as of nonsuit, the court must act, not only in the light of all the evidence introduced and, in such case, the defendant is entitled to the benefit only of his exception to the refusal of the latter motion. State v. Norton, 222 N. C. 418, 23 S. E. (2d) 307.

Supreme Court Not to Weigh Evidence.—This section provides that if on the motion the judgment of nonsuit is allowed on appeal, "It shall, in all cases, have the force and effect of a verdict of not guilty." This is not, however, an absolute rule. The court may consider the evidence, but is a verdict by the court of not guilty, which theretofore was without precedent. But the statute certainly did not intend that the Supreme Court should weigh the evidence and render a verdict. State v. Cooke, 176 N. C. 731, 735, 97 S. E. 171.

Sufficiency of Evidence.—Upon a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State and the court will not pass upon its weight or the credibility of the witnesses. State v. Routtree, 181 N. C. 535, 106 S. E. 669; State v. Atlantic Ice, etc., 191 N. C. 595, 133 S. E. 158, 67 A. L. R. 830; State v. Young, 200 N. C. 738, 763, 184 S. E. 839. See also, State v. Mann, 219 N. C. 212, 13 S. E. (2d) 24.

A demurrer to the evidence presents only the question of whether there is evidence to carry the case to the jury, the weight and credibility of the evidence being for the jury and not the court. State v. Smith, 221 N. C. 400, 20 S. E. (2d) 360; State v. Johnson, 220 N. C. 773, 18 S. E. 2d. 360.

The requirement that the evidence must be sufficient to convict beyond a reasonable doubt in criminal actions, is for the benefit of the defendant; and it requires the State to satisfy the court that the evidence, if believed by the jury, tends to prove the fact of guilt or which reasonably conduces to its proof. State v. Fulcher, 184 N. C. 663, 11 S. E. 769. In considering a motion to dismiss the action under the section, the evidence is to be considered in the light most favorable to the State, and if there is any evidence tending to prove the fact of guilt or which reasonably conduces to its proof, the defendant's motion as of nonsuit, should have been sustained, under this section. State v. Everett, 194 N. C. 442, 140 S. E. 22. See also, State v. Tankersley, 172 N. C. 590, 119 S. E. 698.

Same.—Rape. Evidence tending to show that the deceased was ravished by a person suffering from gonorrhea, and that she died from the assault and choking, with further evidence that the defendant had the disease and that his shoes fitted the tracks made at the time of the crime, is sufficient, taken with other evidence of guilt, to be submitted to the jury and to sustain the defendant's motion as of nonsuit, under this section. State v. McLeod, 196 N. C. 542, 146 S. E. 409.

Same—Tending Only to Exculpate. — Where the State's evidence and that of the defendant are substantially to the same effect, in an action for an assault, and evidence tending only to exculpate the defendant, his motion as of non-suit after all the evidence has been introduced, considering it as a whole, must be sustained. State v. Fulcher, 184 N. C. 663, 113 S. E. 769.

Same.—Father Shielding Child. — The father may shield his child from assault of another to the extent necessary for the purpose of preventing the child and not merely to justify an inference that, as such a one where he has done so, without the use of excessive force, as appears from all the evidence in the case, his motion as of nonsuit at the close of his evidence should be granted. State v. Fulcher, 184 N. C. 663, 113 S. E. 769.

Same—Personal Presence of Defendant. — In a criminal prosecution for felonious breaking and entering, larceny and receiving against several defendants, resulting in conviction of one of them of larceny only, a motion for nonsuit in the case of the defendant who was not convicted of larceny, the evidence tended to show that this defendant and one of the other defendants planned the theft and this defendant advised, aided and abetted his codefendant therein, though not personally present when the theft occurred, State v. King, 222 N. C. 239, 22 S. E. (2d) 445.

Same.—Recent Possession of Stolen Goods. — Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in the possession of the defendant one hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of section 14-34, and defendant's demurrer to the evidence of his possession of goods thereafter overruled. State v. Williams, 187 N. C. 492, 122 S. E. 13. Evidence from which the jury might infer that stolen goods were thereafter in the constructive possession of defendant will not justify an inference that, as such, same, that the defendant knew the goods to have been stolen, and where the evidence is sufficient to support only the first inference

Evidence to go to the jury, it does not mean that there is liter-
the defendant's motion as of nonsuit should be allowed under this section. State v. Anthony, 206 N. C. 120, 173 S. E. 47.

same—Evidence Raising Suspicion Only.—Evidence that does no more than raise a suspicion, somewhat strong perhaps, of a homicide and the defendant's guilt, is not enough on a prosecution for murder and demurrer to the evidence is properly overruled. State v. Carter, 204 N. C. 394, 305, 168 S. E. 204.

same—Malicious Castration.—The direct evidence of the guilt of one of the defendants in a prosecution for malicious castration, and the circumstantial evidence of his guilt, are sufficient to overrule their motions as of nonsuit. State v. Ammons, 204 N. C. 733, 169 S. E. 536.

same—Identity.—In a prosecution for homicide the evidence of the defendant's identity as the perpetrator of the crime is sufficient to be submitted to the jury, the weight and credibility of the wife's identification of the defendant being for their determination, and defendant's motion as of nonsuit on the ground that her testimony was based upon imagination and auto-suggestion was properly refused. State v. Fogleman, 204 N. C. 401, 169 S. E. 536.

same—Conspiracy.—Where the direct circumstantial evidence in this case tends to show that defendant had quarreled with deceased and had entered into a conspiracy to kill him, the weight of the evidence and that all the conspirators, including the appealing defendant, were proximate observers and abettors in the commission of the crime, the evidence is sufficient to be submitted to the jury and motion for non-suit was properly overruled. State v. Brown, 204 N. C. 392, 168 S. E. 521.

same—Assault with Intent to Kill.—In a prosecution, for a secret assault and battery with a deadly weapon with malice aforethought, and intent to kill, evidence that there had been ill-feeling between the prosecuting witness and the defendant, that the prosecuting witness had seen and recognized the defendant standing outside a window in the witness's home, that the deceased was at a distance from the window, that the defendant had not previously attempted to commit any assault, and that his motion to dismiss under this section was properly refused where there was sufficient evidence to convict of an assault. State v. McClamb, 203 N. C. 442, 166 S. E. 597.

same—Assault with Intent to Rape.—Upon an indictment charging an assault with intent to commit rape, defendant may not use as an alibi a female, whom he separately charged, and motion to dismiss under this section was properly overruled where there was sufficient evidence to convict of the assault. State v. Jones, 222 N. C. 261, 11 S. E. (2d) 513.

same—Operation of Prohibited Mechanical Device.—Evidence tending to show that defendant was the owner of an automobile, and had been seen in same prior to its collision; that the automobile was subsequently examined by a sworn expert, who found in it a sub- stantially mechanical device for the emission of excessive smoke or gas, is insufficient to resist defendant's motion as of nonsuit. State v. Lazarc, 771, 113 S. E. 731, 500 C. R. 450(b). State v. Yates, 208 N. C. 194, 195 S. E. 25; State v. Oakley, 210 N. C. 206, 186 S. E. 244; State v. Delk, 212 N. C. 631, 194 S. E. 94; State v. Lockey, 214 N. C. 525, 199 S. E. 715; State v. Myers, 214 N. C. 653, 200 S. E. 443; State v. Forte, 222 N. C. 537, 23 S. E. (2d) 842; State v. Johnson, 213 N. C. 523, 195 S. E. 877, and cases therein cited, evidencing showing felonious breaking and entry and showing identity.


§ 15-174. New trial to defendant.—The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases. (Rev. s. 3272; Code, s. 1202; R. C. c. 35, s. 35; 1815, c. 895; C. S. 4641.)

Cross Reference.—As to new trial in civil cases, see § 1-272 and notes thereof.

Rule Similar at Common Law.—Independent of this section, the rule of the common law was the same and in Wharton's Criminal Law, sec. 3991, it is laid down that "at common law the court trying the case, is the sole tribunal by whom a new trial can be granted, and its refusal so to
do being matter of discretion is no ground for a writ of es-
ror. State v. Taylor, 8 N. C. 462.

New Trial Not Granted After Acquittal.—After a verdict of acquittal on a State prosecution, a new trial is not al-
lowed by this section. State v. Taylor, 8 N. C. 462.

Nolle prosequi—A motion for new trial for newly discovered evidence will not be granted even in a civil case, where the evidence is merely cumulative or where it was withheld by the party moving. State v. Lilliston, 141 N. C. 827, 54 S. E. 27.

Motions for new trials for newly discovered evidence cannot be entertained in the Supreme Court in criminal cases. State v. Lilliston, 141 N. C. 857, 54 S. E. 27.

Disqualification of Jurors and Newly Discovered Evidence.—When a judgment of the Supreme Court in a criminal case is certified to the Clerk of the Superior Court, the case is in the latter court for execution of the sentence and must be the subject of a trial under the provisions for disqualification of jurors and for newly discovered evidence. State v. Casey, 201 N. C. 630, 161 S. E. 81.

When Judgment Set Aside.—A motion regularly entered at any term of the court, cannot be set aside at a subsequent term, except in cases of surprise, mistake or ex-

§ 15-175. Nolle pros. after two terms; when ca-
pias and subpoenas to issue.—A nolle prosequi "with leave" shall be entered in all criminal actions in which the indictment has been pending for two terms of court, and the defendant has not been apprehended or in which a nolle prosequi has not been entered, unless the judge for good cause shown shall order otherwise. The clerk of the superior court shall issue a capias for the arrest of any defendant named in any criminal action in which a nolle prosequi has been entered when he has reasonable ground for believing that such defendant may be arrested or upon application of the solicitor of the district. When any defendant shall be arrested it shall be the duty of the clerk to issue a subpoena for the witnesses for the state indorsed on the in-
dictment. (Rev., s. 3274; 1903, c. 360, ss. 1, 3, 4; C. S. 4645.)

Cross Reference.—As to clerk's record of nolle prosequi with leave cases, see § 2-42, paragraph 34.

In General.—A nolle prosequi is merely a declaration on the part of the solicitor that he will not then prosecute the suit further, and is not an acquittal, although its effect is to discharge the defendant without delay. Wilkinson v. Wilkinson, 199 N. C. 265, 74 S. E. 740.

Effect of Nol. Pros.—A nolle prosequi in criminal proceedings does not amount to an acquittal, and the defendant may be again arrested upon the same bill and put to trial. State v. Thornton, 35 N. C. 256; State v. Faggart, 179 N. C. 737, 744, 7 S. E. 31; State v. Smith, 129 N. C. 546, 40 S. E. 1.

Discretion of Attorney General.—The attorney general has a discretionary power to enter a nolle prosequi, and the court will not interfere, unless the power be oppressively used. State v. Thompson, 10 N. C. 613; State v. Buchanan, 23 N. C. 59.

Permitment of Court for New Capias.—Where a nolle pro-
sequi has been entered in a criminal case, a capias will not issue where the same may be obtained upon the part of the court, but only upon permission of the court first obtained. State v. Thornton, 35 N. C. 256.

Same.—When Unnecessary.—Where a "nolle prosequi with leave" has been entered, it authorizes the clerk, at the request of the solicitor, to issue another capias. State v. Smith, 129 N. C. 546, 40 S. E. 1.

§ 15-176. Prisoner not to be tried in prison uniform.—It shall be unlawful for any sheriff, jailer or other officer to require any person imprisoned in jail to appear in any court for trial dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with head shaven or clipped by or under the direction and requirement of any sheriff, jailer or other officer, unless the head was shaven or clipped while such person was serving a term of imprisonment for the commission of a crime.

Any sheriff, jailer or other officer who violates the provisions of this section shall be guilty of a misdemeanor. (1915, c. 124; C. S. 4646.)

Art. 18. Appeal.

§ 15-177. Appeal from justice, trial de novo.—The accused may appeal from the sentence of the justice to the Superior Court in the county. On such appeal being prayed, the justice shall recog-
nize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of ap-
peal, the trial shall be anew, without prejudice from the former proceedings. (Rev., s. 3274; Code, s. 900; 1808-9, c. 178, subc. 4, s. 11; 1879, c. 92, s. 10; C. S. 4647.)

Cross References.—As to appeal in civil cases, see § 1-299 and notes thereto. As to appeal by state, see § 15-179. As to recordari as substitute for appeal, see § 1-269.

In General.—A nolle prosequi in any criminal cases wherein the magistrate gives judgment against a party charged with a criminal offense, and imposes on him a punishment by fine or imprisonment. This is apparent from the nature of the matter, and as well from the language employed. They refer to the conviction and sentence of defendants. State v. Lyon, 93 N. C. 575, 577.

Right of Appeal Has Been Modified.—The right of ap-
peal from the Superior Court to the Court of Errors in a crime case wherein the magistrate gives judgment against a party charged with a criminal offense, and imposes on him a punishment by fine or imprisonment. This is apparent from the nature of the matter, and as well from the language employed. They refer to the conviction and sentence of defendants. State v. Lyon, 93 N. C. 575, 577.

Right of Appeal Personal to Accused.—The right of ap-
peal provided for by this section is for the benefit only of the person accused, State v. Powell, 86 N. C. 640; but so much of the judgment as is personal to the prosecutor and taxes him with the costs, may be appealed from.

Appeal under Section Presents Trial de novo.—Where the defendant after trial and conviction before a justice of the peace, moved in arrest of judgment, which motion was re-
fused, and he appealed to the superior court, it was held, that the appeal brought up the whole case, and the defend-
ant under this section was entitled to a trial de novo. State v. Koontz, 108 N. C. 732, 12 S. E. 1002. But where the de-
fendant resists himself by a plea of guilty than there can be no acts left open for consideration by a jury and the case on appeal does not concern the whole case. State v. Warren, 113 N. C. 681, 684, 686, 18 S. E. 498.

After an appeal from a recorder's court to a Superior Court has been effected and appeal bond given, the record-
er's court has no further jurisdiction over the case, the procedure being the same as under this section, and de-
fendant's appeal may not be brought to the recorder's court by notice given in the recorder's court. State v. Goff, 205 N. C. 545, 172 S. E. 407.

Bill of Indictment Unnecessary.—Upon an appeal from a court of a petit jury, the necessity of a bill of indictment in the latter court is dispensed with, State v. Jones, 181 N.
Amendment to Complaint.—Where the defendant has been separately tried before a justice of the peace for several indictable offenses, it is permissible for the superior court, on appeal, to consolidate all the counts into one indictment, so as to make one complaint include all the offenses under different counts. State v. Mills, 181 N. C. 530, 106 S. E. 677.

Excessive Punishment by Public Justice.—A defendant is not entitled to a new trial because the punishment imposed by a police justice was excessive; the case should be remanded for resentence in conformity to law. State v. Black, 135 N. C. 371, 51 S. E. 258.

Due Process Where Justice Paid by Fee upon Conviction.—Since a defendant in a criminal prosecution before a justice of the peace has a right to demand a jury trial as provided in § 15-157, and the right to appeal to the superior court, and have the whole matter heard therein de novo, under this section, that a justice’s compensation is fixed upon a fee basis, which he will receive only in the event of conviction, does not result in depriving the defendant of trial under due process of law. In re Steele, 220 N. C. 665, 18 S. E. (2d) 132.


§ 15-178. Justice to return papers and findings to superior court.—In every case in which an appeal shall be prayed the justice shall forthwith transmit to the clerk of the superior court of the county all papers in the case, together with a copy of the verdict, if any, of his determination of the facts if there shall have been no trial by jury, and of the sentence, in which shall be set forth all the facts found by him, as well as his finding of those which were alleged in the complaint and which were found by him not to be proved. (Rev., s. 3275; Code, s. 901; 1868-9, c. 178, subc. 4, s. 12; C. S. 4648.)


§ 15-179. When state may appeal.—An appeal to the supreme court may be taken by the state in the following cases, and no other. Where judgment has been given for the defendant
1. Upon a special verdict.
2. Upon a demurrer.
3. Upon a motion to quash.
4. Upon a motion of judgment. (Rev., s. 3276; Code, s. 1237; C. S. 4649.)

Cross Reference.—As to distinction between general and special verdicts, see § 1-301 et seq.

Editor's Note.—See 13 N. C. Law Rev., 321, for note on "Special Verdicts."

Judgments Rendered in Superior Court.—The right of the state to appeal upon a special verdict, a demurrer, a motion to quash, or a motion in arrest of judgment, as provided by this section, applies only to judgments rendered in the superior court. State v. Nichols, 215 N. C. 80, 200 S. E. 926.

Right Is Statutory.—The right of the state to appeal is statutory, which right may not be enlarged by the superior court when the superior court remands a cause to the county court with provision that the state may appeal from any judgment thereafter rendered by the county court, the provision giving the state the right to appeal is void. State v. Cox, 216 N. C. 424, 5 S. E. (2d) 125.

Bond Not Essential.—A bond, in the case of an appeal in the superior court, is not necessary, a recognition being given in this section that as a matter of right the state may appeal in such cases, exclusive original jurisdiction. State v. Myrick, 202 N. C. 688, 163 S. E. 903.

The state may appeal from judgment rendered to the Supreme Court, 100 N. C. 186, 76 S. E. 558.

The State may appeal from judgment rendered in State v. Brannen, 149 N. C. 593, 63 S. E. 169.

Overruling Motion to Amend Record.—No appeal lies by the state from an order overruling a motion to amend the record. State v. McAden, 169 N. C. 727, 154 S. E. 224.

Taxing Prosecutor with Costs.—An appeal lies from the judgment of a justice of the peace taxing the prosecutor with such taxing being in the nature of a civil judgment. State v. Morgan, 206 N. C. 564, 15 S. E. (2d) 247; judges of State of Powell, 86 N. C. 640, under section 15-177.

The refusal of the court to mark one as prosecutor of record is not one of the cases enumerated in this section in which the state is entitled to appeal. State v. Myrick, 202 N. C. 688, 163 S. E. 903.

General Verdict of Not Guilty.—In a criminal prosecution where there is a plea and general verdict of not guilty, the state has no right of appeal; such verdict ends the case. State v. Savery, 126 N. C. 1083, 36 S. E. 22 and cases cited; but under this section the state may appeal from a judgment for defendant on a special verdict. State v. Haynes, 151 N. C. 771, 60 S. E. 547; State v. Winston, 194 N. C. 241, 139 S. E. 240.

Judgment Non Obstante Veredicto.—Where there is a verdict convicting a defendant of a misdemeanor under provisions of a statute prohibiting the writing of a worthless check on a bank under certain conditions and a judgment has been rendered in favor of the defendant non obstante veredicto, the State may appeal under the provisions of this section. State v. Yarbrough, 194 N. C. 498, 140 S. E. 216.

Acquittal in Consequence of Erroreous Charge.—When a defendant has once been tried and acquitted upon an indictment good in form, no appeal lies even though the acquittal is in consequence of the erroneous charge of the presiding judge. State v. West, 71 N. C. 363.

Arrrest of Judgment.—In a prosecution for manslaughter, judgment was entered providing that prayer for judgment and sentence be continued and that the defendant be placed on probation for a period of five years, with further order that as a special condition of probation the defendant shall pay a designated sum weekly into the office of the clerk for a period of five years for the use of the mother of the deceased. Upon defendant's petition filed after the death of the mother within the five-year period, the court adjudged that the requirement for the payment of the sum had terminated and abated on her death. Held: The state may not appeal from the order, as the ruling is not equivalent to the allowance of a motion in arrest of judgment. State v. McColloch, 216 N. C. 737, 6 S. E. (2d) 593.

Arrest of Judgment as to One of Two Defendants.—Where in a prosecution for murder two defendants were convicted of manslaughter, the state under sub-division 4 of this section, has a right to appeal from an arrest of judgment as to one of them. State v. Hall, 183 N. C. 506, 112 S. E. 411.

Remanding Case for Lighter Sentence.—This section does not include a ruling of the superior court remanding a case for the imposition of a lesser sentence. State v. Davidson, 121 N. C. 839, 52 S. E. 992.

If a warrant charges simple assault, the State has no right of appeal from a judgment of a justice of the peace acquitting the defendant, the justice having, in such cases, exclusive original jurisdiction. State v. Myrick, 202 N. C. 688, 163 S. E. 903.

The State may appeal from acquittal of defendant upon a special verdict, although the verdict is fatally defective. State v. Brannen, 169 N. C. 727, 154 S. E. 224; as to necessity of bond on appeal by defendant see State v. Patrick, 72 N. C. 317.

The word "demurrer" is used in this section in its usual and accepted sense, as used in criminal pleading, and is not used in the sense of embracing "demurrer to evidence." State v. Moody, 150 N. C. 847, 64 S. E. 431; State v. Mc Dowell, 84 N. C. 799, 74 S. E. 65.

§ 15-180. Appeal by defendant to supreme court.—In all cases of conviction in the superior court
for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court; and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions. (Rev., s. 3277; Code, s. 1234; R. C., ch. 500. S. E. 2d 142.)

Appeals in criminal cases are controlled by this section, and a defendant is entitled to appeal only from conviction in the Supreme Court or some final judgment thereon and an appeal from an order of the Superior Court remanding the case to the recorder's court will be dismissed. State v. Rocks, 207 N. C. 275, 178 S. E. 752.

Appeal or Substitute for Writ of Error.—At common law there was no appeal from the decision of any of the courts, high or low, and these decisions could only be reviewed by writ of error or writ of false judgment. In North Carolina appeals are only from final judgment, whereas in the federal courts, a writ of certiorari may be had to review any decision of a court of record. State v. Bailey, 65 N. C. 426, 428; State v. Webb, 155 N. C. 426, 70 S. E. 1064.

Bond Necessary.—An appeal by the defendant to the supreme court is dismissed if there is no bond or the appeal is pending in the court below, if there is no order allowing the appeal without bond. State v. Patrick, 72 N. C. 217; State v. Spurtin, 40 N. C. 362. See section 15-181.

Defendant's appeal in three cases without giving bond appeal, and it appeared that he had obtained leave without bond in one case only, it was held that the other cases would be dismissed. State v. Hambly, 126 N. C. 355, 35 F. Supp. 135, 136, 137 S. E. 714.

Appeal “By Consent.”—Where an appeal without bond or affidavit was allowed by consent it was held not to be in compliance with the section, State v. Kerns, 90 N. C. 650. An appeal by the defendant in three cases without giving bond appeal, and it appeared that he had obtained leave without bond in one case only, it was held that the other cases would be dismissed. State v. Patrick, 72 N. C. 217, 218 S. E. 825.

Bond Necessary.—An appeal by the defendant to the supreme court is dismissed if there is no bond or the appeal is pending in the court below, if there is no order allowing the appeal without bond. State v. Patrick, 72 N. C. 217; State v. Spurtin, 40 N. C. 362. See section 15-181.

Defendant's appeal in three cases without giving bond appeal, and it appeared that he had obtained leave without bond in one case only, it was held that the other cases would be dismissed. State v. Hambly, 126 N. C. 355, 35 F. Supp. 135, 136, 137 S. E. 714.

Defendant was not convicted, but was acquitted. There was no judgment on conviction, or judgment prejudicial to the defendant in its nature final. The defendant therefore had no right to appeal to the supreme court and it is without jurisdiction to entertain the appeal, or to decide the matter presented by the defendant's assignment of error. State v. Hiatt, 211 N. C. 116, 117, 189 S. E. 124.

Exercise of Right Should Not Prejudice Defendant.—While the trial judge has the discretionary power to change the defendant's plea from guilty to nolo contendere, in order to enter a judgment of sentence upon the order of such judge, to pay the necessary cost of obtaining a transcript of the proceedings had and the evidence offered on the trial from the court reporter for the use of the defendant and the necessary cost of preparing the requisite copies of the record and briefs which the defendant is required to file in the supreme court under the rules of said court. The judge may fix the reasonable value of the services rendered in furnishing such transcript and preparing such copies of the record and briefs, and said copies of the record and briefs shall be prepared in the manner prescribed by the rules of the supreme court in pauper appeals. Provided, that this paragraph shall apply only to those cases in which counsel has been assigned by the court. (Rev., s. 3278; Code, s. 1235; 1936-37, c. 196, s. 1; 1923, c. 197; 1937, c. 330; C. S. 4651.)

Cross Reference.—As to appeals in forma pauperis in civil cases, see § 15-282 and notes.

Editor's Note.—Public Laws of 1913, c. 197, added the last two paragraphs of this section relating to appeals in capital felony cases to the Supreme Court. That section, as amended, extended the 1913 law to include defendants who have been tried for or convicted of a capital felony and convicted of a lesser offense. Again the statute would apply only in cases where counsel had been assigned by the court. (Rev., s. 3278; Code, s. 1235; 1936-37, c. 196, s. 1; 1923, c. 197; 1937, c. 330; C. S. 4651.)

Cross Reference.—As to appeals in forma pauperis in civil cases, see § 15-282 and notes.
§ 15-182. Appeal granted; bail for appearance.

The affidavit required in the preceding section may be filed at any time during the term or within ten days from the adjournment of the term either with the Judge or the Clerk, and it shall be the duty of the Judge or the Clerk on filing the affidavit to grant the appeal without security for costs, and for any bailable offense the judge shall require the defendant to enter into recognizance, the motions are coram non judice, State v. Casey, 110 N. C. 500, 15 S. E. 110; State v. Atkins, 141 N. C. 734, 110 S. E. 522. The affidavit not containing the assertion that "the application is in good faith," prevented the court having jurisdiction. See also, State v. Bynum, 199 N. C. 376, 154 S. E. 250. But it has been suggested that it would be proper to state the name of such counsel. State v. Divine, 69 N. C. 390. It was held that the affidavit not containing the assertion that "this application is in good faith," prevented the court having jurisdiction. See also, State v. Brumfield, 199 N. C. 613, 178 S. E. 258. Hence, where the order allowing an appeal is in good faith, the affidavit and certificate of counsel are not in the record sent to the Supreme Court, it will be presumed that they were in due form. State v. Starnes, 94 N. C. 97, S. E. 55; State v. Wylde, 110 N. C. 500, 15 S. E. 5; State v. Atkinson, 141 N. C. 734, 110 S. E. 228.-motion for joinder of issue and facts, State v. Watson, 208 N. C. 70, 179 S. E. 455; State v. Etheridge, 207 N. C. 801, 199 S. E. 565. The affidavit must state the name of defendant, the crime of which he was convicted, and if the statutory time for perfecting the appeal has been extended by agreement, the time of such extension must be stated. State v. Mitchell, 221 N. C. 460, 20 S. E. (2d) 292. Said notice shall give the name of defendant, the crime of which he was convicted, and, if the statutory time for perfecting the appeal has been extended by agreement, the time of such extension must be stated. State v. Mitchell, 221 N. C. 460, 20 S. E. (2d) 292. Said notice shall give the name of defendant, the crime of which he was convicted, and, if the statutory time for perfecting the appeal has been extended by agreement, the time of such extension must be stated. State v. Mitchell, 221 N. C. 460, 20 S. E. (2d) 292. Said notice shall give the name of defendant, the crime of which he was convicted, and, if the statutory time for perfecting the appeal has been extended by agreement, the time of such extension must be stated. State v. Mitchell, 221 N. C. 460, 20 S. E. (2d) 292.
§ 15-186 Procedure upon receipt of certificate of supreme court.—The clerk of the superior court, in all cases where the judgment has been affirmed (except where the conviction is a capital felony), shall forthwith on receipt of the certificate of the opinion of the supreme court notify the sheriff, who shall proceed to execute the sentence which was appealed from. In criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for trial at the first ensuing term of the court after the receipt of such certificate. (Rev. s. 3283; 1857, c. 192, s. 3; C. S. 4656.)


§ 15-187 Death by administration of lethal gas.—Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor. (1909, c. 443, s. 1; 1935, c. 294, s. 1; C. S. 4657.)

Cross Reference.—As to punishment for capital crimes committed before July 1, 1935, see § 15-191.

Editor's Note.—Prior to the amendment of 1935, this section provided for electrocution.

This section applies only to crimes committed after the effective date of the statute, 1 July, 1935, and it will not support a sentence of death by lethal gas imposed for a capital crime committed prior to the effective date of the statute although defendant was tried and convicted after the effective date thereof. State v. Dingle, 209 N. C. 293, 172 S. E. 376; State v. McNell, 211 N. C. 286, 287, 189 S. E. 872.


§ 15-188. Manner and place of execution.—The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the state having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the state penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the state penitentiary shall also cause to be provided, in conformity with this article and approved by the governor and council of state, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article. 1909, c. 443, s. 2; 1935, c. 294, s. 2; C. S. 4658.)


§ 15-189. Sentence of death; prisoner taken to penitentiary.—Upon the sentence of death being pronounced against any person in the state of North Carolina convicted of a crime punishable by death it shall be the duty of the judge pronouncing such death sentence to make the same in writing, which shall be filed in the papers in the case against such convicted person, and a certified copy thereof shall be transmitted by the clerk of the superior court in which such sentence is pronounced to the warden of the state penitentiary at Raleigh, North Carolina, not more than twenty nor less than ten days before the time fixed in the judgment of the court for the execution of the sentence; and in all cases where there is no appeal from the sentence of death and in all cases where the sentence is pronounced against a prisoner convicted of the crime of rape it shall be the duty of the sheriff, together with at least one deputy, to convey to the penitentiary at Raleigh such condemned felon or convict forthwith upon the adjournment of the court in which the felon was tried, and deliver the convict or felon to the warden of the penitentiary: Provided, that in all cases where an appeal is taken from the death sentence by any person convicted of a crime punishable by death, except the crime of rape, such convicted felon or convict shall not be taken or conveyed to the penitentiary unless, in the judgment of the sheriff of the county in which the felon was tried and the solicitor prosecuting the felon, it shall be deemed necessary for the safety and safekeeping of the convicted person or felon during the pendence of the appeal. (1909, c. 443, s. 3; C. S. 4659.)

Judgment Must Be Written and Signed by Trial Judge.—The entry of judgment of the court on the verdict of guilty of a capital felony by the clerk of the court on its minutes and signed by the judge is not a sufficient compliance with the provisions of this section unless its mandatory provisions requiring the judgment to be written and signed by the judge, and where it appears of record that he has failed so to do the case will be remanded. State v. Jackson, 199 N. C. 321, 154 S. E. 402.

Death Sentence without Reference to Crime.—A judgment sentencing defendant to death for the commission of a capital felony, though making no reference to the trial or the crime of which the defendant was convicted, is, nevertheless, sufficient to meet the requirements of this section. State v. Taylor, 194 N. C. 738, 140 S. E. 728.

When No Reference to Trial or Crime Is Made.—A judgment, while somewhat informal, because it made no reference to the trial or the crime of which the prisoner was convicted, is, nevertheless, sufficient to meet the requirements of this section. State v. Edney, 202 N. C. 706, 707, 164 S. E. 23.

§ 15-190. A guard or guards or other person to be named and designated by the warden to execute sentence.—Some guard or guards or other reliable person or persons to be named and designated by the warden from time to time shall cause the person, convict or felon against whom the death sentence has been so pronounced to be asphyxiated as provided by this article and all amendments thereto. The asphyxiation shall be under the general supervision and control of the warden of the penitentiary, who shall from time to time, in writing, name and designate the guard or guards or other reliable person or persons who shall cause the person, convict or felon against whom the death sentence has been pronounced to be asphyxiated as provided by this article and all amendments thereto. At such execution there shall be present the warden or deputy warden or some person designated by the warden in his stead; the surgeon or
physician of the penitentiary and six respectable citizens, the counsel and any relatives of such person, convict or felon and a minister or ministers of the gospel may be present if they so desire, and the board of directors of the penitentiary may provide for and pay the fee for each execution not to exceed thirty-five dollars ($35.00). (1909, c. 443, s. 4; 1925, c. 123; 1935, c. 294, s. 3; C. S. 4660.)

§ 15-191. Pending sentences unaffected.—Nothing in §§ 15-187, 15-188, and 15-190 shall be construed to alter in any manner the execution of the sentence of death imposed on account of any crime or crimes committed before July 1, 1935. (1935, c. 294, s. 4.)

Editor's Note.—The act from which this section was codified changed the mode of executing a death sentence from electrocution to the administration of lethal gas.

§ 15-192. Certificate filed with clerk. — The warden, together with the surgeon or physician of the penitentiary, shall certify the fact of the execution of the condemned person, convict or felon to the clerk of the superior court in which such sentence was pronounced, and the clerk shall file such certificate with the papers of the case and enter the same upon the records thereof. (1909, c. 443, s. 5; C. S. 4661.)

§ 15-193. Notice of reprieve or new trial.—Should the condemned person, convict or felon be granted a reprieve by the governor or obtain a writ of error, or a new trial be granted by the supreme court of the state of North Carolina, or should the execution of the sentence be stayed by any competent judicial tribunal or proceeding, notice of such reprieve, new trial, appeal, writ of error or stay of execution shall be served upon the warden or deputy warden of the penitentiary by the sheriff of Wake County, in case such condemned person is confined in the penitentiary, or upon any sheriff having the custody of any such condemned person, also upon the condemned person himself. (1909, c. 443, s. 6; C. S. 4662.)

§ 15-194. Judgment sustained on appeal, reprieve, time for execution.—In case of an appeal, should the Supreme Court find no error in the trial, or should the stay of execution granted by any competent judicial tribunal or proceeding, or reprieve by the Governor, have expired or terminated, such condemned person, convict or felon shall be executed, in the manner heretofore provided in this article, upon the third Friday after the filing of the opinion or order of the Supreme Court or other competent judicial tribunal or proceeding, or reprieve by the Governor, have expired or terminated, such condemned person, convict or felon shall be executed, in the manner heretofore provided in this article, upon the third Friday after the filing of the opinion or order of the Supreme Court or other competent judicial tribunal as aforesaid, or, in case of a reprieve by the Governor, such condemned person, convict or felon shall be executed in the manner heretofore provided in this article upon the third Friday after the expiration or termination of such reprieve; and it shall be the duty of the clerk of the Supreme Court, and of any other competent tribunal, as aforesaid, or the clerk thereof, to notify the warden of the penitentiary of the date of the filing of the opinion or order of such court or other judicial tribunal, and in case of a reprieve by the Governor, it shall be the duty of the Governor to give notice to the warden of the State Penitentiary of the date of the expiration of such reprieve. (1909, c. 443, s. 6; 1925, c. 55; C. S. 4663.)


§ 15-195. New trial granted, prisoner taken to place of trial.—Should a new trial be granted the condemned person, convict or felon against whom sentence of death has been pronounced, after he has been conveyed to the penitentiary, he shall be conveyed back to the place of trial by such guard or guards as the warden of the penitentiary shall direct, their expenses to be paid as is now provided by law for the conveyance of convicts to the penitentiary. (1909, c. 443, s. 7; C. S. 4664.)

§ 15-196. Disposition of body.—Upon application, written or verbal, of any relative as near as the degree of fourth cousin of the person executed, made at any time prior to the execution or on the morning thereof, the body, after execution, shall be prepared for burial under the supervision of the warden or deputy warden and shall be returned to the nearest railroad station of the relative or relatives asking for such body. In the event that no relative asks for the body of such executed person, convict or felon, the same shall be disposed of as other bodies of convicts dying in the penitentiary. (1909, c. 443, s. 9; 1925, c. 275, s. 6; C. S. 4665.)

Cross References.—As to disposition of other bodies of convicts, see § 50-212.

Art. 20. Suspension of Sentence and Probation.

§ 15-197. Suspension of sentence and probation.—After conviction or plea of guilty or nolo contendere for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation. (1937, c. 132, s. 1.)

Cross References.—As to suspension of sentence in basby proceedings, see § 49-8. As to probation in cases of prostitution, see § 14-208. As to restoration of citizenship in case of pardon or suspension of judgment, see § 13-6.

Editor's Note.—For a discussion of the act from which this article was codified, see 15 N. C. Law Rev. p. 345. For comment on 1939 amendatory act, see 17 N. C. Law Rev. 350.

For article on punishment for crime in North Carolina, see 29 N. C. Law Rev. 549, 15 S. E. (2d) 9.

History.—For nearly half a century prior to 1937, the trial judges in North Carolina operated a system of probation on their own initiative, permitted convicted criminals to go at large on specified conditions, and arrested them upon warrants if the terms of probation were violated. Either the sentence of imprisonment would be formally entered and execution suspended on conditions, or prayer for judgment would be continued in like manner. Since 1937 this power has been expressly continued by this article as a part of the state's probation system. Pelley v. Colpoys, 122 F. (2d) 12, 13.

Probation Must Be Consistent with Right of Appeal.—Where the privilege of probation, granted by this article, is so conditioned as to be inconsistent with a defendant's right of appeal, the judgment is erroneous. State v. Calbert, 29 N. C. Law Rev. 549, 15 S. E. (2d) 9.


§ 15-198. Investigation by probation officer.—When directed by the court the probation officer shall fully investigate and report to the court in writing the circumstances of the offense and the criminal record, social history, and present condition of the defendant, including, whenever practicable, the findings of a physical and mental examination of the defendant. When the services of a probation officer are available to the court, no defendant charged with a felony, and, unless the court shall direct otherwise in individual cases, no other defendant shall be placed on probation or released under suspension of sentence until the
§ 15-199. Conditions of probation.—The court shall determine and may impose, by order duly entered, and may at any time modify the conditions of probation and may include among them the following, or any other: That the probationer shall:

(a) Avoid injurious or vicious habits;
(b) Avoid persons or places of disreputable or harmful character;
(c) Report to the probation officer as directed;
(d) Permit the probation officer to visit at his home or elsewhere;
(e) Work faithfully at suitable employment as far as possible;
(f) Remain within a specified area;
(g) Pay a fine in one or several sums as directed by the court;
(h) Make reparation or restitution to the aggrieved party for the damage or loss caused by his harmful character;

The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended, within the above limit. Upon the satisfactory fulfillment of the conditions of probation or suspension of sentence the court shall by order duly entered discharge the defendant. At any time during the period of probation or suspension of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any police officer, or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer without a warrant. In case of an arrest without a warrant the arresting officer shall have a written statement signed by said probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation; and said statement shall be sufficient warrant for the detention of said probationer in the county jail, or other appropriate place of detention, until said probationer shall be brought before the judge of the court. Such probation officer shall forthwith report such arrest and detention to the judge of the court, or in superior court cases to the judge holding the courts of the district, or the resident judge, or any judge commissioned at the time to hold court in said district, and submit in writing a report showing in what manner the probationer has violated probation. Upon such arrest, with or without warrant, the court shall cause the defendant to be brought before it in or out of term and may revoke the probation or suspension of sentence, and shall proceed to deal with the case as if there had been no probation or suspension of sentence.

Editor's Note.—The 1939 amendment inserted in the first sentence the words "suspended by the court at any time". It also inserted in the sixth sentence the proviso as to superior court cases, and in the last sentence the words "in or out of term.

§ 15-200. Termination of probation, arrest, subsequent disposition.—The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the court at any time, within the above limit. Upon the satisfactory fulfillment of the conditions of probation or suspension of sentence the court shall by order duly entered discharge the defendant. At any time during the period of probation or suspension of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any police officer, or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer without a warrant. In case of an arrest without a warrant the arresting officer shall have a written statement signed by said probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation; and said statement shall be sufficient warrant for the detention of said probationer in the county jail, or other appropriate place of detention, until said probationer shall be brought before the judge of the court. Such probation officer shall forthwith report such arrest and detention to the judge of the court, or in superior court cases to the judge holding the courts of the district, or the resident judge, or any judge commissioned at the time to hold court in said district, and submit in writing a report showing in what manner the probationer has violated probation. Upon such arrest, with or without warrant, the court shall cause the defendant to be brought before it in or out of term and may revoke the probation or suspension of sentence, and shall proceed to deal with the case as if there had been no probation or suspension of sentence. 

(1937, c. 132, s. 4; 1939, c. 373.)
§ 15-202. Duties and powers of the commissioner; meetings; appointment of director of probation; qualifications.—With respect to the administration of probation in the state, except cases within the jurisdiction of the juvenile courts, the state probation commission shall exercise general supervision; formulate policies; adopt general rules, not inconsistent with law, to regulate methods of procedure; and set standards for personnel. It shall meet at stated times to be fixed by it not less often than once every three months, and on call of its chairman, to consider any matters relating to probation in the state.

The state probation commission, with the approval of the governor, shall appoint a director of probation, who shall serve as its executive secretary, and shall receive a salary to be fixed by the governor and the council of state and who shall give his entire time to the work. When the necessity of the service requires, it shall appoint one or more assistants and fix their salaries.

The person appointed as director of probation shall be qualified by education, training, experience and temperament for the duties of the office. (1937, c. 132, s. 6; 1943, c. 638.)

Cross Reference.—As to administration of probation with respect to cases within the jurisdiction of juvenile courts, see § 110-31 et seq.

Editor's Note.—Prior to the 1943 amendment this section provided a minimum salary of $3,600 and a maximum salary of $4,500 for the director.

§ 15-203. Duties of the director of probation; appointment of probation officers; reports.—The director of probation shall appoint, subject to the approval of the state probation commission, such probation officers as are required for service in the state and such clerical assistance as may be necessary: Provided, that before any persons other than the director of probation shall be appointed, the state probation commission shall make up and submit to the governor a budget covering its proposed organization and expenditures, and no fund shall be available to carry out the purpose of this article except to the extent that said budget is approved first by the state highway and public works commission, and then by the director of the budget.

The director of probation shall direct the work of the probation officers appointed under this article. He shall consult and cooperate with the courts and institutions in the development of methods and procedure in the administration of probation, and shall arrange conferences of probation officers and judges. He shall make an annual written report with statistical and other information to the probation commission and the governor. (1937, c. 132, s. 7.)

§ 15-204. Assignment and compensation and oath of probation officers.—Probation officers appointed under this article shall be assigned to serve in such courts or districts or otherwise as the director of probation may determine. They shall be paid annual salaries to be fixed by the probation commission, and shall also be paid traveling and other necessary expenses incurred in the performance of their official duties as probation officers when such expense accounts have been authorized and approved by the director of probation.

Each person appointed as a probation officer shall take an oath of office before the judge of the court or courts in which he is to serve, which oath shall be as follows:

"I, ............ do solemnly and sincerely swear that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain, and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God;" and shall be noted of record by the clerk of the court. (1937, c. 132, s. 8.)

Cited in State v. Calcutt, 219 N. C. 545, 15 S. E. (2d) 9 (dis. op.).

§ 15-205. Duties and powers of the probation officers.—A probation officer shall investigate all cases referred to him for investigation by the juvenile court or courts or by the director of probation, and shall report in writing thereon. He shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision by visiting, requiring reports, and in other ways, and shall report thereon in writing as often as the court or the director of probation may require. Such officer shall use all practicable and suitable methods, not inconsistent with the conditions imposed by the court, or the director of probation, to aid and encourage persons on probation to bring about improvement in their conduct and condition. Such officer shall keep detailed records of his work: Provided, that such records in writing to the director of probation as he may require; and shall perform such other duties as the director of probation may require. A probation officer shall have, in the execution of his duties, the powers of arrest and, to the extent necessary for the performance of his duties, the same right to execute process as is now given, or that may hereafter be given by law, to the sheriffs of this state. (1937, c. 132, s. 9.)

§ 15-206. Co-operation with commissioner of parole and officials of local units.—It shall be the duty of the director of probation and the commissioner of parole to co-operate with each other to the end that the purposes of probation and parole may be more effectively carried out. When requested, each shall make available to the other case records in his possession, and in cases of emergency, where time and expense can be saved, shall provide investigation service.

It is hereby made the duty of every city, county, or state official or department to render all assistance and co-operation which may further the objects of this article. The state probation commission, the director of probation, and the probation officers are authorized to seek the co-operation of such officials and departments, and especially of the county superintendents of public welfare and of the state board of charities and public welfare. (1937, c. 132, s. 10.)
CHAPTER 16. GAMING CONTRACTS

§ 16-1. Gaming Contracts.


16-1. Gaming and betting contracts void.

16-2. Players and better's competent witnesses.

Art. 2. Contracts for “Futures.”

16-3. Certain contracts as to “futures” void.


§ 16-1. Gaming and betting contracts void.—All wagers, bets or stakes made to depend upon any race, or upon any gaming or lot, chance, casualty or unknown or contingent event whatever, shall be unlawful; and all contracts, judgments, conveyances and assurances for and on account of any money or property, or thing in action, so wagered, bet or staked, or to pay, or to secure any money, or property, or thing in action, lent or advanced for the purpose of such wagering, betting, or staking as aforesaid, shall be void. (Rev., s. 1687; Code, ss. 2841, 2842; R. C., c. 51, ss. 1, 2; 1810, C. 796; C. S. 2143.)

Cross Reference.—As to criminal laws regarding gambling, see § 14-289 et seq.

In General.—A gaming contract or wager is a contract by which two or more agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event. Bouv. Law Dict.

At common law all gambling contracts were void. Generally, in this country, all wagers and gambling contracts are held to be illegal and void as against public policy. Irwin v. Willif., 110 U. S. 499, 510, 4 S. Ct. 160, 28 L. Ed. 225.

Liberal Construction.—This section is construed liberally. Turner v. Peacock, 11 N. C. 301.

Gambling contracts are void, because they are so declared by this section. Morehead Banking Co. v. Tate, 122 N. C. 313, 317, 30 S. E. 341.

Judgments in Invitum Not Included.—This section does not include judgments taken in invitum, such as are confessed or taken by consent. Teague v. Perry, 64 N. C. 39.

No Recovery Where Game Fair.—It is settled that money, or a horse, or a judgment, won at cards and actually paid and delivered, can not be recovered back, the game being fairly played. Teague v. Perry, 64 N. C. 39, 41; Hudspeth v. Wilson, 13 N. C. 372; Warden v. Plummer, 49 N. C. 507; Hosges v. Plummer, 4 N. C. 276.

Unfair Gaming Always Illegal.—Unfair gaming was not only illegal by force of the statute against gaming, but was unlawful at common law, so that the money, or thing won, if it had been paid, might be recovered back in an action at law. Warden v. Plummer, 49 N. C. 524, 526; Webb v. Fulchire, 25 N. C. 485.

Same—Recovery.—Where a man is cheated out of his money, though it is in playing at a game forbidden by law, he may recover back what he has paid from the person who practiced the fraud upon him. Webb v. Fulchire, 25 N. C. 465, cited in note in 5 L. R. A., N. S., 907.

The provisions of this article shall be fixed in accordance with the Executive Budget Act and the Personnel Act, and shall be paid by the state highway and public works commission out of the state highway funds, under direction of the director of the budget. (1937, c. 132, s. 12.)

§ 15-209. Accommodations for probation officers.—The county commissioners in each county in which a probation officer serves shall provide, in or near the courthouse, suitable office space for such officer. (1937, c. 132, s. 13.)

Chapter 16. Gaming Contracts and Futures.

Sec. 16-4. Entering into or aiding contract for “futures” misdemeanor.

16-5. Opening office for sales of “futures” misdemeanor.

16-6. Evidence in prosecutions under this article.

No Recovery on Bond Unfairly Won.—Where A., at a game of cards unfairly played, won a justice's judgment from B., and took from the defendant in the judgment a bond payable to himself for the amount, on which he brought suit, to which the statute against gaming was pleaded, it was held that he could not recover. Warden v. Plummer, 49 N. C. 524.

Subsequent Note Valid.—A note given subsequently, in purchase of a magistrate's judgment which had been won at cards by the payee from the maker, is not void under this section against gaming. Teague v. Perry, 64 N. C. 39.

Rights of Innocent Holder of Gambling Note.—This section applies to a note originally given for a gambling debt, renders this and all notes and contracts in like cases void, this being true, no action thereon can be sustained. The position as stated is undoubtedly the law in this jurisdiction, and is in accord with well considered authorities elsewhere. This principle, however, is allowed to prevail only where the action is on the note to enforce its obligations, and due not affect or extend to suits by an innocent endorsee for value, and holder in due course, against the endorser on his contract of endorse. Wachovia Bank, etc., Co. v. Crafton, 161 N. C. 404, 405, 107 S. E. 316.

Intent of Parties.—Where the transaction is legitimate on the face of the game, the party cannot avoid it by claiming that it was a gambling contract where the proof shows that the other party did not so understand it, but believed it to be a valid agreement. Bibb v. Allen, 149 U. S. 481, 492, 13 S. Ct. 950, 37 L. Ed. 817.

Money Loaned for Gaming.—Money lent to play at gaming, or to play at the time of loss, is not recoverable. Mooring v. Stanton, 1 N. C. 70.

When Stakeholder Liable.—When money is deposited with a stakeholder, to be delivered to the winner, and the stakeholder pays over the money, after notice from the loser not to do so, the loser may recover the money from the stakeholder. Wood v. Wood, 7 N. C. 172; Forrest v. Hart, 7 N. C. 458.

Note Given in Foreign State Unenforceable.—A note given in consideration of a bet won on a horse race cannot be enforced in this state although given in a state where wagering contracts are not invalid. Gooch v. Fautt, 122 N. C. 270, 29 S. E. 362. See Burrus v. Witcover, 158 N. C. 384, 74 S. E. 11.

Card a Game of Chance.—It is a matter of common knowledge that a game of cards is a game of chance. State v. Taylor, 111 N. C. 680, 16 S. E. 168.

 Betting on Horse Race.—It was the intention of this section to make betting on horse races a criminal offense, since such wagering contracts had already been outlawed and the denouement of the wager as unlawful came in by amendment at a later time. State v. Brown, 221 N. C. 301, 304, 20 S. E. (2d) 286.

"Shuffleboard."—The keeping of a gaming table called a "shuffleboard" is not indictable, as the game is not one of chance, but of skill. State v. Bishop, 30 N. C. 266.

"Shooting for Beef" and other called "shooting for skill," for which the participants pay for the "chance" or privilege of shooting, is not a game of chance there being no "chance" in the sense of the acts against gambling. State v. DeBoy, 117 N. C. 702, 23 S. E. 167.


§ 16-2. Players and betters competent witnesses. — No person shall be excused or incapacitated from confessing or testifying touching any money or property, or thing in action, so wagered, bet or staked, or lent for such purpose, by reason of his having won, played, bet or staked upon any game, lot or chance, casualty, or unknown or contingent event aforesaid; but the confession or testimony of such person shall not be used against him, in any criminal prosecution, on account of such betting, wagering or staking. (Rev., s. 1688; Code, s. 2843; R. C., c. 51, s. 3; C. S. 2143.)

Cross References.—As to rule of evidence generally that defendant is not compellable to testify, see § 8-54. As to exception with reference to testimony as to gambling, etc., defendant is not compellable to testify, see § 8-54. As to defenses, see § 8-55.


Art. 2. Contracts for "Futures." —Every contract, whether in writing or not, whereby any person shall agree to sell and deliver any cotton, Indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt pork, salt fish, beef, cattle, sugar, coffee, stacks, bonds, and choses in action, at a place and at a time specified and agreed upon therein, to any other person, whether the person to whom such contract is so agreed to be sold and delivered shall be a party to such contract or not, when, in fact, and notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other. See Rodgers, etc., Co. v. Bell, 156 N. C. 378, 384, 72 S. E. 817.

From these considerations, it seems clear that the last sentence of this section was inserted "unnecessarily and out of place of this section," and it is to be treated as "bucket shops," and, having provided for this in sections 1 and 2, the statute contains several additional sections relating to the statute of 1889 and all of them having reference to the question of proof which should be required in foreclosing the act. The Law of 1905 then, in its closing section, provided: "That this act shall not be construed so as to apply to any person, firm, or corporation, etc., that this is the first time these words appear in our legislation, and, so far as they have reference to the law of 1889, it is clear that the Legislature, in the original statute, only intended that they should affect questions of proof. See Rodgers, etc., Co. v. Bell, 156 N. C. 378, 384, 72 S. E. 817.

The 1911 act amended the "Bucket Shop Act" of 1889, now this section, so as to exempt contracts with respect to purchase or sale where they are made in accordance with the regulations of any exchange, and where the rules of the exchange permit either party to require delivery. It was intended to remove the ban of illegality from transactions on legitimate exchanges, as distinguished from "an establishment" for the transaction of a book of business, or business of a similar character, but really for the registration of lots or wagers, usually for small amounts, on the rise or fall of stock, grain, etc., there being no

Section Constitutional.—This section is in furtherance of our declared public policy, and is constitutional and valid. Randolph v. Heath, 171 N. C. 383, 88 S. E. 731; Rankin v. Mitchem, 141 N. C. 277, 53 S. E. 684. See also State v. Stone, 141 N. C. 381, 53 S. E. 731; and English v. Page, 125 N. C. 215, 51 S. E. 305. See 9 N. C. Law Rev. 358, 359.

Test of Validity under Section.—The test of the validity of a contract for 'future' which this section requires is the 'intention not to actually deliver' the articles bought or sold for future delivery. No matter how explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that on the stipulated date the losing party shall pay to the other the difference between the market price and the contract price, this is a gambling contract. Rodgers, et al. v. Bell, 156 N. C. 378, 380, 72 S. E. 817, 818; E. v. R., 190 N. C. 236, 237, 180 S. E. 305.

When there is no real transaction, no real contract for purchase or sale, but only a wager upon the rise or fall of the price of stock, or an article of merchandise in the exchange or market, one party agreeing to pay, if there is a rise, and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. No business is done—nothing is acquired or sold—contracted for but there is only a bet. Ovis Bros. & Co. v. Holt-Morgan Mills, 193 N. C. 231, 233, 91 S. E. 948.

The North Carolina statutes prohibiting gambling in futures and denying jurisdiction of the courts to suits on judgments based upon such contracts have been upheld as constituting an exception to the application of the full faith and credit clause of the constitution, on the ground that the judgments sued on were rendered on a transaction expressly forbidden by our statute on gaming, and that the judgment was not raised, investigated or determined in the courts of the State in which the judgment was originally rendered. Mott v. Davis, 151 N. C. 237, 65 S. E. 969.

The contract, by its terms, not disclosing any gambling element, the matter is to be settled by ascertaining the true underlying purpose of the parties. Was it in the intention of both parties that the cotton should not be delivered, and did they conceal in the deceptive terms of a fair and lawful contract the essential element of the gambling agreement, by which they contemplated no real transaction as to the article contracted to be delivered? Edgerton & Son v. Edgerton & Bros., 151 N. C. 167, 99 S. E. 53; Harvey & Son v. Pettaway, 156 N. C. 375, 69 S. E. 53; B. v. Pettaway, 156 N. C. 375, 69 S. E. 53; Rodgers, et al. v. Bell, 156 N. C. 378, 72 S. E. 817; Burns v. Tomlinson, 147 N. C. 645, 61 S. E. 614; Rankin v. Mitchem, 141 N. C. 277, 53 S. E. 854; Hold v. Wellons, 163 N. C. 124, 129, 79 S. E. 450. It is immaterial whether the parties intended that the commodity contracted for should not be actually delivered is the cardinal element of a "future's" contract made illegal by this section and the courts will disregard the form and ascertain whether the underlying purpose of the parties was to avoid the performance of the contract and the price of the commodity. Fenner v. Tucker, 213 N. C. 419, 196 S. E. 357.

Same—Same—Parol Evidence.—Section requiring void and unenforceable in our courts a contract for the sale of cotton must be construed to require the margin of the contract and that the parties did not contemplate the delivery of the thing bargained for, but only a payment to be made for the loss incurred or a profit to be received in accordance with the fall or rise of the market, looks to the substance of the contract agreement and to its form, and parol evidence is competent to show the intention of the parties entering therein. Welles & Co. v. Satterfield, 190 N. C. 89, 129 S. E. 177.

§ 16-3

CH. 16. GAMING CONTRACTS

Action upon judgment obtained in foreign state. See Cody v. Hovey, 217 N. C. 407, 8 S. E. (2d) 479. For note on this case, see 18 N. C. Law Rev. 224.

Bucket Shop.—A "bucket shop" has been defined as "an establishment nominally for the purpose of buying and selling cotton, but in reality used for gambling purposes, in which the cotton business is a mere sham, and, so far from the parties not having the intention to deliver the cotton, such a delivery is absolutely impossible."—Gatewood v. North Carolina, 203 U. S. 531, 27 S. Ct. 167, 51 L. Ed. 305. For other definitions, see State v. McGinnis, 138 N. C. 724, 51 S. E. 50.

Contracts for Future Delivery.—As well settled that contracts for the future delivery of merchandise or tangible property, not void where such property is in existence in the hands of the seller, or to be subsequently acquired. Bibb v. Allen, 149 U. S. 461, 493, 13 S. Ct. 950, 957, 37 L. Ed. 738.

Thus the fact that it is the practice of persons making sales for future delivery to settle the same by setting off one sale against another, will not render it invalid. Board v. Christie Grain, etc., Co., 198 U. S. 236, 247, 25 S. Ct. 637, 49 L. Ed. 1031.

Within Police Power.—This section forbidding the business of running a "bucket shop," is clearly within the police power of the State. State v. McGinnis, 138 N. C. 724, 51 S. E. 50.

Illegal Contract.—This section clearly defines what is an illegal contract where there is no real sale, but merely an agreement for an adjustment upon the basis of the prices in the commodities at the time of the transaction. Co. v. Holt-Morgan Mills, 173 N. C. 231, 233, 91 S. E. 948.

Not Contrary to Federal Constitution.—When, in an action pending in the courts of this State to recover on a judgment rendered in the Courts of New York, the plaintiff attempted to allege in its answer a fact which would prescribe when and under what circumstances and as to what offenses a certain act shall be prima facie evidence. Therefore, a provision that the purchase of commodities upon margin, under certain circumstances shall be a prior offense, and in such case that such purchases were void, and other circumstances shall not constitute such prima facie evidence, is not a discrimination forbidden by the Fourteenth Amendment. State v. Clyatt, 138 N. C. 89, 94, 129 S. E. 177. This section was added under what formerly constituted § 2145 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 239.

[ 758 ]
Contracts to Which This Section Applies.—Where the defendant has induced the plaintiff to purchase certain shares of stock, through himself, from his own broker, upon margin, the broker to carry the stock upon its hypothecation with his own broker or to sell the stock, and the broker, unknown to the plaintiff, to sell the stock and place the proceeds to his own account, and uses the same and other money upon margin advanced from time to time by the plaintiff on judgment against the defendant as a defense. Gladstone v. Swain, 187 N. C. 712, 122 S. E. 755.

A note given for margins upon an illegal contract for cotton futures, without intention of delivery of the cotton, cannot be collected by suit in our courts, and the promisor’s repeated promise to pay it cannot impair any bond by the acts and statements of his agents in negotiating, etc., is a genuine and undiscoverable note given for a valid contract upon the understanding that such contracts were absolutely void. Martin v. Bush, 199 N. C. 93, 154 S. E. 638.

A contract for “cotton futures” in which no actual delivery is intended or contemplated is void and no action may be maintained thereon. Bodie v. Horn, 211 N. C. 397, 191 S. E. 191.

Both Parties Must Have Intent.—It was never held that when an innocent party had made a contract valid in its terms, his rights acquired thereunder should be denied him by the mere statement that it was not intended to be a legal transaction. To avoid the contract the vitiating purpose or understanding must be shared in by both. Rodgers, etc., Co. v. Bell, 110 N. C. 378, 83, 73 S. E. 617.

Unauthorized Agent.—An agent of a draft which he knows to have been given in the unlawful purchase of cotton futures, or in maintaining or purchasing margins in contracts of that character, is a party to the prohibited contract, the consideration is illegal and he cannot recover from the payee in his action on the draft. Burrus v. Witcover, 158 N. C. 384, 74 S. E. 11; 39 L. R. A. (N. S.) 1055.

Where there is evidence that contracts set up by certain defendants in an action by the receiver of a brokerage business were to be used for speculation and based upon “margins,” and that no actual delivery of the cotton was intended by the parties, the evidence is sufficient to support a finding that the contracts were void under this section and that the contracts were void and the judgment that such contracts were absolutely void will be sustained. Martin v. Bush, 199 N. C. 93, 154 S. E. 638.

Unlawful Purchase of Cotton.—When there is evidence that the contract was founded upon speculation and based upon “margins,” and that no actual delivery of the cotton was intended by the parties, the evidence is sufficient to support a finding that the contracts were void under this section and that the contracts were void and the judgment that such contracts were absolutely void will be sustained. Martin v. Bush, 199 N. C. 93, 154 S. E. 638.

Burden Not upon Administrator.—Where an administrator paid certain notes and it was later alleged by the legatee that the contracts were unlawful and that the notes were given for a valid contract upon the understanding that such contracts were absolutely void, it was held that the burden of proving that the plaintiff had paid the notes which should not have been paid, it was held that former § 2140 did not apply so as to put the burden of proving that the notes were given for a valid contract upon the administrator. Overman v. Lanier, 157 N. C. 544, 71 S. E. 192.

This case was decided under what formerly constituted § 2146 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

Evidence Sufficient.—The purchaser makes out a prima facie case upon evidence that the contract was founded upon a gambling or wagering consideration in violation of this section. Wells & Co. v. Satterfield, 190 N. C. 89, 129 S. E. 177. This case was decided under what formerly constituted § 2145 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

When Question for Jury.—Where the contract is not a gambling one on its face the underlying purpose and intent of the parties should be left to the jury. Harvey v. Pettaway, 156 N. C. 375, 377, 72 S. E. 364.

Where the plaintiff himself testified that he did not buy certain cotton in the ordinary course of his business as a cotton manufacturer for use in his mill, this was prima facie evidence that the contract was a gambling one. Burns v. Tomlinson, 147 N. C. 645, 61 S. E. 614. This case was decided under what formerly constituted § 2145 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

Cited in Meyer v. Fenner, 196 N. C. 476, 146 S. E. 82.

§ 16-4. Entering into or aiding contract for “futures” misdemeanor.—If any person shall become a party to any contract declared void in this article; or if any person shall be the agent, directly or indirectly, of any party in making or furthering or effectuating the same; or if any agent or officer of a corporation shall in any manner knowingly aid in making or furthering any such contract to which the corporation is a party, he shall be deemed to have violated this section, and on conviction shall be fined not less than one hundred dollars nor more than five hundred dollars, and may be imprisoned in the discretion of the court.

If any person shall, while in this state, consent to become a party to any such contract made in another state, and if any person shall, as agent of any person or corporation, become a party to any
such contract made in another state, or in this state do any act or in any way aid in the making or furthering of any such contract so made in another state, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than fifty nor more than two hundred dollars, and may be imprisoned in the discretion of the court. (Rev., ss. 3823, 3824; 1889, c. 221, ss. 3, 4; C. S. 2147.)


§ 16-5. Opening office for sales of “futures” misdemeanor.—If any person, corporation or other association of persons, either as principal or agent, shall establish or open an office or place of business in this state for the purpose of carrying on or engaging in making such contracts as are forbidden in this article, he shall be guilty of a misdemeanor, and shall on conviction be fined and imprisoned in the discretion of the court. (Rev., § 3825; 1889, c. 221, ss. 3, 4; C. S. 2148.)

§ 16-6. Evidence in prosecutions under this article.—No person shall be excused on any prosecution under the provisions of this article from testifying touching anything done by himself or others contrary to the provisions thereof, but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him. In all such prosecutions proof that the defendant was a party to a contract, as agent or principal, to sell and deliver any article, thing or property specified or named in this article, or that he was the agent, directly or indirectly, of any party in making, furthering or effectuating the same, or that he was the agent of any corporation or association or person in making, furthering or effectuating the same, and that the article, thing or property agreed to be sold and delivered was not actually delivered, and that settlement was made or agreed to be made upon the difference in value of said article, thing or property, shall constitute against such defendant prima facie evidence of guilt. Proof that any person, corporation or other association of persons, either as principal or agent, has established an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds and other commodities, or of any one or more of the same, shall constitute prima facie evidence of being guilty of violating the provisions of this article. (Rev., s. 3826; 1905, ss. 3, 4, 5; C. S. 2149.)

Chapter 17. Habeas Corpus.

17-1. Remedy without delay for restraint of liberty.
17-2. Habeas corpus not to be suspended.

Art. 2. Application.
17-3. Who may prosecute writ.
17-4. When application denied.
17-5. By whom application is made.
17-6. To judge of supreme or superior court; in writing.
17-7. Contents of application.
17-8. Issuance of writ without application.

Art. 3. Writ.
17-10. Penalty for refusal to grant.
17-11. Sufficiency of writ; defects of form immaterial.
17-12. Service of writ.

Art. 4. Return.
17-13. When writ returnable.
17-14. Contents of return; verification.
17-15. Production of body if required.

Art. 5. Enforcement of Writ.
17-16. Attachment for failure to obey.
17-17. Liability of judge refusing attachment.
17-18. Attachment against sheriff to be directed to coroner; procedure.
17-19. Precept to bring up party detained.
17-20. Liability of judge refusing precept.
17-21. Liability of judge confining at insufficient return.

17-23. Obedience to order of discharge compelled.
17-24. No civil liability for obedience.
17-25. Recommittal after discharge; penalty.
17-26. Disobedience to writ or refusing copy of process; penalty.
17-27. Penalty for false return.

Art. 7. Habeas Corpus for Custody of Children in Certain Cases.
17-39. Custody as between parents; modification of order.
17-40. Appeal to supreme court.

Art. 8. Habeas Corpus Ad Testificandum.
17-41. Authority to issue the writ.
17-42. Contents of application.
§ 17-1. Remedy without delay for restraint of liberty. — Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Rev., s. 1819; Const., Art. I, s. 18; C. S. 2293.)

Cross Reference. — As to costs in habeas corpus, see § 6-21, subsec. 3.

Editor's Note. — "By the Habeas Corpus Act passed in 1679 the liberty of every Englishman was made as certain as law could make it; it being guaranteed to him that if accused of crime, he, instead of languishing in prison, as had often been the case, should be brought to a fair and speedy trial." —R. Buckle, History of Civilization In England, Vol. I, p. 385.

Macaulay in speaking of the prorogation of the Parliament of 1679 says: "The day of that prorogation, the twenty-six of May, 1679, is a great era in our history. For on that day the Habeas Corpus Act received the royal assent. From the time of the Great Charter, the substantive law respecting the personal liberty of Englishmen had been nearly the same as at present; but it had been inefficacious for want of a stringent system of procedure. What was needed was not a new right but a prompt and searching remedy; and such a remedy the Habeas Corpus Act supplied."


Definition. — The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. In pursuance to its command, the body of the petitioner is brought before the court, that it may inquire into the legality of his detention. United States v. Ju Toy, 198 U. S. 253, 272, 49 L. Ed. 1040, 25 S. Ct. 644.

Nature. — The writ of habeas corpus is a high prerogative writ, known to the common law, similar in nature to the writs of quo warranto, mandamus, certiorari and prohibition, and the proceedings thereunder are regarded as appellate in character, but it cannot be made to perform the office of a writ of error on appeal. Ex Parte Virginia, 100 U. S. 339, 357, 25 L. Ed. 676.


Object. — The object of the proceeding by a writ of habeas corpus is to inquire into the legality of the detention of the petitioner. United States v. McBratney, 104 U. S. 621, 624, 26 L. Ed. 869.

§ 17-2. Habeas corpus not to be suspended. — The privileges of the writ of habeas corpus shall not be suspended. (Rev., s. 1820; Const., Art. I, s. 21; C. S. 2294.)


Can Not Be Abrogated. — This section is an express provision, and there is no rule of construction or principle of constitutional law by which an express provision can be abrogated and made of no force by an implication from any other provision of the instrument. The clauses should be construed so as to give effect to each, and prevent conflict. This is done by giving to Art. XII, sec. 3, the effect of allowing a military trial, possession of a country to be taken, and the arrest of all suspected persons to be made by military authority, but requiring, by force of Art. I, sec. 21, the persons arrested to have an opportunity for trial to the civil authorities on habeas corpus, should they not be delivered over without the writ. Ex parte Moore, 64 N. C. appx., 802, 808.

Art. 2. Application.

§ 17-3. Who may prosecute writ. — Every person imprisoned or restrained of his liberty within this state, for any criminal or supposed criminal matter, or on any pretense whatsoever, except in cases specified in § 17-4, may prosecute a writ of habeas corpus, according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom. (Rev., s. 1821; Code, s. 1623; 1858-9, c. 116, s. 1; C. S. 2205.)

Prisoner under Illegal Sentence. — Where a defendant, charged with the crime of burglary with intent to commit murder, convicted thereof, and sentenced to imprisonment for a longer term of imprisonment than is legal, a writ of habeas corpus may be presented, and on the presentation of such a writ, and if the defendant is held as a soldier he is entitled to a habeas corpus while he is undergoing punishment or awaiting trial for a military offense. Cox v. Gee, 60 N. C. Appx., 156.

§ 17-4. When application denied. — Application to prosecute the writ shall be denied in the following cases:

1. Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts.

2. Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

3. Where any person has willfully neglected, for the space of two whole terms after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.

4. Where no probable ground for relief is shown in the application. (Rev., s. 1822; Code, s. 1624; 1858-9, c. 116, s. 2; C. S. 2206.)

In General. — In construing this term, "final judgment or decree of a competent tribunal," it is to be understood that the exception refers only to judgments warranted by the law applicable to the case in hand, and where it appears from an inspection of the record proper and the
judgment itself that the court had no jurisdiction of the cause and was manifestly without power to render the sentence in question, in such case there, would be no final sentence of a competent tribunal, and the exception established by the statute does not obtain. State v. Dunn, 119 N. C. 69; In re Holley, 154 N. C. 163, 167, 69 S. E. 872.

Presumption of Validity.—Proceedings before a court of competent jurisdiction will be presumed to be regular and valid, unless it clearly appears to the contrary. State v. Burnett, 173 N. C. 734, 91 S. E. 365.

"Competent Jurisdiction."—The term, "competent jurisdiction," used by this section in making an exception to the power of this court to review a judgment in habeas corpus proceedings, means that when a competent tribunal has pronounced a sentence not authorized by law, he is entitled to be heard, and where, though authorized in kind, it extends beyond what the law expressly permits, he may be relieved from further punishment after lawful portion of the sentence, and a different construction would render the statute unconstitutional. In re Holley, 154 N. C. 163, 69 S. E. 872.

Cannot Be Used as Writ of Error.—The writ of habeas corpus cannot be used in the nature of a writ of error. State v. Dunn, 159 N. C. 470, 74 S. E. 1014.

Habeas corpus is in the nature of a writ of error to the extent that it permits of a prisoner's defense by argument, but it is not available as a means of reviewing and correcting mere errors as distinguished from defects of jurisdiction. State v. Edwards, 192 N. C. 321, 135 S. E. 37; In re Chase, 153 N. C. 642, 156 S. E. 280.

The writ of habeas corpus may not be used for a substitute for appeal. In re Smith, 218 N. C. 462, 11 S. E. (2d) 317.

Process by United States Judge.—The petitioner in habeas corpus proceedings adjudged in contempt of court shall be entitled to a writ of habeas corpus by virtue of a process issued by a court or judge of the United States having jurisdiction, therefore, it is necessary to show, not that the United States has given him jurisdiction, but that Congress possesses and has exercised the power of taking away that jurisdiction which the states have vested in their own judges. (Rev., s. 1823; Code, s. 1625; 1868-9, c. 116, s. 3; C. S. 2208.)

Cross Reference.—As to jurisdiction of special or emergency judges of the superior court, see §§ 7-32, 7-38.

In General.—The Constitution required the Legislature to furnish an adequate remedy, and when it was declared that all such persons should have the right "to prosecute a writ of habeas corpus", it followed ex vi termini, that they were entitled to demand this remedy without the necessity of any court of general jurisdiction in this country. The power of all judges to grant it was conceded before the Magna Charta, and was only reaffirmed, like many other cardinal principles, in the instrument of our federal Constitution. In re Harkins v. Cathey, 119 N. C. 649, 663, 26 S. E. 138.

Concurrent Jurisdiction in State and Federal Courts.—On habeas corpus, the state courts have concurrent jurisdiction with the federal courts of all cases of imprisonment within their territorial jurisdiction, except in the case where the prisoner is in custody under the authority, or claim of authority, of the United States. (Rev., s. 1823; Code, s. 1625, 1868-9, c. 116, s. 3; C. S. 2208.)

The federal and state courts have concurrent jurisdiction to inquire into the legality of detention under a governor's warrant in interstate extradition cases. United States v. Johnson, 17 U. S. 336, 24 L. Ed. 542, 54 S. Ct. 607.

Source from Which Authority of State Judges Emanates.—It is to be observed that the authority of the state judges in cases of habeas corpus emanates from the several states, and not from the United States. In order to destroy their jurisdiction, therefore, it is necessary to show, not the United States has given them jurisdiction, but that Congress possesses and has exercised the power of taking away that jurisdiction which the states have vested in their own judges. In the matter of Byrnon, 60 N. C. 1.

Judiciary of Courts.—The courts of this State, as well as the individual judges, have jurisdiction to issue writs of habeas corpus returnable to any court of law, term, and at any time, and as a court. In the matter of Byrnon, 60 N. C. 1.

Judges Mentioned Have Equal Powers.—A single judge of the Supreme Court has the same and no other jurisdiction than the writ than a judge of the superior court. The same limitation of power to issue the writ in certain cases extends equally to the two classes of judges. In re Schenck, 74 N. C. 607, 608.

Extent of Jurisdiction.—The habeas corpus jurisdiction of every court, and of every judge, extends to every possible case of privation of liberty to the National Constitution, treaties and laws. In re Burrous, 136 U. S. 586, 592, 34 L. Ed. 500, 19 S. Ct. 83.


Sections 17-60 to 17-68, inclusive, of the General Statutes, contain all the law relating to habeas corpus proceedings.
liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.

2. The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.

3. If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.

4. If the imprisonment or restraint is alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.

5. The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits. (Rev., s. 1825; Code, s. 1627; 1868-9, c. 116, s. 5; C. S. 2260.)

Waiver of Errors.—The parties may waive all errors and dispense with all forms in the proceedings on the petition. State v. Edney, 60 N. C. appx., 463.

Necessary Allegation.—A petition for habeas corpus must allege that the imprisonment has not been already adjudged, upon a prior writ of habeas corpus. In the matter of Brittain, 91 N. C. 387.

Where Other Remedies Exist.—The writ of habeas corpus will be refused where the prisoner can be otherwise discharged. In re Belt, 159 U. S. 95, 100, 40 L. Ed. 88, 15 S. Ct. 181.


§ 17-8. Issuance of writ without application. —When the supreme or superior court, or any judge of either, has evidence from any judicial proceeding before such court or judge that any person within this state is illegally imprisoned or restrained of his liberty, it is the duty of said court or judge to issue a writ of habeas corpus for his relief, although no application be made for such writ. (Rev., s. 1826; Code, s. 1632; 1868-9, c. 116, s. 10; C. S. 2210.)

When Illegal Imprisonment Appears.—If a case comes before the Supreme Court by appeal, or by certiorari, and upon the trial it appears that the prisoner was suffering an illegal confinement in the penitentiary, it would be the duty of that court, by virtue of its supervisory power, and of this section, enacted to carry into effect this constitutional power of the Supreme Court, to issue the writ of habeas corpus, even of its own motion, and discharge the prisoner. In re Schenck, 74 N. C. 607, 610.

Art. 3. Writ.

§ 17-9. Writ granted without delay. —Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that no such relief is intended, or that the benefit it is intended is, by this chapter, prohibited from prosecuting the writ. (Rev., s. 1827; Code, s. 1628; 1868-9, c. 116, s. 6; C. S. 2261.)

Cross Reference.—As to when application shall be denied, see § 17-4.

Duty of Court to Issue. —There can be no doubt of the duty and power of the court to issue the writ of habeas corpus when applied for in accordance with statutory provisions. In re Boyett, 136 N. C. 415, 424, 48 S. E. 789.

§ 17-10. Penalty for refusal to grant. —If any judge authorized by this chapter to grant writs of habeas corpus refuses to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars. (Rev., s. 1828; Code, s. 1631; 1868-9, c. 116, s. 9; C. S. 2212.)

Writ Always Issues.—The writ of habeas corpus always issues when legally applied for, because this section subjects a judge who refuses to entertain the petition to a penalty of $2,500. In the matter of Croom, 175 N. C. 455, 456, 92 E. 903.


§ 17-11. Sufficiency of writ; defects of form immaterial. —No writ of habeas corpus shall be disallowed on account of any defect of form. It shall be sufficient—

1. If the person having the custody of the party imprisoned or restrained be designated either by his name of office, if he have any, or by his own name, or, if both such names be unknown or uncertain, he may be described by an assumed appellation, and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name, or description, or to another person.

2. If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person intended. (Rev., s. 1829; Code, ss. 1629, 1630; 1868-9, c. 116, ss. 7, 8; C. S. 2213.)

§ 17-12. Service of writ. —The writ of habeas corpus may be served by any qualified elector of this state thereto authorized by the court or judge allowing the same. It may be served by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person cannot be found, by leaving it, or a copy of it, at the place where the party for whose relief it is intended is confined, with some under officer or other person of proper age; or, if none such can be found, or if the person attempting to serve the writ be refused admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling-house of the party to whom the writ is directed or of the place where the party is confined for whose relief it is sued out. (Rev., s. 1833; Code, s. 1637; 1868-9, c. 116, s. 32; C. S. 2214.)

To Whom Issued.—The writ should be issued to the person who has the immediate custody of the petitioner with the power to produce the body of such party before the court or judge. Wales v. Whitney, 114 U. S. 564, 574, 29 L. Ed. 277, 5 S. Ct. 1050.

Art. 4. Return.

§ 17-13. When writ returnable. —Writs of habeas corpus may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein. (Rev., s. 1830; Code, s. 1656; 1868-9, c. 116, s. 31; C. S. 2213.)

§ 17-14. Contents of return; verification. —The person or officer on whom the writ is served
must make a return thereto in writing, and, except where such person is a sworn public officer and makes his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally—
1. Whether he has or has not the party in his custody or under his power or restraint.
2. If he has the party in his custody or under his power or restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large.
3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge before whom the same is returnable.
4. If the person or officer upon whom such writ is served has had the party in his power or custody, or under his restraint, at any time prior to or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place. (Rev., s. 1831; Code, s. 1633; 1868-9, c. 116, s. 11; C. S. 2216.)

§ 17-15. Production of body if required.—If the writ requires it, the officer or person on whom the same has been served shall also produce the body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided. (Rev., s. 1832; Code, s. 1636; 1868-9, c. 116, s. 14; C. S. 2217.)

Art. 5. Enforcement of Writ.

§ 17-16. Attachment for failure to obey.—If the person or officer on whom any writ of habeas corpus has been duly served refuses or neglects to obey the same, by producing the body of the party named or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse is shown for such refusal or neglect, it is the duty of the court or judge before whom the writ has been made returnable, upon due proof of the substantial excuse for the refusal or neglect, to issue an attachment against such person or officer, directed to the sheriff of any county within this state, and commanding him forthwith to apprehend such person or officer and bring him immediately before such court or judge. On being so brought such person or officer shall be committed to close custody in the jail of the county or the court or judge may be, without being allowed the liberties thereof, until such person or officer make return to such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ has been issued. (Rev., s. 1834; Code, s. 1637; 1868-9, c. 116, s. 15; C. S. 2218.)

In General.—The attachment warranted by this section does not rest on the idea of punishing for a contempt of the judge, or court, but of compelling a return to the writ and a production of a body. It is a substitute for the provision in the old habeas corpus act, which punished the officer or person refusing or neglecting to make return, "upon conviction by indictment," with a fine of $500 for the first offense, and of $1,000, and incapacity to hold office, for the second. Ex parte Moore, 64 N. C. appx., 802, 809. See also, Ex parte Kerr, 64 N. C. appx., 816.

No Power to Arrest Governor.—Under the habeas corpus act, a judge has no power to order the arrest of the Governor of the State. Ex parte Moore, 64 N. C. appx., 802, 815.

Excuse for Refusal to Make Return.—Where a military officer detaining persons arrested in counties declared by the Governor to be in a state of insurrection, answered to a writ of habeas corpus, that he held them under the orders of the Governor, who had also ordered him not to obey the writ: it was held, that such return was a sufficient excuse, under this section, and, therefore, that such officer was not liable to be attached. Ex parte Moore, 64 N. C. appx., 802, 815.

§ 17-17. Liability of judge refusing attachment.—If any judge willfully refuses to grant the writ of attachment, as provided for in § 17-16, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (Rev., s. 1835; Code, s. 1638; 1870-1, c. 221, s. 2; C. S. 2219.)

§ 17-18. Attachment against sheriff to be directed to coroner; procedure.—If a sheriff has neglected to return the writ agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own. (Rev., s. 1836; Code, s. 1639; 1868-9, c. 116, s. 16; C. S. 2220.)

Cross Reference.—As to requirement of coroner to act for sheriff in certain cases, see § 152-8.

§ 17-19. Precept to bring up party detained.—The court or judge by whom any such attachment may be issued may also at the same time, or afterwards, direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith before such court or judge the party, wherever to be found, for whose benefit the writ of habeas corpus has been granted. (Rev., s. 1837; Code, s. 1640; 1868-9, c. 116, s. 17; C. S. 2221.)

§ 17-20. Liability of judge refusing precept.—If any judge refuses to grant the precept provided for in § 17-19, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (Rev., s. 1838; Code, s. 1641; 1870-1, c. 221, s. 3; C. S. 2222.)

§ 17-21. Liability of judge conniving at insufficient return.—If any judge grants the attachment, or the precept, and gives the officer or other person charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law; or shall connive at the failing to make any return or any evasive or insufficient return, or any return other than that provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (Rev., s. 1839; Code, s. 1642; 1870-1, c. 221, s. 4; C. S. 2223.)

§ 17-22. Power of county to aid service.—In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, in other cases. (Rev., s. 1840; Code, s. 1643; 1868-9, c. 116, s. 18; C. S. 2224.)
§ 17-23. Obedience to order of discharge compelled.—Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this chapter, may be enforced by the court or judge by attachment in the same manner and with the same effect as for a neglect to make return to a writ of habeas corpus; and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five hundred dollars, besides any special damages which such party may have sustained. (Rev., s. 1841; Code, s. 1649; 1868-9, c. 116, s. 24; C. S. 2225.)

§ 17-24. No civil liability for obedience.—No officer or other person shall be liable to any civil action for obeying a judgment or order of discharge upon writ of habeas corpus. (Rev., s. 1842; Code, s. 1650; 1868-9, c. 116, s. 25; C. S. 2226.)

§ 17-25. Recommittal after discharge; penalty.—If any person shall knowingly again imprison or detain one who has been set at large upon any writ of habeas corpus, for the same cause, other than by the legal process or order of the court wherein he is bound by recognizance to appear, or of any other court having jurisdiction in the case, he shall be guilty of a misdemeanor. (Rev., s. 3581; Code, s. 1651; 1868-9, c. 116, s. 26; C. S. 2227.)

Cross Reference.—See also, § 17-38 and notes.

When Arrested Valid.—A party, set at large by writ of habeas corpus, upon the ground that the judgment of imprisonment was void for want of jurisdiction in the court, may be again arrested for the same cause upon legal process of a court having jurisdiction. State v. Weatherpoon, 68 N. C. 19.

§ 17-26. Disobedience to writ or refusing copy of process; penalty.—If any person to whom a writ of habeas corpus is directed shall neglect or refuse to make due return thereeto, or to bring the body of the party detained according to the command of the writ without delay, or shall not, within six hours after demand made therefor, deliver a copy of the commitment or cause of detention, such person shall, upon conviction on indictment, be fined one thousand dollars, or imprisoned not exceeding twelve months, and if such person be an officer, shall moreover be removed from office. (Rev., s. 3597; Code, s. 1653; 1868-9, c. 116, s. 27; C. S. 2228.)

§ 17-27. Penalty for false return.—If any person shall make a false return to a writ of habeas corpus, he shall be guilty of a misdemeanor. (Rev., s. 3582; Code, s. 1653; 1868-9, c. 116, s. 28; C. S. 2229.)

§ 17-28. Penalty for concealing party entitled to writ.—If any one having in his custody, or under his power, any party who, by law, would be entitled to a writ of habeas corpus, or for whose relief such writ shall have been issued, shall, with intent to elude the service of such writ, or to avoid the effect thereof, transfer the party to the custody, or put him under the power or control, of another, or shall conceal or change the place of his confinement, or shall knowingly aid or abet another in so doing, he shall be guilty of a misdemeanor. (Rev., s. 3583; Code, ss. 1654, 1655; 1868-9, c. 116, ss. 29, 30; C. S. 2230.)

Art. 6. Proceedings and Judgment.

§ 17-29. Notice to interested parties.—When it appears from the return to the writ that the party named therein is in custody on any process, or by virtue of any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it appears that the person so interested, or his attorney, if he have one, has had reasonable notice of the time and place at which such writ is returnable. (Rev., s. 1843; Code, s. 1634; 1868-9, c. 116, s. 12; 1870-1, c. 221, s. 1; C. S. 2231.)

§ 17-30. Notice to solicitor.—When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ has been returned, or is made returnable, is given to the solicitor of the district in which the person prosecuting the writ is detained. (Rev., s. 1844; Code, s. 1635; 1868-9, c. 116, s. 13; C. S. 2232.)

Hearing May Be Continued.—If it appear from the return on a writ of habeas corpus that the petitioner is detained on a criminal charge, the court may continue the hearing for a reasonable time to give the solicitor an opportunity to examine into the case. State v. Jones, 113 N. C. 669, 18 S. E. 249.

§ 17-31. Subpoenas to witnesses.—Any party to a proceeding on a writ of habeas corpus may procure the attendance of witnesses at the hearing, by subpoena, to be issued by the clerk of any superior court, under the same rules, regulations and penalties prescribed by law in other cases. (Rev., s. 1845; Code, s. 1659; 1868-9, c. 116, s. 34; C. S. 2233.)

Cross Reference.—As to issuance of subpoenas, see §§ 2-16, 8-59.

§ 17-32. Proceedings on return; facts examined; summary hearing of issues.—The court or judge before whom the party is brought on a writ of habeas corpus shall, immediately, after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same has been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party. (Rev., s. 1846; Code, s. 1644; 1868-9, c. 116, s. 19; C. S. 2234.)

Proceedings Must Be Summary.—Proceedings under the writ of habeas corpus, which have for their principal object a release of a party from illegal restraint, must necessarily be summary and prompt to be useful, and if an action could be arrested by an appeal, they would lose many of their most beneficial results. State v. Miller, 57 N. C. 451, 454, 1 S. E. 776.

Hearing Not Perfunctory.—The words "if issue be taken upon the material facts . . . the judge shall proceed in
a summary way to bear the allegations and proofs of both sides," preclude the idea that such hearing shall be perfunctory and merely formal. In re Bailey, 203 N. C. 362, 365, 100 S. E. 165.

17-33. Writ of Certiorari—To Record.—The hearing is confined to the record and judgment, and relief may be afforded only when on the record itself the judgment is one clearly and manifestly beyond the power of the court, a statement of the facts on which the question of law is based, and his action in that regard cannot be reviewed. State v. Hooker, 183 N. C. 763, 111 S. E. 351.

Evidence Not Reviewable.—The writ was held in State v. Dunn, 159 N. C. 470, 74 S. E. 1014, the Supreme Court cannot review the evidence or other matters in a criminal case in habeas corpus proceedings, but only the jurisdiction of the court. Where the inferior court did not act upon the habeas corpus petition, the judgment of the superior court was not subject to review. State v. Burnett, 173 N. C. 724, 91 S. E. 364.

Presumption of Innocence and Burden of Proof.—The presumption of innocence applies only on a trial, and does not apply to habeas corpus proceedings, where the inculpation of the petitioner is attacked. State v. Hooker, 183 N. C. 450, 113 S. E. 364.

Discretion of Judge.—The quantum of evidence and the number of witnesses to be examined must necessarily be left to the discretion of the judge. Herndon, 107 N. C. 934, 12 S. E. 268. See also In re Bailey, 203 N. C. 362, 365, 100 S. E. 165.

Question of Insanity Determined.—When the petitioner in habeas corpus proceedings is adjudged insane and her detention is illegal, the presumption of innocence applies only on a trial, and does not apply to habeas corpus proceedings, where the inculpation of the petitioner is attacked. State v. Hooker, 183 N. C. 450, 113 S. E. 364.

Judicial Review of Questions of Law.—In deciding questions which arise under writs of habeas corpus the judiciary may review and control the action of the Governor in regard to points of law; but cannot interfere with such action in regard to any matter within the discretion of the Governor.

In the matter of Hughes, 61 N. C. 57.

§ 17-33. When party discharged.—If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appears on the return to the writ that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

1. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.

2. Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.

3. Where the process is defective in some matter of substance required by law, rendering such process void.

4. Where the process, though in proper form, has been issued in a case not allowed by law.

5. Where the person, having the custody of the party under such process, is not the person empowered by law to detain him.

6. Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law. (Rev. s. 1847; Code, s. 1645; 1868-9, c. 116, s. 20; C. S. 2235.)

Cross Reference.—See also, notes under § 17-32.

§ 17-34. The Imposition of Contempt.—A contempt is held in Ex parte Summers, 27 N. C. 149, that in a case of imprisonment for contempt, where the court states the facts upon which it proceeds, a reviewing tribunal may, on a habeas corpus, discharge the party if it appears plainly that the facts do not amount to a contempt. State v. Queen, 91 N. C. 659, 662.

Sentence Partly Valid and Partly Void.—Where a prisoner is detained by virtue of a sentence in part valid and part void, he shall have served the valid portion of his sentence, and he shall be remanded when it appears that the time during which he may lawfully be detained has not expired. State v. Hooker, 183 N. C. 763, 111 S. E. 351.

State Cannot Appeal.—The State cannot appeal from an order in habeas corpus proceedings discharging from imprisonment one convicted of crime. Proceedings in habeas corpus, the object of which is to release a person from illegal restraint, must necessarily be summary to be useful, and if action could be arrested by an appeal upon the part of the
§ 17-34. When party remanded.—It is the duty of the court or judge forthwith to remand the party, if it appears that he is detained in custody, either—

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.

2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.

3. For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged.

4. That the time during which such party may be legally detained has not expired. (Rev., s. 1848; Code, s. 1646; 1868-9, c. 116, s. 21; C. S. 2236.)

Cross Reference.—See also, § 17-4, when application for writ shall be denied.

§ 17-35. When the party bailed or remanded.—If it appears that the party has been legally committed for any criminal offense, or if it appears by the testimony offered with the return of the writ, or upon the hearing thereof, that the party is guilty of such an offense, although the commitment is irregular, the court or judge shall proceed to let such party to bail, if the case is bailable and good bail is offered; if not, the court or judge shall forthwith remand such party to the custody of the officer or person legally entitled thereto; if not so entitled, the court or judge may, on good cause shown, annul, vary or modify the same; provided, that where the father is a non-resident of North Carolina and the custody of the child has been awarded, by an order of two thousand five hundred dollars to the party aggrieved thereby. (Rev., s. 1852; Code, s. 1651; 1868-9, c. 116, s. 26; C. S. 2240.)

Cross Reference.—As to recommittal after discharge, see § 17-36.

Surrender by Sureties.—According to the express terms of this section, a party once discharged may be again arrested and imprisoned for the same cause, provided it be done by the legal order or process of a court of competent jurisdiction. State v. Weatherspoon, 88 N. C. 19, 21.

Art. 7. Habeas Corpus for Custody of Children in Certain Cases.

§ 17-39. Custody as between parents in certain cases; modification of order.—When a contest shall arise on a writ of habeas corpus between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same; provided, that where the father is a non-resident of North Carolina and the custody of the child has been awarded, by an order of a court of this State, to the mother who is a resident of North Carolina, no motion on the part of such non-resident father may be heard or entertained by the court for a modification of the order of the court, unless such father has first shown under oath that, since the making of the original order, he has regularly contributed to the support of said child according to his means and according to the needs of the child, and, if said motion is heard and at said hearing such facts is not established to the satisfaction of the court, the motion for a modification of the order shall be denied, unless the court shall find that, at the time of said hearing the mother is not a fit and proper person to have the custody of said child. Provided, that
§ 17-40

the last two provisos shall only apply after the case has been reopened on time. (Rev., s. 1853; Code, s. 1661; 1858-9, c. 53; 1868-9, c. 116; 1899, c. 270, s. 1; C. S. 2241.)

Cross References.—As to custody of children in divorce, see § 50-13 and notes thereto. As to persons entitled to custody of children in general, see § 33-2.

Editor's Note.—The Act of 1929 added the two provisos to this section.

Broad Powers Conferred.—This section confers upon the court very large powers to "promote the interest and welfare of the child" and "to award the custody of the child to its father or mother, or to the grandparents of the child," where a divorce has been granted, and, where there is no divorce, by proceedings in habeas corpus. In the matter of Blake, 184 N. C. 288, 111 S. E. 294; McEachern v. McEachern, 210 N. C. 98, 155 S. E. 684.

Custody of children in general, see § 33-2. J

When Section Applies.—When, without being divorced, parents contest the question of determining the position of their offspring must be decided under the provisions of this section. In re Habeas Corpus of Jones, 153 N. C. 312, 69 S. E. 217.

It is essential that the parents must be living in a state of separation "without being divorced" before the court has power in habeas corpus to determine the custody of the children. In the matter of Blake, 184 N. C. 278, 280, 114 S. E. 294; McEachern v. McEachern, 210 N. C. 98, 155 S. E. 684.

Custody of children may be used to decide a contest "between any husband and wife, who are living in a state of separation," in respect to the custody of their children. It is not available as between other parties, nor as between divorced parents. In re Young, 222 N. C. 708, 709, 24 S. E. (2d) 579.

When Parents Divorced Section 50-13 Applies.—When this section was enacted in connection with section 50-13, it became apparent that the Legislature intended that the custody of children shall be determined by the court in which the divorce was granted, and, where there is no divorce, by proceedings in habeas corpus. Jurisdiction of the court in which a divorce is granted to award the custody of a child is exclusive and continuing. In the matter of Blake, 184 N. C. 293, 294; see McEachern v. McEachern, 210 N. C. 98, 155 S. E. 684.

But where the parties have been divorced and the decree does not award the custody of the children, the procedure to determine the right to their custody, is by motion in the cause, and habeas corpus will not lie, and where in habeas corpus proceedings a decree for absolute divorce between the parties is introduced in the record without objection, but the custody of the child is awarded, or where the custody of the child has been, but awards the custody of the child to its mother, on appeal the case will be remanded for a finding as to whether the parties had been divorced. In re Albertson, 117 N. C. 41, 10 S. E. 41.

Jurisdiction of Juvenile Court.—In Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824, it was held that the jurisdiction of the superior court or judge thereof in habeas corpus proceedings between husband and wife, living apart without divorce, where there was no divorce whereby the custody of the child was awarded, was the jurisdiction of the court in which a divorce was granted, and that the court could not grant or refuse the custody of the child.


Where Foreign Decree Ineffectual.—When, under an invalid decree of divorce rendered in favor of the wife in another state, the custody of a child was awarded to the wife, it is sought by habeas corpus proceedings in this State to obtain the custody of the child domiciled with its father in this State, the proceeding will be regarded as one between husband and wife, living apart without divorce, and the proceeding is not available to enforce the provisions of the divorce decree relating to the custody of the child as against the mother moving to this State and bringing the child with her. In re Ogden, 210 N. C. 98, 155 S. E. 684.

Findings of Fact Are Conclusive When Based on Evidence.—The findings of fact by the court in proceedings in habeas corpus, to determine the custody of minor children of the parties, are conclusive when based upon evidence. McEachern v. McEachern, 210 N. C. 98, 155 S. E. 684.

Cited in In re Gibson, 222 N. C. 350, 23 S. E. (2d) 50.

§ 17-40. Appeal to supreme court.—In all cases of habeas corpus, where a contest arises in respect to the custody of minor children, either party may appeal to the supreme court from the final judgment. (Rev., s. 1854; Code, s. 1662; 1858-9, c. 53; s. 2; C. S. 2242.)

No Appeal Except under This Section.—There is no provision for appeal from a judgment in habeas corpus proceedings, except in cases concerning the care and custody of children under this section. In re Holley, 154 N. C. 163, 166, 128 S. E. 835; State v. Miller, 97 N. C. 451, 454, 1 S. E. 776.

Death of Party Pending Appeal.—When in habeas corpus proceedings brought to secure the custody of infant children, the respondent (in whose favor judgment had been rendered below) died pending appeal, it was held, that the proceeding was not, and could not be, revived against the personal representative. Brown v. Rainor, 108 N. C. 304, 12 S. E. 1008.

Judgment of Superior Court Stayed Pending Appeal.—Upon appeal to the Supreme Court from an order of the judge of the superior court in habeas corpus proceedings be—
between husband and wife for the custody of the minor children of the marriage upon petition of the wife, living by mutual consent separated from her husband, without divorce, upon a writ of habeas corpus, upon notification to the adverse party to appear before one of the Justices, and after a regular hearing, for the Justice to allow a supersedeas bond in a fixed amount, to stay the judgment of the lower court pending appeal, and by consent to set the hearing after the call of a certain district in the Supreme Court in term. Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824.

Discretion in Supreme Court.—When the superior court judge has entered judgment in habeas corpus proceedings between husband and wife, and has found the facts upon which his judgment was based, and both parties appeal, the Supreme Court, in its sound legal discretion, may review the judgment and affirm, reverse, or modify it. Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824; Atkinson v. Downing, 175 N. C. 244, 95 S. E. 487.

What Reviewed.—Upon an appeal from a judgment upon a writ of habeas corpus awarding the custody of a minor child, the court will only review errors of "law or legal inference, Constitution, Art. IV, Section 8, and not the findings of fact made by the lower court upon competent evidence; and this section allowing an appeal in such cases, does not affect the matter. Stokes v. Cogdell, 153 N. C. 181, 69 S. E. 65.

Decree as between Divorced Parents Is Not Appealable.—A decree in habeas corpus proceedings to determine the custody of a child as between its divorced parents is not appealable, since the proceeding does not come within the provisions of this and § 17-39, nor will the provisions made for the child be considered when the judge below finds that the child is in school and is being properly cared for by the parent having its custody, and awards its custody to such parent during the school term, the sole remedy being by certiorari to invoke the constitutional power of the Supreme Court to supervise and control proceedings of inferior courts. In re Ogden, 211 N. C. 100, 189 S. E. 119. Applied in In re Alberson, 205 N. C. 742, 172 S. E. 411.

Art. 8. Habeas Corpus Ad Testificandum. § 17-41. Authority to issue the writ.—Every court of record has power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court any prisoner who may be detained in any jail or prison within the state, for any cause, except a prisoner under sentence of death, is a competent witness; and the solicitor for the State is entitled to a writ of habeas corpus ad testificandum under this section, to bring such condemned prisoner into court for the purpose of testifying before the grand jury. Ex parte Harris, 73 N. C. 65.

Murderer Is Competent Witness.—One who has been convicted of murder, and is under sentence of death, is a competent witness; and the solicitor for the State is entitled to a habeas corpus to bring such condemned prisoner into court for the purpose of testifying before the grand jury. Ex parte Harris, 73 N. C. 65.

Same.—Objection Untenable.—When the State has procured the attendance of a witness under sentence of death, the objection by the defendant that he could not be procured by writ of habeas corpus ad testificandum under this section, is untenable, this not applying to the State; nor will objection avail that the time set for the execution had passed, and the witness, being dead, in the eye of the law, could not testify, the witness having been present and having testified. State v. Jones, 176 N. C. 702, 97 S. E. 32.

§ 17-42. Contents of application.—The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant, and shall state—

1. The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired.

2. That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes. (Rev., s. 1857; Code, s. 1665; 1868-9, c. 116, s. 39; C. S. 2244.)

§ 17-43. Service of writ.—The writ of habeas corpus to testify shall be served by the same person, and in like manner in all respects, and enforced by the court or officer issuing the same as prescribed in this chapter for the service and enforcement of the writ of habeas corpus cum causa. (Rev., s. 1858; Code, s. 1666; 1868-9, c. 116, s. 40; C. S. 2245.)

Cross Reference.—As to service of writ in habeas corpus proceedings, see § 17-12.

§ 17-44. Applicant to pay expenses and give bond to return.—The service of the writ shall not be complete, however, unless the applicant for the same tenders to the person whose custody by the prisoner may be, if such person is a sheriff, coroner, constable or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he also gives bond, with sufficient security, to such sheriff, coroner, constable or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner. (Rev., s. 1859; Code, s. 1667; 1868-9, c. 116, s. 41; C. S. 2246.)

§ 17-45. Duty of officer to whom writ delivered or on whom served.—It is the duty of the officer to whom the writ is delivered or on whom it is served, whether such writ is directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same has been issued the sum of five hundred dollars. (Rev., s. 1860; Code, s. 1668; 1868-9, c. 116, s. 48; C. S. 2247.)

§ 17-46. Prisoner to be remanded.—After having testified, the prisoner shall be remanded to the prison from which he was taken. (Rev., s. 1861; Code, s. 1669; 1868-9, c. 116, s. 43; C. S. 2248.)
CHAPTER 18. INTOXICATING LIQUORS

Chapter 18. Regulation of Intoxicating Liquors.

Art. 1. The Turlington Act.

Sec.
18-1. Definitions; application of article.
18-2. Manufacture, sale, etc., forbidden; construction of law; nonbeverage liquor.
18-3. Advertisements, signs, and billboards.
18-4. Advertising, etc., of utensils, etc., for use in manufacturing liquor.
18-5. Soliciting orders for liquor.
18-6. Seizure of liquor or conveyance; arrests; sale of property.
18-7. Use of seized property forbidden.
18-8. Witnesses; self crimination; immunity.
18-9. Place of sale and delivery; place of prosecution.
18-10. uniting separate offenses in indictment, etc.; bill of particulars; trial.
18-12. Summons on citizens having interest in property.
18-15. Clubrooms and other places for keeping, etc., of liquor.
18-16. Records of transportation companies; evidence.
18-17. Indictments; allegations of sale; circumstantial evidence.
18-19. Sale by druggists or pharmacists.
18-20. Grain alcohol for use in medicine or surgery; manufacture or sale of cider.
18-22. Sheriffs and police to search for and seize distilleries; confiscation; disposal of property.
18-23. Destruction of liquor at distillery; persons arrested.
18-24. Laches of officers; removal from office.
18-25. Rewards for seizure of still.
18-26. Same—in certain counties.
18-27. Officers given power to compel evidence; effect of evidence; process; immunity to witnesses.
18-28. Distilling or manufacturing liquor; first offense misdemeanor.
18-29. Misdemeanor; punishment; effect of previous punishment by federal court.
18-30. Laws repealed; local laws.

Art. 2. Miscellaneous Regulations.

18-31. Unlawful sale through agents.
18-32. Keeping liquor for sale; evidence.
18-33. Unlawful to handle draft connected with receipt for liquor.
18-34. Allowing distillery to be operated on land.
18-35. Federal license as evidence.

Art. 3. Alcoholic Beverage Control Act of 1937.

18-36. Purposes of article.
18-37. State board of alcoholic control created; membership; compensation.
18-38. Members of board appointed by governor; terms of office.

Sec.
18-40. Removal of member by governor; vacancy appointments.
18-41. County boards of alcoholic control.
18-42. Compensation for members of county boards.
18-43. Persons disqualified for membership on boards.
18-44. Bonds required of members of county boards.
18-45. Powers and duties of county boards.
18-46. No sales except during hours fixed by county boards; sales to minors, habitual drunkards, etc.; discretion of managers and employees; list of persons convicted of drunkenness, etc.; unlawful to buy for person prohibited.
18-47. Drinking upon premises prohibited; stores closed on Sundays, election days, etc.
18-48. Possession illegal if taxes not paid; punishment and forfeiture for violations; possession in container without proper stamp, prima facie evidence.
18-49. Transportation, not in excess of one gallon, authorized; transportation in course of delivery to stores.
18-50. Possession for sale and sales of illicit liquors; sales of liquors purchased from stores.
18-51. Drinking or offering drinks on premises of stores, and public roads or streets; drunkenness, etc., at athletic contests or other public places.
18-52. Advertising permitted in newspapers, magazines and periodicals.
18-54. Advertising by radio broadcasts prohibited.
18-55. Additional regulations as to advertising.
18-56. Salaries and expenses paid from proceeds of sales.
18-57. Net profits to be paid into general fund of the various counties.
18-58. Transportation into state; and purchases, other than from stores, prohibited.
18-59. Violations by member or employee of boards, cause for removal and punishable as misdemeanor.
18-60. Definition of "alcoholic beverage."
18-61. County elections as to liquor control stores; application of Turlington Act; time of elections.
18-62. Elections in counties now operating stores, not required for continued operation.

Art. 4. Beverage Control Act of 1939.

18-63. Title.
18-64. Definitions.
18-65. Regulations; statement required on container; application of other law.
18-66. Transportation.
18-68. Bottler's license.
18-69. Wholesaler's license.
18-70. Sales on railroad trains.
18-71. Salesman's license.
Art. 1. The Turlington Act.

§ 18-1. Definitions; application of article. — When used in this article—

(1) The word “liquor” or the phrase “intoxicating liquor” shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spiritual, vinous, malt or fermented liquors, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes: Provided, that the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process of which beer, ale, porter, or wine is produced, if it contains less than one-half of one per cent of alcohol by volume, and is otherwise designated than as beer, ale, or porter, and is contained and sold in, or from, sealed and labeled bottles, casks, or containers, and is made in accordance with the regulations set forth in Title II of “The Volstead Act,” an act of Congress enacted October twenty-eighth, one thousand nine hundred and nineteen, and an act supplemental to the National Prohibition Act, “H. R. 7294,” an act of Congress approved November twenty-third, one thousand nineteen, and is in conformity with valid Federal statutes on the subject where interstate regulation is concerned. State v. Hickey, 198 N. C. 45, 46, 150 S. E. 615.

Similarity to Volstead Act.—This and the following sections are, in many respects, the same as “The Volstead Act,” although more stringent. State v. Sigmon, 190 N. C. 684, 690, 130 S. E. 584.

An act by our Legislature to make the State law conform in a substantial manner to the Federal Volstead Act. See State v. Davis, 214 N. C. 787, 1 S. E. (2d) 104; State v. Carpenter, 215 N. C. 653, 3 S. E. (2d) 34.

Effect upon Existing Legislation.—This act, with certain reservations as to existing State laws, establishes the rule now prevailing on the subject of prohibition and it applies to the extent that it is inconsistent with former legislation and is in conformity with valid Federal statutes on the subject where interstate regulation is concerned. State v. Hammond, 188 N. C. 602, 125 S. E. 402.

Beverages Not Enumerated.—It may be shown in evi-
dence as a fact that other beverages than those defined by this section as intoxicating and prohibited are intoxicating in fact and come within the intent and meaning of the statute; State v. Atkinson, 110 N. C. 5, 27 S. E. 11.


§ 18-2. Manufacture, sale, etc., forbidden; construction of law; nonbeverage liquor.—No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possesses any intoxicating liquor, except as authorized in this article; and all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of the Volstead Act, act of congress enacted October twenty-eighth, one thousand nine hundred and nineteen, possession, but only as provided by Title II of the Volstead Act, act of congress enacted October twenty-eighth, one thousand nine hundred and nineteen, see §§ 18-36 to 18-62, and § 8411(b).)

"The Volstead Act," act of congress enacted October twenty-eighth, one thousand nine hundred and nineteen, and all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of the Volstead Act, act of congress enacted October twenty-eighth, one thousand nine hundred and nineteen, see §§ 18-36 to 18-62, and § 8411(b).

Constitutionality.—The State in its inherent and reserved power preserved to it by the Tenth Amendment to the Constitution, and this section, making the purchase of intoxicating liquor a crime, is in express terms prohibited in the statute, and all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of the Volstead Act, act of congress enacted October twenty-eighth, one thousand nine hundred and nineteen, see §§ 18-36 to 18-62, and § 8411(b).

State v. Knight, 188 N. C. 630, 125 S. E. 406.

Effect of Acquiring Possession Prior to Act.—Evidence tending to show that defendant had intoxicating liquor in his possession before the efficacy of this act, is not a defense under the provisions of this act for the defendant's possession a year thereafter, upon the trial for violating the prohibition law; State v. Knight, 188 N. C. 630, 125 S. E. 406.

Effect on Recovery under Compensation Act.—The mere fact that an applicant for compensation under the provisions of the Workmen's Compensation Act had in his possession intoxicating liquor is not forbidden. State v. Hammond, 188 N. C. 602, 608, 125 S. E. 402.

If a man procures another to obtain liquor for him and put it in a given place, and the other performs this agreement or acts as authorized in the possession, all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of the Volstead Act, act of congress enacted October twenty-eighth, one thousand nine hundred and nineteen, see §§ 18-36 to 18-62, and § 8411(b).

Sufficiency of Evidence.—To Convict of Transporting Liquor.—Where a car, parked with the rear to the road and with the tail light concealed by a cap but with the front lights on, and the rear of the car smelled of liquor, and empty jugs, and a funnel which smelled of liquor, were found on the premises, and they ran to the neighbors, the officers approached the car, and the officers arrested the defendant who came up after their arrival, carried him to jail, and upon return to the place found the jug and funnel gone, and the car very put together and had all gone around and came back, it was held that the facts were sufficient to justify a finding "beyond a reasonable doubt that not only defendant was transporting liquors, but he had converted and disposed of the same, and that the liquor had sold and gone back to them to get another load. He had all the implements of a blind-tiger transporting liquor. The officers caught him before he had gotten his new supply." State v. Sigmon, 190 N. C. 684, 130 S. E. 854.
§ 18-3. Advertisements, signs, and billboards.—

It shall be unlawful to advertise, anywhere or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the means, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement in charge of an attempt to commit a crime. State v. Beavers, 188 N. C. 595, 125 S. E. 258.

§ 18-4. Advertising, etc., of utensils, etc., for use in manufacturing liquor.—It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or receipt advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor. It shall be unlawful to have any liquor or property designed for the manufacture of liquor intended for use in violating this article, or which has been so used, and no property rights shall exist in any such liquor or property. (1923, c. 1, s. 4; C. S. 3411(d.).)

Possession of Property Designed for Manufacture.—An indictment charging the defendant with a violation of this section, in that he had in his possession property designed for the manufacture of intoxicating liquor is not identical with a charge of an attempt to commit a crime. State v. Jones, 198 N. C. 728, 153 S. E. 410.

"Designated."—In the interpretation of this section making it unlawful to possess property "designated" for use in the unlawful manufacture of intoxicating liquor, the word "designated" is construed to mean "designed," and so used it is held in this case that evidence of the defendant's guilt of possessing parts of a still designed and intended for the purpose of manufacturing intoxicating liquor was sufficient to be submitted to the jury and to sustain their verdict of guilty, and the fact that the parts had not been assembled into a still is immaterial under the language of the statute. State v. Jones, 198 N. C. 728, 153 S. E. 410.

§ 18-5. Soliciting orders for liquor.—No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this article. (1923, c. 1, s. 5; C. S. 3411(e.).)

§ 18-6. Seizure of liquor or conveyance; arrests; sale of property.—When any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquor in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquor transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this article. He shall charge any property seized, and the seizure thereof being made in accordance with the provisions of the statute. He shall take possession of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, sale, for said purpose, as being bona fide and as wise at said hearing or in other proceeding brought against the person arrested under the provisions of this article, or which are established, by intervention or otherwise, as being bona fide and as wise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used for illegal transportation of liquor, and shall pay the balance of the proceeds to the treasurer.
or the proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property, or, if no one shall be found claiming the same, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the treasurer or proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county: Provided, that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage. (1923, c. 1, s. 6; C. S. 3411(f).)

Cross References.—As to disposal of tax-paid liquor that has been seized, see § 18-13. As to fines to be paid into the fund of the county. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property, or, if no one shall be found claiming the same, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the treasurer or proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county: Provided, that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage. (1923, c. 1, s. 6; C. S. 3411(f).)

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Cross References.—As to disposal of tax-paid liquor that has been seized, see § 18-13. As to fines to be paid into the fund of the county. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property, or, if no one shall be found claiming the same, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the treasurer or proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county: Provided, that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage. (1923, c. 1, s. 6; C. S. 3411(f).)
It shall be the duty of the officer seizing said automobile or other personal property to store same in a safe and suitable place, until final disposition is ordered. Any officer or officers violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars or imprisoned not to exceed thirty days. (1927, c. 18.)

§ 18-8. Witnesses; self crimination; immunity.
—No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpoena of any court in any suit or proceeding based upon or growing out of any alleged violation of this article, but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence; but no person shall be exempt from prosecution and punishment for perjury committed in so testifying. (1923, c. 1, s. 7; C. S. 3411(g).)

Cross References.—As to general rule of evidence that defendant in criminal action is competent but not compelled to testify, see § 8-54. As to perjury, see § 14-209 et seq.

Validity.—Former statute held valid. State v. Randall, 170 N. C. 252, 87 S. E. 327.

Immunity Must Be Claimed Under Section.—The immunity from punishment of an offender against our prohibition law when testifying against others charged with the same offense, must be claimed by him under the provisions of this section which superseded C. S. sec. 3406, so as to make our statute conform to the Federal Act, whereunder no discovery made by such person shall be used against him and he shall be altogether pardoned for the offense done or participated in by him. State v. Luquire, 191 N. C. 479, 132 S. E. 162.

Voluntary Testimony of Offender.—The evidence in criminal prosecutions that may not be received from the offender, is such as is compulsory, and does not apply to one volunteering his testimony and willingly giving it. State v. Luquire, 191 N. C. 479, 132 S. E. 162.

Savings Waiver.—An offender against the criminal law relating to prohibition may waive his constitutional right not to give evidence that would tend to incriminate himself and be bound thereby so to do. State v. Luquire, 191 N. C. 479, 132 S. E. 162.

Testimony at Former Trial.—Where a witness on a former trial for violating the prohibition law against the manufacture, sale, barter, exchange, or delivery of intoxicating liquor, testifies, as to matters which may tend to incriminate him, claiming no exemption or immunity when called upon to testify, it is competent for witnesses to testify thereto at the second trial, who were present and heard the testimony at the former one, the testimony not coming within the terms of this section. State v. Burnett, 184 N. C. 785, 115 S. E. 57.

§ 18-9. Place of sale and delivery; place of prosecution.—In case of a sale of liquor where the delivery thereof was made by a common or other carrier, the sale and delivery shall be deemed to be made in the county wherein the delivery was made by such carrier or the consignee, his agent or employee, or in the county wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in either county. (1923, c. 1, s. 8; C. S. 3411(h).)

§ 18-10. Uniting separate offenses in indictment, etc.; bill of particulars; trial.—In any affidavit, information, warrant, or indictment for the violation of this article, separate offenses may be united in separate counts, and the defendant may be tried on all at one trial, and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, warrant, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful; but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so. (1923, c. 1, s. 9; C. S. 3411(i).)

§ 18-11. Possession prima facie evidence of keeping for sale.—The possession of liquor by any person not legally permitted under this article to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this article. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his bona fide guests when entertained by him therein. (1923, c. 1, s. 10; C. S. 3411(j).)

Editor's Note.—For a discussion of the wisdom of permitting proof of possession to raise a presumption of unlawfulness for gain, see § 5 N. C. Law Rev. 200.

Liberal Construction.—This section is to be liberally construed to prevent the use of liquor as a beverage; and the provisions of this section do not apply to one voluntarily entering the violation of the law, but the possession thereof for the personal consumption of the owner and bona fide guests, etc., is allowed. State v. Hampton, 188 N. C. 602, 125 S. E. 402.

Section Limited to Private Dwelling Used Exclusively as a Dwelling.—The provision of this section that a person may legally possess intoxicating liquor in his dwelling for his personal consumption is limited by its terms to a private dwelling occupied and used exclusively as a dwelling, and a person may not lawfully possess intoxicating liquor in a building or structure used and operated by such person as a filling station and dwelling combined when the parts of the structure used for the respective purposes are connected. State v. Hardy, 209 N. C. 83, 182 S. E. 431.

The provisions of this section prohibiting the possession of intoxicating liquor for personal use applies only to possession in a structure used exclusively as a dwelling, and therefore defendants' possession in the structure used as a dwelling and store house was illegal. State v. Carpenter, 215 N. C. 635, 3 S. E. (2d) 34.

Possession as Evidence of Sale.—If one had possession of liquor as disclosed by this record it was prima facie evidence that he had it for sale. If not in his private dwelling, if he had actual constructive possession, whether for sale or not, it is a violation of law. State v. Pierce, 192 N. C. 766, 135 S. E. 121; State v. McAllister, 187 N. C. 409, 125 S. E. 739; State v. Kennebrew, 188 N. C. 630, 125 S. E. 406.

But the prima facie case so established may be rebutted by showing that possession was lawful under the statutory qualifications, that the structure was an extension of the dwelling for the respective purposes. State v. Anthony, 209 N. C. 83, 182 S. E. 431.

However, the mere possession unrebutted is sufficient to carry the issues in the jury. State v. Hampton, 188 N. C. 602, 125 S. E. 402.

Prima Facie Evidence Applies to Possession in Private Dwelling.—The prima facie evidence arising out of the possession of liquor is possession in a private dwelling or elsewhere. State v. Dowell, 195 N. C. 525, 143 S. E. 131.

Keeping In Bottles.—As shown in this section one is not allowed "to manufacture, sell, barter, etc., or possess intoxicating liquors," except as herefore explained and modified, but if received only in one's home (without violation of the law as specified and prohibited in the statute), and is kept there only for the consumption of the owner and his family and the bona fide guests entertained by him, this constitutes no breach of the present statute, though received
§ 18-12

CH. 18. INTOXICATING LIQUORS

§ 18-13

search warrant; disposal of liquor seized.—Upon the filing of a complaint under oath by a reputable citizen or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by the law to issue warrants, that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information; and if such liquor be found in any such place or places, to seize and take into his custody all such liquor, and to seize and take into his custody all glasses, bottles, jugs, pumps, bars, or other equipment used in the business of selling intoxicating liquor which may be found at such place or places, and to keep the same subject to the order of the court. The complaint or information shall describe the place or places to be searched with sufficient particularity to identify the same, and shall describe the intoxicating liquor or other property alleged to be used in carrying on the business of selling intoxicating liquor as particularly as practicable, and any description, however general, that will enable the officer executing the warrant to identify the property seized shall be deemed sufficient. All liquor seized under this section shall be held and shall upon the acquittal of the person so charged be returned to the established owner, and shall not be subject to conviction or default of appearance of such person be destroyed: Provided that any tax-paid liquor so seized shall within ten days be turned over to the board of county commissioners, which shall within ninety days from the receipt thereof turn it over to hospitals for medicinal purposes, or sell it to legalized alcoholic beverage control stores within the state of North Carolina, the proceeds of such sale being placed in the school fund of the county in which such seizure was made, or destroy it. (1923, c. 1, s. 12; 1930, c. 12; 1941, c. 310; C. S. 3411(l).)

§ 18-14. Grand jury, witnesses before; effect of evidence.—When the solicitor of any judicial district has good reason to believe that liquor has been manufactured or sold contrary to law within a county in his district, and believes that any person has knowledge of the existence and establishment of any illicit distillery, or that any person has sold liquor illegally, then it is lawful for the solicitor to apply to the clerk of the superior court of the county wherein the offense is supposed to have been committed to issue a subpoena for the person so having knowledge of said offense to appear before the next grand jury drawn for the county, there to testify upon oath what he may know concerning the existence, establishment, and personal description of the keepers thereof, or persons who have sold intoxicating liquor contrary to law, who shall give the names and personal description of the keepers thereof, and of any person who has sold liquor unlawfully; and such evidence, when so obtained, shall be considered and held in law as an information on oath upon which the grand jury shall make presentment, as provided by law in other cases. If any officer shall fail or refuse to use due diligence in the execution of the provisions of this section he shall be guilty of laches in office, and such failure be cause for removal from office. (1923, c. 1, s. 13; C. S. 3411(m).)

§ 18-15. Clubrooms and other places for keeping, etc., of liquor.—No corporation, club, association, or person shall directly or indirectly keep or maintain, alone or by association with others, or by any other means, or shall in any manner aid, assist, or abet others in keeping or maintaining a clubroom or other place where intoxicating liquor is received, kept, or stored for barter, sale, exchange, distribution, or division
among the members of any such club or association or aggregation of persons, or to or among any other persons by any means whatever, or shall act as agents in ordering, procuring, buying, storing, or keeping intoxicating liquor for any such purpose. (1923, c. 1, s. 14; C. S. 3411(n).)

§ 18-16. Records of transportation companies; evidence.—All express companies, railroad companies, or other transportation companies doing business in this state are required therefore to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom liquor is shipped, the amount and kind received, and the date when received, the date when delivered, by whom delivered, and to whom delivered, after which record shall be a blank space, in which the consignee shall be required to sign his name, or, if he cannot write, shall make his mark in the presence of a witness, before such liquor is delivered to such consignee, and which book shall be open for inspection to any officer or citizen of the state, county, or municipality any time during business hours of the company, and such book shall constitute prima facie evidence of the facts therein and will be admissible in any of the courts of this state. Any express company, railroad company, or other transportation company, or any employee or agent of any express company, railroad company, or other transportation company violating the provisions of this section shall be guilty of a misdemeanor. (1923, c. 1, s. 15; C. S. 3411(o).)

Editor's Note.—See State v. R. Co., 169 N. C. 295, 84 S. E. 283.

§ 18-17. Indictments; allegations of sale; circumstantial evidence.—In indictments for violating any provisions of this article it shall not be necessary to allege a sale to a particular person, and the violation of law may be proved by circumstantial evidence as well as by direct evidence. (1923, c. 1, s. 16; C. S. 3411(p).)

Editor's Note.—The cases which follow were decided under a similar section, C. S. § 3383, which has been superseded by this section.

Evidence.—Sale to Unknown Persons.—To convict under an indictment of sale of intoxicating liquors "to some person to the jurors unknown," it is as necessary to offer evidence of an actual sale to the unknown person as if his name had been inserted in the indictment. State v. Watkins, 164 N. C. 425, 79 S. E. 619.

Same—Other Sales.—The rule of evidence that one illegal sale of intoxicating liquors should not be received as evidence that another such sale had been made, applies where the sales are entirely separated and distinct transactions, the one having no fair or reasonable tendency to establish the other, but inapplicable when it tends to show that the defendant, accused of violating the prohibition law at a certain city number, with evidence tending to show such violation there, kept the spirituous liquor elsewhere for some other purpose of making illegal sales. State v. Boynton, 155 N. C. 456, 71 S. E. 341.

Same—Liquors on Hand.—Upon trial on indictment for the sale of intoxicating liquors at a certain city number, testimony that the accused had and kept liquors on hand in other portions of the city is a relevant circumstance tending to show that he had it on hand and was prepared and equipped to make the illegal sale charged in the bill of indictment, when it is not shown that any corruption of witnesses or other misconduct on the part of the prosecution was intended to destroy the evidence tending to show that he had sold such liquor at the place charged in the indictment. State v. Boynton, 155 N. C. 456, 71 S. E. 341.

Upon indictment for violating the prohibition law, the possession of liquors by the accused, at the time of the offense charged, is always a circumstance admissible against him, and in general the circumstances under which liquors are kept, and even that they are kept at other places or in other rooms, may be shown. Id.
§ 18-21. Wine for sacramental purposes.—It is lawful for any ordained minister of the gospel who is in charge of a church and at the head of a congregation in this state to receive in the course of ninety consecutive days a quantity of vinous liquor not greater than five gallons, for use in sacramental purposes only, and it shall be lawful for him to receive same in one or more packages or one or more receptacles. (1923, c. 1, s. 20; 1933, c. 114; C. S. 3411(i).)

Editor’s Note.—By the amendment of 1935 the quantity which could be received was increased from three to five gallons.

§ 18-22. Sheriffs and police to search for and seize distilleries; confiscation; disposal of property.—It is the duty of the sheriff of each county in the state and of the police of each incorporated town or city in the state to search for and seize any distillery or apparatus used for the manufacture of intoxicating liquor in violation of the laws of North Carolina, and to deliver same, with any materials used for making such liquor found on the premises, to the board of county commissioners, who shall confiscate the same and shall cause the distillery to be cut up and destroyed, in their presence or in the presence of a delegate of a committee of the board, and who may dispose of the material, including the copper or other material from the destroyed still or apparatus, in such manner as they may deem proper. (1923, c. 1, s. 21; C. S. 3411(u).)

§ 18-23. Destruction of liquor at distillery; persons arrested.—It is the duty of the sheriff and other officers mentioned in § 18-22 to seize and then destroy any and all liquor which may be found at any distillery for the manufacture of intoxicating liquor, and to arrest and hold for trial all persons found on the premises engaged in distilling or aiding or abetting in the manufacture or sale of intoxicating liquor. (1923, c. 1, s. 22; C. S. 3411(v).)

§ 18-24. Laches of officers; removal from office.—If any officer mentioned in §§ 18-22, 18-23, shall fail or refuse to use diligence in the execution of the provisions of such sections, after being informed of violation thereof, he shall be guilty of laches in office, and such failure shall be cause for removal therefrom. (1923, c. 1, s. 23; C. S. 3411(w).)

Cross Reference.—As to removal of officers, see § 126-16.

§ 18-25. Rewards for seizure of still.—For every distillery seized under this article the sheriff or other police officer shall receive such sum as the board of county commissioners of the county in which the seizure was made shall, in the discretion of such board, allow, which sum shall not be less than five dollars nor more than twenty dollars: Provided, that the commissioners shall not pay any amount if they are satisfied, after due investigation, that the seizure of the distillery was not bona fide made: Provided further, that when the sheriff of a county captures a distillery he shall receive the fee for his own use, regardless of whether he be on fees or salary. (1923, c. 1, s. 24; C. S. 3411(x).)

Local Modification.—Sheriffs’ fees for seizure of stills were prior to 1923 regulated by C. S. 3401, 3402, § 18-25, part of the Burlington Act, would seem to supersede C. S. 3401, 3402, since it sets a different fee, and 1933, c. 480 specifically repealed C. S. 3401, 3402, except in three counties. However, many local laws have been passed to reference to C. S. 3401, as well as to §§18-25 and 18-26. Citations to all of these laws which have been discovered are listed here, not as a statement of the present status of the law in any county, but merely as an aid in tracing down the fees in the counties named. These citations are: Alamance, Avery, Caswell, Chowan, Graham, Greene, Jackson, Northampton, Surry, Wilson, Yadkin: C. S. 3401, 3402; Anson: 1937, c. 442; Burke: 1933, c. 136; Haywood, Lincoln, Pitt, Transylvania: C. S. 3909; Ex. Sess. 1908, c. 97; Pub. Loc. 1919, c. 30; Lenoir: 1933, c. 246; Moore: 1933, c. 246; 1933, c. 253; Nash: 1923, c. 91; Union: 1933, c. 121; Union: Pub. Loc. 1933, c. 160; Warren: 1923, c. 230.

§ 18-26. Same.—In certain counties.—The Board of Commissioners of the several counties in the State, hereinafter named, shall pay by way of reward to the sheriff or other officers in the various counties for the capture and destruction of stills used in the manufacture of spirited liquors, the sum of twenty dollars ($20.00) and no more, upon the production of a certificate from the Clerk of the Superior Court or other court having final jurisdiction, that one or more operators of the still captured and destroyed were by the sheriff or other officer apprehended, captured and have been convicted and that no appeal has been taken from the judgment rendered, which said twenty dollars ($20.00) shall be in lieu of any and all other rewards authorized by law to be paid for the capture and destruction of stills to the sheriff or other officers in the counties hereinafter named.

This section shall apply to the following counties only: Alleghany, Ashe, Avery, Bladen, Buncombe, Caswell, Catawba, Chowan, Craven, Duplin, Forsyth, Dare, Hyde, Hoke, Lee, Lenoir, Lincoln, Mecklenburg, New Hanover, Onslow, Pamlico, Pender, Perquimans, Richmond, Rockingham, Sampson, Vance, Wake, Washington, Watauga, Wilkes, Wilson and Yancey. (1937, c. 42; Pub. Loc. 1933, c. 160.)

§ 18-27. Officers given power to compel evidence; effect of evidence; process; immunity to witnesses.—When any justice of the peace, magistrate, recorder, mayor of a town, or judge of the superior courts or supreme court shall have good reason to believe that any person within his jurisdiction has knowledge of the unlawful sale of liquor or the existence and establishment of any place where intoxicating liquor is sold or manufactured contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice of the peace, magistrate, recorder, mayor, or judge to issue to the sheriff of the town or within his jurisdiction, such person having final jurisdiction, that one or more operators of the still captured and destroyed were by the sheriff or other officer apprehended, captured, and have been convicted and that no appeal has been taken from the judgment rendered, which said twenty dollars ($20.00) shall be in lieu of any and all other rewards authorized by law to be paid for the capture and destruction of stills to the sheriff or other officers in the counties hereinafter named.

This section shall apply to the following counties only: Alleghany, Ashe, Avery, Bladen, Buncombe, Caswell, Catawba, Chowan, Craven, Duplin, Forsyth, Dare, Hyde, Hoke, Lee, Lenoir, Lincoln, Mecklenburg, New Hanover, Onslow, Pamlico, Pender, Perquimans, Richmond, Rockingham, Sampson, Vance, Wake, Washington, Watauga, Wilkes, Wilson and Yancey. (1937, c. 42; Pub. Loc. 1933, c. 160.)
§ 18-28. Distilling or manufacturing liquor; first offense misdemeanor.—It is unlawful for any person to distill, manufacture, or in any manner make, or for any person to aid, assist, or abet any such person in distilling, manufacturing, or in any manner making any spiritual or malt liquors or intoxicating bitters within the state of North Carolina. Any person or persons violating the provisions of this section shall, for the first conviction, be guilty of a misdemeanor and, upon conviction or confession of guilt, punished, in the discretion of the court; for the second or any subsequent conviction, said person or persons shall be guilty of a felony, and upon conviction or confession in open court shall be imprisoned in the state prison for not less than two years and not exceeding five years, in the discretion of the court. (1923, c. 1, s. 26; C. S. 3411(z).)

Process of Manufacturing Need Not Be Complete.—It is not necessary for a conviction under the provisions of Public Laws 1917, chap. 157, similar to those of this section, making the distilling or manufacturing, etc., of spirituous or malt liquors or intoxicating bitters within the state unlawful, including within its express terms those who aid, assist, or abet therein, that the liquor should have been actually manufactured or the product finished; and where there is evidence tending to show that such manufacture had been in progress, but had been suspended by the arrest of the prisoner, and that he was aiding or assisting therein, it is sufficient to be submitted to the jury as prima facie evidence of the offense charged. State v. Horner, 174 N. C. 788, 94 S. E. 291.

When Question for Jury.—Where there is evidence of defendant's guilty knowledge in aiding in the distilling or manufacturing of intoxicating liquor prohibited by Public Laws 1917, chap. 157, similar to this section, by hauling it away, and also consistent with his innocence in merely hauling away the remnants after the illegal purpose had been accomplished or frustrated, without intention of taking part or aiding in its manufacture, the question of his guilt or innocence is one for the jury, under proper instructions. State v. Horner, 174 N. C. 788, 94 S. E. 291.

Second Degree.—Upon a charge in an indictment for manufacturing liquor, etc., the defendant may be convicted of the second degree of the offense—i. e., aiding or abetting its manufacture. State v. Horner, 174 N. C. 788, 94 S. E. 291.

Accessories Equally Guilty.—The defendant, guilty of aiding and abetting the unlawful manufacture of liquor, is equally guilty with those who actually operated the still. State v. Clark, 183 N. C. 733, 110 S. E. 641.

The appellant, convicted on his trial of aiding or abetting in the manufacture of whiskey on an illicit still, upon a new trial, may claim as a ground of complaint, that he was tried on another count of the same bill for the unlawful manufacture of liquor and acquitted, there being sufficient evidence to sustain a conviction on each one. State v. Smith, 183 N. C. 733, 110 S. E. 641.

Presumption Regarding Previous Conviction.—The first conviction of manufacturing or aiding and abetting in the manufacture of spirituous, malt, or intoxicating liquors is a misdemeanor, and the second is a felony; and where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. State v. Clark, 183 N. C. 733, 110 S. E. 641.

Irrelevant Testimony.—The rejection of evidence as to the unlawful manufacture of liquor, etc., had raised on his farm that year, is of irrelevant testimony, and its exclusion not erroneous. State v. Smith, 183 N. C. 725, 110 S. E. 654.


Indictment.—The second offense of manufacturing spirituous liquor is a felony and a person may be tried on a charge of manufacturing spirituous liquor for the second offense only upon indictment, since the offense is a felony. State v. Sanderson, 213 N. C. 381, 196 S. E. 334.


§ 18-29. Misdemeanor; punishment; effect of previous punishment by federal court.—Any person violating any of the provisions of this article, except as otherwise specified in this article, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court: Provided, that no person shall be punished who has been previously punished for the same offense by a federal court. (1923, c. 1, s. 27; C. S. 3411(aa).

§ 18-30. Laws repealed; local laws.—All laws in conflict with this article are hereby repealed, but nothing in this article shall operate to repeal any of the local acts of the general assembly of North Carolina prohibiting the manufacture or sale or other disposition of any liquor mentioned in this article, or any laws for the enforcement of the same, but all such acts shall continue in full force and effect and in concurrence herewith, and indictment or prosecution may be had either under this article or under any local act relating to the same subject. (1923, c. 1, s. 28; C. S. 3411(bb.).)


Art. 2. Miscellaneous Regulations.

§ 18-31. Unlawful sale through agents.—If any person unlawfully and illegally procures and delivers any spirituous or malt liquors to another, he shall be deemed and held in law to be the agent of the person selling said spirituous and malt liquors, and shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (Rev., ss. 3526, 3534; 1905, c. 498, ss. 6, 7, 8; C. S. 3371.)

What Constitutes One an Agent.—Revial, section 3354, now this section, making it unlawful for any one to procure for and deliver spirituous liquors to another, and making such person, in law, the agent of the seller, and punishable, though its meaning is not plain, makes the one procuring liquor by purchase from an illicit dealer, and delivering it to another, the agent of the seller, and subjects him to the punishment prescribed therein, as a principal in the misdemeanor. State v. Burchfeld, 149 N. C. 537, 63 S. E. 89.

If one buys whisky for another from an illicit dealer in prohibited territory, without being interested in the sale otherwise than as an agent of the purchaser, to whom he delivers it, and pays the money to the seller for the buyer, it is a wrongful procuring of the whisky for another, without making him the agent of the seller, or subjecting him to the punishment prescribed therein, as a principal in the misdemeanor. State v. Burchfeld, 149 N. C. 537, 63 S. E.

§ 18-32. Keeping liquor for sale; evidence.—It is unlawful for any person, firm, association or corporation, by whatever name called, to have or keep in possession, for the purpose of sale, except as otherwise authorized by law, any spirituous, vinous or malt liquors, and proof of any one of the following facts shall constitute prima facie evidence of the violation of this section:

1. The possession of a license from the govern-
ment of the United States to sell or manufacture intoxicating liquors; or

2. The possession of more than one gallon of spirituous liquors at any one time, whether in one or more places; or

3. The possession of more than three gallons of vinous liquors at any one time, whether in one or more places; or

4. The possession of more than five gallons of malt liquors at any one time, whether in one or more places; or

5. The delivery to such person, firm, association or corporation of more than five gallons of spirituous or vinous liquors, or more than twenty gallons of malt liquors within any four successive weeks, whether in one or more places; or

6. The possession of intoxicating liquors as samples to obtain orders thereon: Provided, That this section shall not prohibit any person from keeping in his possession wines and ciders in any quantity where such wines and ciders have been manufactured from grapes or fruit grown on the premises of the person in whose possession such wines and ciders may be. (1913, c. 44, s. 2; 1915, c. 97, s. 8; C. S. 3317.)

Editor's Note.—See 13 N. C. Law Rev. 115.

Constitutionality.—The section is constitutional and valid. State v. Randall, 170 N. C. 757, 87 S. E. 227; State v. Langley, 209 N. C. 178, 183 S. E. 536.

The burden of proof remains continually upon the State to establish the accusation which it makes, as prima facie evidence does not change or shift the burden. State v. Jones, 209 N. C. 49, 182 S. E. 699.

"Prima Facie" Defined.—The words "prima facie evidence" are defined in Webster's International Dictionary as meaning "evidence sufficient to raise a presumption of fact or establish the fact in question, unless rebutted." It must presume that the Legislature had such meaning in mind when such words were used in the statute. State v. Russell, 164 N. C. 482, 490, 80 S. E. 66.

Effect of the Presumption.—This (prima facie evidence) neither conclusively determines the guilt or innocence of the party accused nor withdraws from the jury the right and duty of passing upon and deciding the issue to be tried. The burden of proof remains continually upon the State to establish the accusation which it makes, as prima facie evidence does not change or shift the burden. State v. Russell, 164 N. C. 482, 487, 80 S. E. 66.

Same—Sufficient to Sustain Verdict.—While the prima facie case, unexplained, is sufficient to sustain a verdict of guilty, yet the defendant is not required to show, by the greater weight of evidence, that the whiskey was in his possession for lawful purposes, for such, in effect, would relieve the State of the burden of the issue, which is placed upon it. State v. Wilkerson, 164 N. C. 431, 79 S. E. 898.


Burden of Proof.—The possession of the specified quantity of spirituous liquors sufficient to make out prima facie evidence of an unlawful purpose is only sufficient to sustain a verdict of guilty, and does not shift the burden upon the defendant to prove his innocence, but it does place the burden of the issue upon him. State v. Wilkerson, 164 N. C. 431, 79 S. E. 898.

U. S. Government License as Defense.—For cases under the aforesaid provision has made prima facie evidence of guilt, and the defendant has not introduced evidence, an instruction to the jury placing the burden on the defendant to establish his innocence is reversible error. State v. Helms, 181 N. C. 556, 107 S. E. 228.

Where the possession of the specified quantities of intoxicating liquors is made unlawful by a statutory provision, it is not necessary to charge in the instructions to the jury the statutory provision, but it is sufficient to charge the elements of unlawful possession sufficient to support a conviction; and the burden of showing that such evidence did not apply to the case is upon the defendant. State v. Armitage, 186 N. C. 585, 190 S. E. 1002; State v. Boynton, 155 N. C. 456, 71 S. E. 341.

Possession Means Actual or Constructive.—This section making the possession of certain specified quantities of spirituous, vinous, or malt liquors "prima facie evidence of..."
money is attached a bill of lading, or order, or receipt for intoxicating liquors, or which draft is enclosed with, connected with, or in any way related to, directly or indirectly, any bill of lading, order, or receipt for intoxicating liquors. Provided, this section shall not apply to such instruments issued in connection with the sale or purchase of intoxicating liquors when such sale or purchase is not prohibited by the laws of this state. (1913, c. 44, s. 4; C. S. 3381.)

Cross Reference.—As to bills of lading generally, see § 214, et seq.

§ 18-34. Allowing distillery to be operated on land.—If any person shall knowingly permit or allow any distillery or other apparatus for the making or distilling of spirits to be set up for operation or to be operated on lands in his possession or control, he shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (Rev., s. 3533; 1905, c. 498, s. 2; C. S. 3407.)


§ 18-33. Federal license as evidence.—The possession of a license or the issuance to any person of a license to manufacture, rectify or sell, at wholesale or retail, spirituous liquors by the United States government or any officer thereof in any county, city or town where the manufacture, sale or rectification of spirituous liquors is forbidden by the laws of this state shall be prima facie evidence that the person having such license, or to whom the same was issued, is guilty of doing the act permitted by such license in violation of the laws of this state. On the trial of any person charged with the violation of any such laws, it shall be competent to prove that such a license is in the possession of or has been issued to such person, by the testimony of any witness who has personally examined the records of the government office where the official record of such licenses is kept. (Rev., s. 2060; 1905, c. 339, s. 5; 1907, c. 931; C. S. 3408.)

Cross Reference.—As to federal license as prima facie evidence of keeping liquor for sale, see § 18-32.

Art. 3. Alcoholic Beverage Control Act of 1937.

§ 18-36. Purposes of article.—The purpose and intent of this article is to establish a system of control over the sale of certain alcoholic beverages in North Carolina, and to provide the administrative features of the same, in such a manner as to insure, as far as possible, the proper administration of the sale of certain alcoholic beverages under a uniform system throughout the state. (1937, c. 49, s. 1.)

The Alcoholic Beverage Control Acts do not repeal the provisions of the Turlington Act in regard to the possession and transportation of intoxicating liquors except in so far as the control acts are inconsistent with the Turlington Act. State v. Carpenter, 215 N. C. 633, 3 S. E. (2d) 34.

Applies in State v. Davis, 214 N. C. 787, 199 S. E. 927.


§ 18-37. State board of alcoholic control created; membership; compensation.—A state board of alcoholic control is hereby created, to consist of a chairman and two associate members. The members of said board shall be men well known for their character and ability and business acumen and success. The chairman of said board shall devote his whole time to his official duties and shall receive a salary of six thousand ($6,000.00) dollars per annum, payable monthly, together with necessary traveling expenses, and the two associate members of said board shall receive for the time actually engaged in their official duties, seven dollars ($7.00) per day and necessary traveling expenses. (1937, c. 49, s. 2; c. 411; 1939, c. 185, s. 5; 1941, c. 107, s. 5.)

§ 18-38. Members of board appointed by governor; terms of office.—The members of said state board shall be appointed by the governor, and the first appointees shall serve as follows:

The chairman shall serve for a period of three years from the date of his appointment and one associate member shall serve for a period of two years from the date of his appointment and the other associate member shall serve for a period of one year from the date of his appointment, and the subsequent appointments of all of the members of the said board shall be for a term of three years from the date of each appointment. (1937, c. 49, s. 3.)

§ 18-39. Powers and authority of board.—Said state board of alcoholic control shall have power and authority as follows, to wit:

(a) To see that all the laws relating to the sale and control of alcoholic beverages are observed and performed.

(b) To audit and examine the accounts, records, books and papers relating to the operation of county stores herein provided for, or to have the same audited.

(c) To approve or disapprove the prices at which the several county stores may sell alcoholic beverages and it shall be the duty of said board to require the store or stores in the several counties coming under the provisions of this article to fix and maintain uniform prices and to require sales to be made at such prices as shall promote temperate use of such beverages and as may facilitate policing.

(d) To remove any member, or members, of county boards whenever in the opinion of the state board, such member, or members, of the county board, or boards, may be unfit to serve thereon.

(e) To test any and all alcoholic beverages which may be sold, or proposed to be sold to the county stores, and to install and operate such apparatus, laboratories, or other means or instrumentalities, and employ to operate the same such experts, technicians, employees and laborers, as may be necessary to operate the same, in accordance with the opinion of the said board. In lieu of establishing and operating laboratories as above directed, the board may, with the approval of the governor and the commissioner of agriculture, arrange with the state chemist to furnish such information and advice, and to perform such analyses and other laboratory services as the board may consider necessary, or may, if they deem advisable, cause such tests to be made otherwise.

(f) To supervise purchasing by the county boards when said state board is of the opinion that it is advisable for it to exercise such power in order to carry into effect the purpose and intent of this article, with full power to disapprove any such purchase and at all times shall have the right to inspect all invoices, papers, books and
records in the county stores or boards relating to purchases.

(g) To exercise the power to approve or disapprove in its discretion all regulations adopted by the several county stores for the operation of said stores and the enforcement of alcoholic beverage control laws which may be in violation of the terms or spirit of this article.

(h) To require that a sufficient amount shall be so allocated as to insure adequate enforcement and the amount shall, in no instance, be less than five per cent, nor more than ten per cent of the net profits arising from the sale of alcoholic beverages.

(i) To remove in case of violation of the terms or spirit of this article, officers employed, elected or appointed in the several counties where county stores may be operated.

(j) To approve or disapprove, in its discretion, the opening of county stores, except each county that may be entitled to operate stores for the sale of alcoholic beverages shall be entitled to operate at least one store for such purpose, at the county seat therein, or at such other place as may be selected by the said county board, provided that in the location of control stores in any county in which a majority of the votes have been cast for liquor control stores due consideration shall be given to communities or towns in which a majority of the votes were cast against control, but nothing herein contained shall be construed so as to abridge any of the provisions elsewhere contained relative to the opening, closing or locating such stores. As to all additional stores in each of said counties the same shall not be opened until and unless the opening of the same and the place of location thereof shall first be approved by the said state board, which at any time may withdraw its approval of the operation of any additional county store when the said store is not operated efficiently and in accordance with the alcoholic beverage control laws and all valid regulations prescribed therefor, or whenever, in the opinion of the said state board, the operation of any county store shall be inimical to the morals or welfare of the community in which it is operated or for such other cause, or causes, as may appear to said state board sufficient to warrant the closing of any county store.

(k) To require the use of a uniform accounting system in the operation of all county stores hereunder and to provide in said system for the keeping therein and the record of all such information as may, in the opinion of the said state board, be necessary or useful in its auditing of the affairs of the said county stores, as well as in the study of such problems and subjects as may be studied by said state board in the performance of its duties.

(l) To grant, to refuse to grant, or to revoke, permits for any person, firm or corporation to do business in North Carolina in selling alcoholic beverages to or for the use of any county store and to provide and to require that such information be furnished by such person, firm or corporation as a condition precedent to the granting of such permit, or permits, and to require the furnishing of such data and information as it may desire during the life of such permit, or permits, and for the purpose of determining whether such permit, or permits, shall be continued, revoked or re-granted after expiration dates. No permit, however, shall be granted by said state board, to any person, firm or corporation when the said state board has reason sufficient unto itself to believe that such person, firm or corporation has furnished to it any false or inaccurate information or is not fully, frankly and honestly cooperating with the said state board and the several county boards in the observance and performance of all alcoholic beverage laws which may now or hereafter be in force in this state, or whenever the said board shall be of opinion that such permit ought not to be granted or continued for any cause.

(m) The said state board shall have all other powers which may be reasonably implied from the granting of express powers herein named, together with such other powers as may be incidental to, or convenient for, the carrying out and performance of the powers and duties herein given to said board.

(n) To permit the establishment of warehouses for the storage of alcoholic beverages within the state, the storage of alcoholic beverages in warehouses already established, and to prescribe rules and regulations for the storage of such beverages and the withdrawal of the same therefrom. Such warehousing or bailing of alcoholic beverages as may be made hereunder shall be for the convenience of delivery to alcoholic boards of control authorized to purchase the same and shall be under the strict supervision and subject to all of the rules and regulations of the state board of control relating thereto.

Editor's Note.—This section would seem to authorize the making of necessary rules and regulations to carry out the provisions of the act. 15 N. C. Law Rev. 323.

Under this section the state board is given power to grant, deny or revoke permits for the sale of alcoholic beverages to county liquor stores. This seems to be a very flexible provision to secure an honest co-operation by those who sell alcoholic beverages with the state board and the several county boards. There are no provisions for notice or hearing or appeal and it is likely that no such provisions are needed in view of the fact that state agencies are engaged in the purchase of goods and may do so on their own terms. 15 N. C. Law Rev. 328.

§ 18-40. Removal of member by governor; vacancy appointments.—The governor shall at all times have full power and authority to remove any and all members of the said state board, upon notice to such member or members, in his discretion, for any cause that appears to him to be sufficient, and to reappoint his successor or successors to the removed members, observing, however, the terms of office of each of them, as herein set forth, and whenever a vacancy shall occur for any cause then the appointment to fill such vacancy shall be for the unexpired portion of the term of the predecessor of each appointee. (1937, c. 49, s. 4, cc. 237, 411.)

§ 18-41. County boards of alcoholic control.

In each county which may be permitted to engage in the sale of alcoholic beverages, there is hereby created a county board of alcoholic control, to consist of a chairman and two other members. The members of said board shall be well known for their character, ability and business acumen. The members of said board shall be selected in each respective county in a joint meeting of the
board of county commissioners, the county board of health and the county board of education, and each member present shall have only one vote, notwithstanding the fact that there may be instances in which some members are members of another board.

The terms of office of the members of said county boards shall be as follows: The chairman, who shall be so designated by the appointing boards, shall serve for his first term a period of three years and one member shall serve for his first term a period of two years and the other member shall serve for a period of one year, all terms beginning with the date of their appointment and after the said term shall have expired their successors in office shall serve for a period of three years and shall be appointed in the same manner as herein provided in this section.

Any member of any of the county boards herein above referred to in this section may be removed at any time by such composite board consisting of the board of county commissioners, the board of education and the board of health, whenever such composite board may find by a majority vote of its entire membership such member or members unfit to serve thereon, each member having only one vote as above provided for the selection of such members of county boards. In the event any member of the county board shall be removed hereunder, his successor shall be selected to serve out the time for which such member was originally selected.

Upon the death or resignation of the chairman or any other member of the county board of alcoholic control, whether selected under the provisions of this article or under the provisions of chapter four hundred and eighteen or chapter four hundred and ninety-three of the Public Laws of one thousand nine hundred and thirty-five, such board shall give bond for the faithful performance of their duties, in the penal sum of five thousand ($5,000.00) dollars, and the said bond shall be payable to the state of North Carolina and to the county in which said board performs its duties, with some corporate surety, which surety shall be satisfactory to, and approved by, the county attorney of said county, and the chairman of the state board, and shall be deposited with the chairman of the state board. The state board for and on behalf of the state of North Carolina and the county named in said bond, shall each be secured the said sum of the full amount of the penalty thereof and the recovery or payment of any sums due thereunder to either shall not diminish or affect the right of the other obligee and said bond to recover the full amount of the said penalties thereof, and the giving and the approval of such bond shall be a part of the qualification of said members and no member shall be entitled to exercise any of the functions or powers incident to his appointment until and unless the said bond shall have been given and approved as herein provided. The three joint boards referred to in § 18-41 shall be authorized to relieve any member of the county boards who does not handle any money or funds from furnishing such bond, and shall be further authorized to require bond in excess of five thousand dollars ($5,000) of any member of the board handling money or funds in the event said joint boards deem it advisable to increase such bond. (1937, ch. 49, s. 9; 1939, c. 202.)

Editor's Note.—The 1939 amendment added the last sentence.

§ 18-45. Powers and duties of county boards.—The said county boards shall each have the following powers and duties:

(a) Control and jurisdiction over the importation, sale and distribution of alcoholic beverages within its respective county.

(b) Power to buy and to have in its possession and to sell alcoholic beverages within its county.

(c) Power to adopt and enforce the regulations governing the operation of stores within its county and relating to the carrying out of the provisions and purposes of this article.

(d) To prescribe and regulate and direct the duties and services of all employees of said county board.

(e) To fix the hours for the opening and closing of stores operated by it. No store, however, shall be permitted to remain open between the hours of nine o'clock p. m. and nine o'clock a. m.

(f) To require any county stores to close on such days as it may designate, but all stores in any county operating under the provisions of this

[ 783 ]
§ 18-46

CH. 18. INTOXICATING LIQUORS

article shall remain closed on Sundays, election days, New Year's Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving and Christmas Day.

(3) To import, transport, receive, purchase, sell and deliver and have in its possession for sale for present and future delivery alcoholic beverages.

(4) To purchase or lease property, furnish and equip buildings, rooms and accommodations and when required for the storage and sale of alcoholic beverages and for distribution to all county stores within said county.

(i) To borrow money, guarantee the payment thereof and the interest thereon, in such manner as may be required or permitted by law, and to issue, sign, endorse and accept checks, promissory notes, bills of exchange and other negotiable instruments and to do all such other and necessary things as may be required or may be convenient in the conduct of liquor stores in its county.

(j) To investigate and aid in the prosecution of violations of this article and other liquor laws, by whatever name called, and to seize alcoholic beverages in said county sold, kept, imported or transported illegally and to apply for confiscation thereof and to cooperate in the prosecution of offenders in any court in said county.

(k) To regulate and to prescribe rules and regulations that may be necessary or feasible for the obtaining of purity in all alcoholic beverages, including true statements of contents and the proper labeling thereof.

(l) To fix and maintain the prices of all alcoholic beverages sold by liquor stores in said county and to prescribe to whom the same may be sold.

The provisions of this article shall not apply to ethyl alcohol intended for use and/or used for the following purposes:

For scientific, chemical, mechanical, industrial, medicinal and culinary purposes.

For use by those authorized to procure the same tax free, as provided by the acts of congress and regulations promulgated thereunder.

In the manufacture of denatured alcohol produced and used as provided by the acts of congress and regulations promulgated thereunder.

In the manufacture of patented, patent, proprietary, medicinal, pharmaceutical, antiseptic, toilet, scientific, chemical, mechanical, and industrial preparations or products unfit for beverage purposes.

In the manufacture of flavoring extracts and syrups unfit for beverage purposes.

(m) To exercise the power to buy, purchase and sell and to fix the prices at which all alcoholic beverages may be purchased from it, but nothing herein contained shall give said board the power to purchase or sell or deal in alcoholic beverages which contain less than five per centum of alcohol by weight.

(n) To locate stores in its county and to provide for the management thereof and to appoint and employ at least one person for each store conducted by it, who shall be known as "manager" thereof. The duty of such manager shall be to conduct the said store under directions of the county board and to carry out the law applying thereto, and such manager shall give bond for the faithful performance of his duties in such sum as may be fixed by said county board, with sufficient corporate surety and said surety, or sureties thereon, shall be approved by the said county board as a part of the qualifications of such manager for his appointment, and the said county board shall have the right to sue on said bond and to recover for all failures on the part of said manager faithfully to perform his duties as such manager, to the extent of any loss occasioned by such manager on his part, but as against the surety, or sureties, thereon, such aggregate recovery, or recoveries, shall not exceed the penalty of said bond.

(o) To expend for law enforcement a sum not less than five per cent nor more than ten per cent of the total profits to be determined by quarterly audits and in the expenditure of said funds shall employ one or more persons to be appointed by and directly responsible to the respective county boards. The persons so appointed shall, after taking the oath prescribed by law for the peace officers, have the same powers and authorities within their respective counties as other peace officers. And any person so appointed, or any other peace officer while in hot pursuit of anyone found to be violating the prohibition laws of this state, shall have the right to go into any other county of the state and arrest such offender therein so long as such hot pursuit of such person shall continue, and the common law of hot pursuit shall be applicable to said offenses and such officers. Any law enforcement officer appointed by such county boards and any other peace officer is hereby authorized, upon request of the sheriff or other lawful officer in any other county, to go into such other county and assist in suppressing a violation of the prohibition law therein, and while so acting shall have such powers as a peace officer as are granted to him in his own county and be entitled to all the protection provided for said officer while acting in his own county.

(p) To discontinue the operation of any store in its county whenever it shall appear to said board that the operation thereof is not sufficiently profitable to justify a continuance of its operation, or when, in its opinion, the operation of any store is inimical or hurtful to the morals or welfare of the community in which it is operated, or when said county board may be directed to close any store by the state board.

All the powers and duties herein conferred upon county boards, or required of them, shall be subject to the powers herein conferred upon the state board and whenever or wherever herein the state board has been given power to approve or disapprove anything in respect to county stores or county stores, then no power on the part of the county boards and no act of any county board shall be exercisable or valid until and unless the same has been approved by the state board.

(1937, c. 49, s. 10(p)).

Local Modification.—Moore: 1937, c. 49, s. 10(p).

Editor's Note.—The 1939 amendment added the last two sentences to subsection (o). For comment on 1929 amendatory act, see 17 N. C. Law Rev. 349.

§ 18-46. No sales except during hours fixed by county boards; sales to minors, habitual drunkards, etc.; discretion of managers and em-
employees; list of persons convicted of drunkenness, etc.; unlawful to buy for person prohibited.—No alcoholic beverage shall be sold knowingly by any county store or the manager thereof or any employee therein at any time other than within the opening and closing hours for said store, as fixed in the manner herein provided, and otherwise as prescribed by the said county board. No alcoholic beverage shall be sold knowingly to any minor, or to any person who has been convicted of public drunkenness or of driving any motor vehicle while under the influence of intoxicating liquors, or has been convicted of any crime wherein the court or judge shall find as a fact that such person committed said crime or aided and abetted in the commission thereof as a result of the influence of intoxicating liquors (within one year of any such conviction), or to any person known to be an habitual drunkard or who has within one year been confined in the inebriate ward of any state institution. The manager and employees of and in any county store may, in their discretion, refuse to sell alcoholic beverage to any individual applicant, and such power and the duty to exercise the same shall vest in and apply to such manager and employees, regardless of the failure of the county boards to make any regulations providing for the same, and in their discretion may refuse to sell more than four quarts at any one time in any one day to any person.

The various clerks of the superior court and of any inferior courts in counties coming under the provisions of this article shall furnish to the chairman of the control board of their county a list of all persons convicted of public drunkenness or convicted of driving an automobile while intoxicated; and the state motor vehicle department shall furnish to the chairmen of all the control boards in this state a list of all persons whose driving licenses have been revoked for driving an automobile while intoxicated, or for the illegal use of whiskey.

It shall be unlawful for any person to buy any alcoholic beverage if he be within the class prohibited from purchasing same as set out in this section, and it shall further be unlawful for any person to buy any alcoholic beverage for any person who may be prohibited from purchasing for himself under any of the provisions of this article. (1937, c. 49, s. 11, c. 411.)

§ 18-47. Drinking upon premises prohibited; stores closed on Sundays, election days, etc. —No alcoholic beverage shall be drunk upon the premises of any county store or warehouse, or room or building occupied or used by any county board or any of its employees for the purpose of performing their duties in respect to alcoholic beverages, and such county boards, managers and employees shall not permit alcoholic beverages to be drunk upon said premises and all county stores shall be closed on Sundays and election days, and such other days as the state board may designate. (1937, c. 49, s. 12.)

§ 18-48. Possession illegal if taxes not paid; punishment and forfeiture for violations; possession in container without proper stamp, prima facie evidence.—It shall be unlawful for any firm, person or corporation to have in his or its possession any alcoholic beverages as defined herein upon which the taxes imposed by the laws of congress of the United States or by the laws of this state, have not been paid and any person convicted of the violation of this section shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court and the alcoholic beverage shall be seized and forfeited, together with any vehicle, vessel, aeroplane or other equipment used in the transportation and to carry the said alcoholic beverages, and the procedure pointed out in § 18-6 for the seizure, arrest, confiscation and sale of such vehicle, vessel, aeroplane or other means of transportation shall be used and the provisions of said § 18-6 are hereby declared to be in full force and effect in any of the counties of the state which shall operate under the provisions of this article, and the possession of such alcoholic beverages in a container which does not bear either a revenue stamp of the federal government or a stamp of any of the county boards of the state of North Carolina shall constitute prima facie evidence of the violation of this section. (1937, c. 49, s. 13.)

§ 18-49. Transportation, not in excess of one gallon, authorized; transportation in course of delivery to stores.—It shall not be unlawful for any person to transport a quantity of alcoholic beverages not in excess of one gallon from a county in North Carolina coming under the provisions of this article to or through another county in North Carolina not coming under the provisions of this article: Provided, said alcoholic beverages are not being transported for the purposes of sale, and provided further that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken. Nothing contained in this article shall be construed to prevent the transportation through any county not coming under the provisions of this article, of alcoholic beverages in actual course of delivery to any alcoholic beverage control board established in any county coming under the provisions of this article. (1937, c. 49, s. 14.)

Cross Reference.—As to transportation into state, etc., see § 18-58.

§ 18-50. Possession for sale and sales of illicit liquors; sales of liquors purchased from stores. —The possession for sale, or sales, of illicit liquors, or the sale of any liquors purchased from county stores, is hereby prohibited and a violation of this section shall constitute a crime and shall be punishable by fine or imprisonment, or both, in the discretion of the court. (1937, c. 49, s. 15.)

In a prosecution for possession of intoxicating liquor in violation of this section, the fact of possession does not constitute prima facie evidence that the possession was for the purpose of sale, since by statute under which the warrant is drawn does not provide for such prima facie rule. State v. Lockey, 214 N. C. 525, 199 S. E. 715.

§ 18-51. Drinking or offering drinks on premises of stores, and public roads or streets; drunkenness, etc., at athletic contests or other public places.—It shall be unlawful for any person to drink alcoholic beverages or to offer a drink to another person, or persons, whether accepted or not, at the place where the same is purchased from the county store, or the premises thereof, or upon any premises used or occupied
by county boards for the purpose of carrying out the provisions of this article, or on any public road or street, and it shall be unlawful for any person or persons to be or become intoxicated or to make any public display of any intoxicating beverages at any athletic contest or other public place in North Carolina. The violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not exceeding fifty ($50.00) dollars or imprisoned for not more than thirty days in the discretion of the court. (1937, c. 49, s. 16, c. 411.)

§ 18-52. Advertising permitted in newspapers, magazines and periodicals.—It shall be lawful for newspapers, magazines and periodicals to accept and publish advertisements relating to wines, beers and other alcoholic beverages permitted to be sold and distributed under the laws of North Carolina. (1935, c. 465.)

§ 18-53. Advertising by county A. B. C. stores and on billboards prohibited.—It shall be unlawful for any county store to advertise anywhere, or by any means or method, alcoholic beverages which it has for sale and it shall not advertise or post its prices, other than in the store, or stores, which it operates, and in such stores it shall only state the brands or kinds of beverages and the price of each kind and such price list shall only be posted for public view in said store.

It shall be unlawful for any person, firm or corporation to erect or set up, or permit to be set up, any sign or billboard, or other device, containing any advertisement of alcoholic beverages as defined herein on his premises, and if the same shall be set up by any other person, then such owner or lessee of such premises shall not permit the same to remain thereon.

It shall be unlawful for any person, firm, or corporation to display, or permit to be displayed, upon any billboard, signboard, or any other similar advertising medium, any advertisement of any alcoholic beverages or any spirituous liquors as defined herein. (1937, c. 49, s. 17; 1937, c. 398.)

Cross Reference.—As to advertising provisions under the Turlington Act, see § 18-3.

§ 18-54. Advertising by radio broadcasts prohibited.—No firm, person or corporation in this state shall broadcast, or permit to be broadcast, any statement, speech, or any other message by whatsoever name called, over any radio broadcasting system doing business in this state, when such advertising matter tends to advertise alcoholic beverages as defined herein and the broadcast thereof originates in this state. (1937, c. 49, s. 18.)

§ 18-55. Additional regulations as to advertising.—The several county boards by and with the consent and approval of the state board, shall have power to make such other rules and regulations as will prevent and tend to prevent advertisement of alcoholic beverages otherwise than is expressly prohibited herein and to publish such rules and regulations and to take effective measures to enforce the same. (1937, c. 49, s. 19.)

§ 18-56. Salaries and expenses paid from proceeds of sales.—All salaries and expenses incurred under the provisions of this article except those provided for in § 18-37 shall be paid out of the proceeds of the sales of the alcoholic beverages referred to in this article. All salaries and expenses of county boards and their employees shall be paid out of the receipts for their sales as operating expenses. (1937, c. 49, s. 20.)

§ 18-57. Net profits to be paid into general fund of the various counties.—After deducting the amount required to be expended for enforcement as herein provided and retaining sufficient and proper working capital, the amount to be determined by the board, and except as hereinbefore provided in chapters four hundred ninety-three and four hundred eighteen of the Public Laws of one thousand nine hundred thirty-five, the entire net profits derived from any stores shall be paid quarterly to the general fund of each respective county wherein county stores are operated. (1937, c. 49, s. 21; c. 411.)

Local Modification.—Brunswick: 1937, c. 269; Cumberland: 1941, c. 48; Franklin: 1937, c. 250, s. 2; New Hanover: 1941, c. 135.

§ 18-58. Transportation into state; and purchases, other than from stores, prohibited.—It shall be unlawful for any person, firm, or corporation, to purchase in, or to bring in this state, any alcoholic beverage from any source, except from a county store operated in accordance with this article, except a person may purchase legally outside of this state and bring into the same for his own personal use not more than one gallon of such alcoholic beverage. A violation of this section shall constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. (1937, c. 49, s. 22.)

Cross Reference.—As to transportation to or through dry counties, see § 18-49.

§ 18-59. Violations by member or employee of boards, cause for removal and punishable as misdemeanor.—A violation of any of the provisions of this article by any person, firm or corporation, and the violation of any provision of this article, or any regulation adopted by any county board or by the state board, by any member of the state board, or any member of any county board, or any employee of either of said boards, shall constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court, and in addition thereto shall constitute sufficient cause for the removal of such person from either of said boards, or from his employment under either of said boards and in addition to the powers of the state board to remove any of its employees or any member of any county board and the power of any county board to remove any of its employees from such employment, the court in which the said conviction is had shall have the power upon such conviction and as a part of its judgment thereon to remove such person from either of said boards or from the employment of either. (1937, c. 49, s. 23.)

§ 18-60. Definition of “alcoholic beverage.”—The term “alcoholic beverage”, as used in this article, is hereby defined to be and to mean alcoholic beverages of any and all kinds which shall contain more than fourteen per centum of alcohol by volume, and this article is not intended to apply to, or regulate, the possession, sale, manufacture or transportation of beer, wines or ales containing a lower alcoholic content than above specified.
of the county control board and convert the same into money and shall, after making a true and faithful accounting, turn all money in its hands over to the general fund of the county. Thereafter, chapter one of the Public Laws of one thousand nine hundred twenty-three [§ 18-1 et seq.], being commonly known as the Turlington Act, shall be in full force and effect in such county, until and unless another election is held under the provisions of this article, in which a majority of the votes shall be cast "for county liquor control stores," except as modified by this article or any acts amendatory hereof.

No election under this section shall be held on the day of any biennial election for county officers, or within sixty days of such an election, and the date of such elections under this section shall be fixed by the board of elections of the county wherein the same is held.

No other election shall be called and held in any of the counties in the state under the provisions of this article within three years from the holding of the last election under this act. During any county in which an election was held either under the provisions of chapter four hundred ninety-three or chapter four hundred eighteen of the Public Laws of one thousand nine hundred thirty-five, an election may be called under the provisions of this article, provided no such election shall be called within three years of the holding of the last election. (1937, c. 49, s. 25, c. 431.)

§ 18-62. Elections in counties now operating stores, not required for continued operation.—Nothing herein contained shall be so construed as to require counties in which liquor stores have been established under chapters four hundred eighteen or four hundred ninety-three of the Public Laws of one thousand nine hundred thirty-five to have any further election in order to enable such counties to establish liquor stores, and as to such counties in which liquor stores are now being operated under chapters four hundred eighteen or four hundred ninety-three of the Public Laws of one thousand nine hundred thirty-five, such stores shall from February 22, 1937 be operated under the terms of this article. (1937, c. 49, s. 26.)

Local Modification.—Moore: 1937, c. 49, s. 26.

Art. 4. Beverage Control Act of 1939.

§ 18-63. Title.—This article shall be known as the Beverage Control Act of one thousand nine hundred thirty-nine. (1939, c. 158, s. 500.)

Local Modification.—The following laws are amendments to or modifications of 1939, c. 216, of which the Beverage Control Act of 1939 is a successor: Alamance (Elon College, Sylvan High School, and Cane Creek Church): 1933, c. 381, 417; Bladen (French Creek Township): 1933, c. 475; Buncombe (Ridgecrest, Montreat, town of Weaverville): 1933, c. 396; Caswell (village of Yanceyville and M. E. School): 1933, c. 397; Dare (Stumpy Point voting precinct): 1933, c. 455; Guilford (Guilford College and Oak Ridge Military Institute): 1933, c. 369, 370, 406; Harnett (Campbell College): 1933, c. 398; Madison (Mt. Airy Hill College): 1933, c. 396; Mecklenburg (Davidson College): 1933, c. 313; Mitchell (town of Bakersville): 1933, c. 396; Moore (Quaker Children’s Home): 1933, c. 454; Randolph (village of Worthville): 1933, c. 512; Sampson (Northeast Junior College): 1933, c. 358; Union (Wake Forest College): 1933, c. 454; Wake (Wake Forest College): 1913, c. 564; Warren (village of Macon): 1933, c. 395.
§ 18-64. Definitions.—The term “beverages” as used in this article shall include:
(a) Beer, lager beer, ale, porter, and other brewed or fermented beverages containing one-half of one per cent (1%) of alcohol by volume but not more than five per cent (5%) of alcohol by weight as authorized by the laws of the United States of America.
(b) Unfortified wines, as used in this article, shall mean wine of an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet, or dextrose sugar and having an alcoholic content of not less than five per cent (5%) and not more than fourteen per centum (14%) of absolute alcohol, the per centum of alcohol to be reckoned by volume.

The term “person” used in this article shall mean any individual, firm, partnership, association, corporation, or other groups or combination acting as a unit.

The term “sale” as used in this article shall include any transfer, trade, exchange or barter in any manner or by any means whatsoever, for a consideration.

(1939, c. 158, s. 501; 1941, c. 339, s. 4.)

Editor’s Note.—The 1941 amendment struck out former subsection (c) defining fortified wines. For new definition of fortified wines enacted by the 1941 General Assembly, see § 18-96.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 492.

§ 18-65. Regulations; statement required on container; application of other law.—The beverages enumerated in § 18-64 may be manufactured, transported, or sold in this state in the manner and under the regulations hereinafter set out: Provided, however, that, except as otherwise provided by law, no wines shall be transported or sold in this state unless there be firmly fastened or impressed on the barrel, bottle, or other container in which the same may be a written statement showing that the same are not fortified and that the alcoholic content thereof reckoned by volume, is not more than fourteen per cent.

The possession, transportation, or sale of wines defined in § 18-64, subsection (b) without such statement, and any misrepresentation made in any such statement, shall constitute a misdemeanor and be punished as provided in § 18-91. Except as otherwise provided by law, the manufacture, possession, transportation or sale of wines other than those defined in § 18-64, subsection (b), including fortified wines, shall be subject to all the provisions of chapter one of the Public Laws of one thousand nine hundred and twenty-three, commonly called the Turlington Act, as amended and supplemented, modified as § 18-1 et seq. (1939, c. 158, s. 502; 1941, c. 339, s. 4.)

Editor’s Note.—The 1941 amendment added the proviso and the second paragraph.

§ 18-66. Transportation.—The beverages enumerated in § 18-64 may be transported into, out of or between points in this state by railroad companies, express companies or by steamboat companies engaged in public service as common carriers and having regularly established schedules of service. Upon condition that such companies shall keep accurate records of the character and volume of such shipments, the character and number of packages or containers, shall keep records open at all times for inspection by the commissioner of revenue of this state or his authorized agent, and upon condition that such common carrier shall make report of all shipments of such beverages into, out of or between points in this state at such times and in such detail and form as may be required by the commissioner of revenue.

The beverages enumerated in § 18-64 may be transported into, out of or between points in this state over the public highways of this state by motor vehicles upon condition that every person intending to make such use of the highways of this state shall as a prerequisite thereto register such intention with the commissioner of revenue, in advance of such transportation, with notice of the kind and character of such products to be transported and the license and motor number of each motor vehicle intended to be used in such transportation. Upon the filing of such information, together with an agreement to comply with the provisions of this article, the commissioner of revenue shall issue a numbered certificate to each such owner or operator for each motor vehicle intended to be used for such transportation, which numbered certificate shall be prominently displayed on the motor vehicle used in transporting the products named in § 18-64. Every person transporting such products over any of the public highways of this state shall during the entire time he is so engaged have in his possession an invoice or bill of sale or other record evidence, showing the true name and address of the person from whom he has received such beverages, the character and contents of containers, the number of bottles, cases or gallons of such shipment, the true name and address of every person to whom deliveries are to be made. The person transporting such beverages shall, at the request of any representative of the commissioner of revenue, produce and offer for inspection said invoice or bill of sale or record evidence. If said person fails to produce invoice or bill of sale or record evidence, or if when produced, it fails to clearly and accurately disclose said information, the same shall be prima facie evidence of the violation of this article. Every person engaged in transporting such beverages over the public highways of this state shall keep accurate records of the character and volume of such shipments, the character and number of packages or containers, shall keep records open at all times for inspection by the commissioner of revenue of this state, or his authorized agent, and upon condition that such person shall make report of all shipments of such beverages into, out of or between points in this state at such times and in such detail and form as may be required by the commissioner of revenue.

The purchase, transportation and possession of beverages enumerated in § 18-64 by individuals for their own use is permitted without restriction or regulation. The provisions of this section as to transportation of beverages enumerated in § 18-64 by motor vehicles over the public highways of this state shall in like manner apply to the owner or operator of any boat using the waters of the state for such transportation, and all of the provisions of this section with respect to permit for such transportation and such report to the commissioner of revenue by the operators of motor vehicles on public highways shall in like manner.
apply to the owner or operator of any boat using
the waters of this state. (1939, c. 158, s. 503.)

§ 18-67. Manufacture.—The brewing or manu-
facture of beverages for sale enumerated in sec-
tion 18-64 shall be permitted in this state upon
the payment of an annual license tax to the
commissioner of revenue in the sum of five
hundred dollars ($500.00) for a period ending on the
next succeeding thirtieth day of April and an-
nually thereafter. Persons licensed under this
section may sell such beverages in barrels, bot-
tles, or other closed containers only to persons
licensed under this section, in the manner hereinafter
set forth, and no other license tax shall be levied
upon the business taxed in this section. The sale
of malt, hops, and other ingredients used in the
manufacture of beverages for sale enumerated in
§ 18-64 is hereby permitted and allowed: Pro-
vided, that any person engaged in the business
of manufacturing in this state the wines described
in § 18-64, subsection (b) shall be required to pay
the following tax based on the number of gallons manufactured:
Where not more than one hundred gallons are
manufactured for sale .................. $ 5.00
Where one hundred gallons and not more
than two hundred gallons are manufac-
tured for sale ................................ 10.00
Where two hundred gallons and not more
than five hundred gallons are manufac-
tured for sale .......................... 25.00
Where five hundred gallons and not more
than one thousand gallons are manufac-
tured for sale .......................... 50.00
Where one thousand gallons and not more
than two thousand five hundred gallons
are manufactured for sale .................. 200.00
Where two thousand five hundred gallons
or more are manufactured for sale ...... 250.00

Nothing in this article shall be construed to
impose any tax upon any resident citizen of this
state who makes native wines for the use of him-
self, his family and guests from fruits, grapes and
berries cultivated or grown wild upon his own
land. (1939, c. 158, s. 504.)

§ 18-68. Bottler's license.—Any person who
shall engage in the business of receiving ship-
ments of the beverages enumerated in § 18-64,
subsection (a) in barrels or other containers,
and bottling the same for sale to others for resale,
shall pay an annual license tax of two hundred
fifty dollars ($250.00); and any person who shall
engage in the business of bottling the beverages
described in § 18-64, subsection (b), shall pay an
annual license tax of two hundred fifty dollars
($250.00): Provided, however, that any person
engaged in the business of bottling the beverages
described in § 18-64, subsection (a) and also the
beverages described in § 18-64, subsection (b), or
either, shall pay an annual license tax of four
hundred dollars ($400.00). No other license tax
shall be levied upon the businesses taxed in this
section, but licensees under this section shall be
liable for the payment of the taxes imposed by
§ 18-81 in the manner therein set forth. (1939, c.
158, s. 505; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment struck out references
to former subsection (c) of § 18-64.

§ 18-69. Wholesaler's license.—License to sell
at wholesale, which shall authorize licensees to sell
beverages described in § 18-64, subsection (a)
in barrels, bottles, or other containers, in quan-
tities of not less than one case or container to a
customer, shall be issued as a state-wide license by
the commissioner of revenue. The annual license
under this section shall be one hundred and fifty
dollars ($150.00) and shall expire on the next suc-
ceeding thirtieth day of April. The license issued
under this section shall be revocable at any time
by the commissioner of revenue for failure to com-
ply with any of the conditions of this article with
respect to the character of records required to be
kept, reports to be made or payment of other taxes
hereinafter set out.

Licensees to sell at wholesale the beverages
described in section 18-64, subsection (b) shall
pay an annual license tax of one hundred fifty
dollars ($150.00): Provided, that a licensee to sell
at wholesale the beverages described in § 18-64,
subsection (a) and the beverages described in
§ 18-64, subsection (b) shall pay an annual license
tax of two hundred fifty dollars ($250.00).

If any wholesaler maintains more than one
place of business or storage warehouse from which
orders are received or beverages are distributed a
separate license shall be paid for each separate
place of business or warehouse.

The owner or operator of every distributing
warehouse selling, distributing or supplying to
retail stores beverages enumerated in § 18-64 shall
be deemed a wholesale distributor within the
meaning of this article and shall be liable for the
tax imposed in this section and shall comply with
the conditions imposed in this article upon whole-
sale distributors of beverages with respect to pay-
ment of taxes levied in this article and bond for
the payment of such taxes.

No county shall levy a tax on any business
under the provisions of this section, nor shall any
city or town, in which any person, firm, corpora-
tion or association taxed hereunder has its prin-
cipal place of business, tax at a rate more than
one-fourth of the state tax levied under this sec-
tion; nor shall any tax be levied or collected by
any county, city or town on account of delivery
of the products, beverages or articles enumerated
in § 18-64. (1939, c. 158, s. 506; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment struck out the reference
in the second paragraph to former subsection (c) of §
18-64.

§ 18-70. Sales on railroad trains.—The sale
of beverages enumerated in § 18-64 shall be per-
mitted on railroad trains in this state to be sold
only in dining cars, buffet cars, Pullman cars,
or club cars, and for consumption on such cars
upon payment to the commissioner of revenue
of one hundred dollars ($100.00) for each rail-
road system over which such cars are operated.

No other license shall be levied upon li-
cees under this section, but every licensee un-
der this section shall make a report to the com-
misssioner of revenue on or before the tenth day
of each calendar month covering sales for the
previous month and payment of the tax on such
sales at the rate of tax levied in this article. (1939,
c. 158, s. 507.)

§ 18-71. Salesman's license.—License for sales-
men, which shall authorize the licensee to offer for sale within the state or solicit orders for the sale of within the state beverages enumerated in this article, shall be issued by the commissioner of revenue upon the payment of an annual license tax of twelve dollars and fifty cents ($12.50) to the commissioner of revenue, such license to expire on the next succeeding thirtieth day of April. License to salesmen shall be issued only upon the recommendation of the vendor whom they represent, and no other license tax shall be levied under this section. (1939, c. 158, s. 508.)

§ 18-72. Character of license.—License issued under authority of § 18-64, subsection (a) shall be of two kinds:

(1) "On premises" license which shall be issued for bona fide hotels, cafeterias, cafes and restaurants and shall authorize the licensees to sell at retail for consumption on the premises designated in the license, and to sell the beverages in original packages for consumption off the premises.

(2) "Off premises" license which shall authorize the licensee to sell at retail beverages for consumption only off the premises designated in the license, and only in the immediate container in which the beverages was received by the licensee.

In a municipality the governing board of such municipality shall determine whether an applicant for license is entitled to a "premises" license under the terms of this article, and outside of municipalities such determination shall be by the board of commissioners of the county. (1939, c. 158, s. 509.)

§ 18-73. Retail license issued for sale of wines. —License issued under authority of section 18-64, subsection (b) shall be of two kinds:

1. "On premises" licenses shall be issued to bona fide hotels, cafeterias, cafes and restaurants and shall authorize the licensees to sell at retail for consumption on the premises designated in the license: provided no such license shall be issued except to hotels, cafeterias, cafes and restaurants where prepared food is customarily sold and to such only as are licensed under the provisions of § 105-62 and which, at the time of the application for such license, have been given a grade A or B rating by the state department of health.

2. "Off premises" license shall authorize the licensee to sell said beverages at retail for consumption off the premises designated in the license, and all such sales shall be made in the immediate container in which the beverage was purchased by the licensee, and every such container shall have the tax stamp displayed thereon, as provided in § 18-81. (1939, c. 158, s. 509%; 1941, c. 339, s. 4.)

Editor's Note. —The 1941 amendment struck out in line two of the text of this section the reference to former subsection (c) of § 18-64.

§ 18-74. Amount of retail license tax.—The license tax to sell at retail under § 18-64, subsection (a) for municipalities shall be:

(1) For "on premises" license, fifteen dollars ($15.00).

(2) For "off premises" license, five dollars ($5.00).

The license tax to sell at retail under section 18-64, subsection (b), or both, shall be:

(1) For "on premises" license, fifteen dollars ($15.00).

(2) For "off premises" license, ten dollars ($10.00).

The rate of license tax levied in this section shall be for the first license issued to one person and for each additional license issued to one person an additional tax of ten per cent (10%) of the base tax, such increase to apply progressively for each additional license issued to one person. (1939, c. 158, s. 510; 1943, c. 400, s. 6.)

Editor's Note. —The 1941 amendment reduced the license tax stated in lines six and seven from ten to five dollars.

§ 18-75. Who may sell at retail.—Every person making application for license to sell at retail beverages enumerated in § 18-64, if the place where such sale is to be made is within a municipality, shall make application first to the governing board of such municipality, and the application shall contain:

(1) Name and residence of the applicant and the length of his residence within the state of North Carolina.

(2) The particular place for which the license is desired, designating the same by a street and number, if practicable; if not, by such other apt description as definitely locates it.

(3) The name of the owner of the premises upon which the business licensed is to be carried on.

(4) That the applicant intends to carry on the business authorized by the license for himself or under his immediate supervision and direction.

(5) A statement that the applicant is a citizen and resident of North Carolina and not less than twenty-one years of age; that he has never been convicted of a felony or other crime involving moral turpitude; and that he has not, within the last two years prior to the filing of the application, been adjudged guilty of violating the prohibition laws, either state or federal. The application must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oaths. If it appears from the statement of the applicant or otherwise that he has at any time been convicted of a felony or other crime involving moral turpitude, or that he has, within the two years prior to the filing of the application, been adjudged guilty of violating the prohibition laws, either state or federal, the application must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oaths. If it appears from the statement of the applicant or otherwise that he has at any time been convicted of a felony or other crime involving moral turpitude, or that he has, within the two years prior to the filing of the application, been adjudged guilty of violating the prohibition laws, either state or federal, or that he has within two years prior to the filing of the application completed a sentence for violation of the prohibition laws, such license shall not be granted. If it appears that any false statement is knowingly made in any part of the application and license is received thereon, the license shall be revoked and the applicant subjected to the penalty provided by law for misdemeanors. Before issuing a license, the governing body of the municipality shall be satisfied that the statements required by subsections (1), (2), (3), (4), and (5) of this section are true.

Neither the state nor any county or city shall issue a license under this article to any person, or firm, or corporation who has not been a bona fide resident of North Carolina for one year. No
resident of the state shall obtain a license under this article and employ or receive aid from a nonresident for the purpose of defeating this requirement. Any person violating this paragraph shall be guilty of a misdemeanor, and upon conviction shall be imprisoned not more than thirty days or fined not more than two hundred dollars ($200.00).

(1939, c. 158, s. 511.)

§ 18-76. County license to sell at retail.—License to sell at retail shall be issued by the board of commissioners of the county, and application for such license shall be made in the same manner and contain the same information set out in § 18-75 with respect to municipal license. If the application is for license to sell within a municipality, the application must also show that license has been granted the applicant by the governing board of such municipality. The granting of a license by the governing board of a municipality shall determine the right of an applicant to receive a county license upon compliance with the conditions of this article.

If the application is for license to sell outside of a municipality within the county, the application shall also show the distance to the nearest church or public or private school from the place at which the applicant purposes to sell at retail. No license shall be granted to sell within three hundred feet of any public or private school buildings or church building outside of incorporated cities and towns: Provided, the restrictions set forth in this sentence shall not apply to unincorporated towns and villages having police protection.

The clerk of the board of commissioners of each county shall make prompt report to the commissioner of revenue of each license granted by the board of commissioners of such county. The county license fee shall be fixed at (1) twenty-five dollars ($25.00) for "on premises" license and (2) five dollars ($5.00) for "off premises" license, for the sale of beverages described in § 18-64, subsection (a), and twenty-five dollars ($25.00), for the sale of beverages described in § 18-64, subsection (b) and the same shall be placed in the county treasury, for the use of the county. (1939, c. 158, s. 512; 1941, c. 339, s. 4; 1943, c. 400, s. 6.)

Local Modification.—Anson: 1941, c. 331; Currituck (Polar Branch Township): 1937, c. 990.

Editor's Note.—The 1941 amendment struck out the reference to former subsection (c) of § 18-64 appearing in the third paragraph.

The 1941 amendment struck out the words and figures "twenty-five dollars ($25.00)" in lines five and six of the third paragraph and inserted in lieu thereof "(1) twenty-five dollars ($25.00) for 'on premises' license and (2) five dollars ($5.00) for 'off premises' license."

§ 18-77. Issuance of license mandatory; sales during religious services.—It shall be mandatory that the governing body of a municipality or county issue license to any person applying for the same when such person shall have complied with requirements of this article. Provided, no person shall dispense beverages herein authorized to be sold, within fifty feet of a church building in an incorporated city or town, or in a city or town having police protection whether incorporated or not, while religious services are being held in such church, or within three hundred feet of a church building outside the corporate limits of a city or town while church services are in progress: And provided further that this section shall not apply in any territory where the sale of wine and/or beer prohibited by special legislative act. And provided further, that such governing bodies in the counties of Watauga, Ashe, Jackson, Haywood, Duplin, Alexander, Robeson, McDowell, Yadkin, Wilkes, Sampson, Greene, Montgomery, Transylvania, Randolph, Chatham, Alamance, Clay, Madison, Pender, Avery, Nash, Granville and the Town of Aulander, or any municipality therein shall be authorized in their discretion to decline to issue the "on premises" licenses provided for in subsection one of § 18-73. The governing bodies in the counties of Watauga, Ashe, Jackson, Haywood, Duplin, Alexander, Robeson, McDowell, Yadkin, Wilkes, Sampson, Greene, Montgomery, Transylvania, Randolph, Chatham, Alamance, Clay, Madison, Pender, Avery, Nash, Granville and the town of Aulander or municipalities therein, shall be authorized to prohibit the sale of beer and/or wine between the hours of 12:01 A. M. on Sundays and midnight Sunday night. (1939, c. 158, s. 513; 1939, c. 405.)

§ 18-78. Revocation or suspension of license; rule making power of commissioner of revenue.—If any licensee violates any of the provisions of this article or any rules and regulations under authority of this article or fails to superintend in person or through a manager, the business for which the license was issued, or allows the premises with respect to which the license was issued to be used for any unlawful, disorderly, or immoral purposes, or knowingly employs in the sale or distribution of beverages any person who has been convicted of a felony involving moral turpitude or adjudged guilty of violating the prohibition laws within two years or otherwise fails to carry out in good faith the purposes of this article, the license of any such person may be revoked by the governing board of the municipality or by the board of county commissioners by which the license was issued by the commissioner of revenue.—The commissioner of revenue shall have the power to adopt, repeal, and amend rules and regulations to carry out the provisions of this article and to revoke or suspend the state license of any licensee for violation of the provisions of this article or of any rule or regulation adopted by him, as provided in § 18-78.1. Whenever there shall be filed with the commissioner of revenue a certified copy of a judgment of a court convicting a licensee of a violation of the prohibition laws or of any provision of this article or of any rule or regulation issued by the commissioner of revenue, the commissioner of revenue shall forthwith
revoke the license of said licensee. The revocation or suspension of either a state, county, or municipal license shall automatically revoke or suspend any other license issued to the licensee under the authority of this article. (1939, c. 158, § 514; 1943, c. 400, s. 6.)

Cross Reference.—See also § 18-91.

Editor's Note.—The 1943 amendment inserted in the second sentence the words "or of any of the provisions of this article or of any rule or regulation of the commissioner of revenue." It also added the second paragraph.

§ 18-78.1. Prohibited acts under license for sale for consumption on premises; procedure for revocation or suspension of license; enforcement.—No holder of a license authorizing the sale at retail of beverages, as defined in § 18-64, for consumption on the premises where sold, or any servant, agent, or employee of the licensee, shall do any of the following upon the licensed premises:

1. Knowingly sell such beverages to any person under eighteen (18) years of age.
2. Knowingly sell such beverages to any person while such person is in an intoxicated condition.
3. Sell such beverages upon the licensed premises or permit such beverages to be consumed thereon, on any day or at any time when such sale or consumption is prohibited by law.
4. Permit on the licensed premises any disorderly conduct, breach of peace, or any lewd, immoral, or improper entertainment, conduct or practices.
5. Sell, offer for sale, possess, or permit the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized under his license.

Proceedings for the revocation or suspension under this section of any license authorizing the sale of such beverages at retail for consumption on the premises shall be instituted by the filing of a complaint with the commissioner of revenue against the licensee. Said complaint may be filed by the commissioner of revenue upon his own initiative and the said commissioner of revenue may, in his discretion, file a complaint when requested to do so by a peace officer or any person as hereinafter provided. Any peace officer, who learns that any such licensee within his jurisdiction has violated any of the provisions of this section, shall file with commissioner of revenue an affidavit specifying in detail the facts alleged to constitute said violation and requesting that a complaint be filed against said licensee for the revocation or suspension of his license. A like affidavit may be filed with the commissioner of revenue by any person who resides, and has for at least one year prior thereto resided, within two miles of the licensed premises, of such licensee, requesting that a complaint be filed for the revocation or suspension of said licensee's license. Promptly upon receiving any such affidavit, the said commissioner of revenue shall prepare a proper complaint, which shall be signed and sworn to by the person or persons filing the affidavit with him. The commissioner of revenue shall serve, or cause to be served, upon the licensee by personal service or by United States registered mail a notice of the filing of said complaint, together with a copy of said complaint.

The licensee shall have a right at any time within twenty days after service of the notice, above provided for, within which to file with the commissioner of revenue a written denial of the facts alleged in the complaint and demand a hearing thereon. In event such licensee files a written denial of the facts set out in the complaint and demands a hearing thereon, the commissioner of revenue shall immediately certify the record to the superior court of the county in which the license was issued where the matter shall be heard and determined at the next term of the superior court held in said county. If, upon the trial of said matter in the superior court, the allegations contained in the complaint are found against the licensee, the court shall immediately order a revocation or suspension of the license. In event the licensee fails to file a written denial of the facts set out in the complaint and demand a hearing thereon within twenty days after the service of the notice above provided for, the commissioner of revenue shall immediately revoke or suspend the license of said licensee.

It shall be the duty of all peace officers to enforce within their jurisdiction the provisions of this section and they shall frequently visit all such licensed premises within their jurisdiction to determine whether such licensees are complying with the laws; and shall promptly investigate all complaints made to them by any citizen relative to any alleged violations of this section within their jurisdiction. When any peace officer has knowledge of a violation of this section committed by a licensee within his jurisdiction, it shall be his duty forthwith to file an affidavit with the commissioner of revenue, as herein provided, requesting that a complaint be filed for the revocation or suspension of the license of said licensee.

The jurisdiction herein conferred upon the commissioner of revenue shall not be exclusive and any authority conferred upon the governing boards of a municipality, or boards of county commissioners to revoke or suspend licenses shall remain in full force and effect. Provided, however, that when a complaint is filed with the commissioner of revenue, any proceedings which may then be pending before the municipal or county authorities against the same licensee on the same charges shall abate and no proceedings for the revocation or suspension of a license for a violation of the provisions of this section shall be filed with the governing board of municipality or a board of county commissioners when proceedings are pending with the commissioner of revenue against the licensee on the same charge.

The revocation or suspension of a licensee's license, as herein provided, shall be in addition to and not in lieu of or limitation of any other penalty imposed by law. (1943, c. 400, s. 6.)

Cross Reference. — See also § 18-91.

§ 18-79. State license.—Every person who intends to engage in the business of retail sale of the beverages enumerated in § 18-64, subsection (a) shall also apply for and procure a state license from the commissioner of revenue.

For the first license issued to each licensee five dollars ($5.00), and for each additional license
upon the sale of beverages enumerated in § 18-64, subsection (a) and for which license the following schedule of taxes is hereby levied:

(1) For "on premises" license twenty-five dollars $25.00

(2) For "off premises" license five dollars 5.00

Such retail license shall authorize the sale of the beverages described in this section only on the premises described in the license, and if the same person operates more than one place at which said beverages are sold at retail, he shall obtain a license for each such place and pay therefor the license tax provided in this section.

If the license issued to any person by any municipality or county to sell the beverages referred to in this article shall be revoked by the proper officers of such municipality or county, or by any court, it shall be the duty of the commissioner of revenue to revoke the state license of such licensee; and in such event, the licensee shall not be entitled to a refund of any part of the license tax paid.

It shall be unlawful for any wholesale licensee to make any sale or delivery of the beverages described in § 18-64, subsection (b) to any person except persons who have been licensed to sell such beverages at retail, as prescribed in this article.

It shall be unlawful for any retail licensee to purchase any of the beverages described in § 18-64, subsection (b) from any person except wholesale licensees maintaining a place of business within this state and duly licensed under the provisions of this article. (1939, c. 158, s. 516; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment struck out the references to former subsection (c) of § 18-64 formerly appearing in the first, fourth and fifth paragraphs of this section.

§ 18-81. Additional tax.—(a) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of beverages enumerated in § 18-64, subsection (a) of three dollars and seventy-five cents ($3.75) per barrel of thirty-one gallons, or the equivalent of such tax in containers of more or less than thirty-one gallons, and in bottles or other containers of not more than twelve ounces, a tax of one and one-quarter cents per bottle or container: Provided fruit cider of alcoholic content not exceeding that provided in this article may be sold in bottles or other containers of not more than six ounces at a tax of five-eighths of a cent per bottle or container.

(b) The payment of the tax imposed by the preceding subsection shall be evidenced as to containers of not more than six ounces by the affixing of crowns or lids to such containers in which beverages are placed, received, stored, shipped, or handled, and upon which the tax has been paid at the rate of five-eighths of a cent per bottle or container. And the payment of the tax imposed by the preceding subsection shall be evidenced as to containers of more than six ounces and not more than twelve ounces by the affixing of crowns or lids to such containers in which beverages are placed, received, stored, shipped, or handled, and upon which a tax has been paid of one and one-quarter cents per bottle or container.

(c) Except as may be otherwise provided herein, each manufacturer or bottler manufacturing, selling or delivering beverages in this state shall, within twenty-four hours after the beverages are placed in original containers or bottles, and prior to delivery of any container of beverages to any wholesaler, distributor, retailer, jobber, or any other person whatsoever in this state, affix the proper crown or lid to each container.

(d) Except as may be otherwise provided herein, and unless such crowns or lids have been previously affixed, such crowns or lids shall be affixed as herein provided by each distributor or wholesaler in this state within twenty-four hours after such beverages come into the possession of such wholesaler and prior to the delivery of any container thereof to any retailer or other person in this state.

(e) The commissioner of revenue shall prescribe, prepare and sell the crowns or lids provided for in this section under rules and regulations prescribed by him, and all such crowns and lids shall carry the following words: "N. C. Tax Paid," and shall be so designed as to enable the manufacturer or bottler to place his brand or trade mark thereon, and they shall be purchased by the manufacturer or bottler or other person after the payment of the tax imposed by this article, only from such persons, firms or corporations as may be designated as manufacturers of such crowns and lids by the commissioner of revenue. The commissioner of revenue is authorized to enter into contracts on behalf of the state with one or more manufacturers for the manufacture, sale and distribution of such crowns or lids and shall require of such persons, firms and corporations so manufacturing, selling and distributing such crowns or lids a bond or bonds with a company authorized to do business in this state as surety payable to the state of North Carolina in such penalty and upon such conditions as in the opinion of the commissioner of revenue will adequately protect the state. The crowns and lids shall be manufactured, sold and distributed at the cost of the taxpayer. No manufacturer or bottler will be allowed to purchase the crowns or lids prescribed by this section unless such bottler or manufacturer has a valid permit from the federal government and the state of North Carolina to manufacture, sell and distribute such crowns or lids in the state in which such manufacturer or bottler is located, to manufacture, bottle, or sell the beverages herein described. The crowns and lids shall be sold by the commissioner of revenue at a discount of two per cent (2%) as sole compensation for North Carolina tax-paid crown and lid losses sustained in the process of production of malt beverages. No compensation or refund shall be
made for tax-paid malt beverages given as free goods, or advertising, and losses, sustained by spoilage and breakage incident to the sale and distribution of malt beverages.

(f) At the time of delivering beverages to any person, firm or corporation in this state, each manufacturer or bottler shall make a true duplicate invoice showing the date of delivery, the amount and value of each shipment of beverages delivered, and the name of the purchaser to whom the delivery is made, and shall retain the same for a period of two years, subject to the use and inspection of the commissioner of revenue or his agents.

(g) Persons operating boats, dining cars, buffet cars or club cars upon or in which beverages are sold shall not be required to evidence the payment of the tax herein provided for by affixing crowns or lids as herein provided, but instead shall keep such records of the sales of such beverages in this state as the commissioner of revenue shall prescribe and shall submit monthly reports of such sales to the commissioner of revenue upon a form prescribed thereby by the commissioner of revenue, and shall pay the tax levied under this article at the time such reports are filed.

(h) It is the intent and purpose of this section to require all manufacturers and bottlers and other persons, except as herein provided, to affix the crowns or lids provided for herein to all original containers in which beverages are normally placed, prepared for market, received, sold or handled, before such beverages are sold, offered for sale, or held for sale within this state.

(i) Any person, firm or corporation, except as herein provided, who shall sell the beverages enumerated in § 18-64, subsection (a) to wholesaler, retailers, or consumers which do not have affixed thereto the crowns or lids required by this section, or who shall purchase, receive, transport, store, or possess any beverage in containers to which the crowns or lids required herein are not affixed, shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

(j) Manufacturers, bottlers, or vendors of beverages enumerated in § 18-64, subsection (a), from without this state, shall affix the crowns or lids to original containers of such beverages to be sold, offered for sale, held for sale, delivered or transported for delivery in this state.

(k) The commissioner of revenue shall promulgate rules and regulations to relieve manufacturers or bottlers of beverages from the liability to affix crowns or lids to such containers of such beverages as are intended to be shipped and are thereafter shipped out of this state by such manufacturers or bottlers for resale out of this state.

(l) Any person who falsely or fraudulently makes, forges, alters, or counterfeits any such crowns or lids, or knowingly or wilfully utters, passes or tenders as true any such false, forged, altered, or counterfeited crowns or lids, or uses more than once any crown or lid provided for and required by this article, or uses a crown or lid other than that prescribed herein for the purpose of evading the tax imposed under this article, or for the purpose of aiding orabetting others to evade the tax imposed under this article, shall be guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the state’s prison for not more than five years, or by a fine of not more than five thousand dollars ($5,000.00), or by both such fine and imprisonment in the discretion of the court.

(m) Any person, firm or corporation having in his possession a container or containers of beverages not bearing the crowns or lids required to be affixed to such container, or who fails to produce upon demand by the commissioner of revenue or his agent, invoices of all beverages purchased or received by him within two years prior to such demand, unless upon satisfactory proof it is shown that such non-production is due to providential or other causes beyond his control, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned in the discretion of the court.

(n) Any person who shall fail, neglect, or refuse to comply with or shall violate any provisions of this section, for which no specific penalty is provided, or who shall refuse to permit the commissioner of revenue or his agents to examine his books, papers, invoices and other records, his store of beverages in and upon any premises where the same are manufactured, bottled, stored, sold, offered for sale, or held for sale, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned in the discretion of the court.

(o) The commissioner of revenue is hereby charged with the enforcement of the provisions of this section and hereby authorized and empowered to prescribe, adopt, promulgate, and enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this section, and the collection of taxes, penalties, and interest imposed by this article.

In the event that the commissioner of revenue shall find as facts that due to war conditions or other unusual circumstances, a free supply of taxpaid crowns cannot be obtained, and that the beverage tax revenues of the state are being, or will likely be, impaired by the difficulty or impossibility in obtaining said taxpaid crowns, the commissioner shall be empowered to promulgate a regulation authorizing the use of stamps, labels, or other suitable devices in lieu of or in addition to crowns as evidences of tax payments for the duration of the emergency, but no longer. In the event that stamps, labels, or other devices are authorized by the commissioner as herein provided, the remaining provisions of this article shall not be affected, and shall be construed by substituting the name of the substituted device for “crown or lid” or “crowns or lids” wherever these words appear, unless the context clearly will not permit such construction.

The action of the commissioner of revenue in
promulgating a regulation under date of September second, one thousand nine hundred and forty-two, authorizing the use of stamps as an alternative to crowns or lids, is in all respects hereby approved, ratified and confirmed.

(p) The commissioner of revenue is hereby authorized to prescribe, adopt, promulgate, and enforce the rules and regulations relating to the transportation of beverages enumerated in § 18-64 through this state, and from points outside of this state to points within this state, and to prescribe, adopt, promulgate and enforce rules and regulations reciprocal to those of, or laws of, any other state or territory affecting the transportation of beverages manufactured in this state.

(q) The commissioner of revenue shall have authority at any time after March 24, 1939, to make provisions for the furnishing of crowns or lids required by this section.

(r) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of beverages described in section 18-64, subsection (b) of twenty cents (20c.) per gallon.

These additional taxes levied under this subsection shall be paid to the commissioner of revenue by the wholesale distributor or bottler of such beverages.

Reports shall be made to the commissioner of revenue in such form as he may prescribe, on or before the tenth day of each month, for all beverages sold by such wholesale distributor or bottler within the preceding month, and such reports when filed shall be accompanied by a remittance of the amount of tax shown to be due. Failure to file the reports herein prescribed and pay the tax as shown to be due thereon shall subject such wholesale distributor or bottler to a penalty of five per centum of the amount of the tax due, per month from the date the tax is due.

If the wholesale distributor or bottler shall refuse to make the reports required under this section, then such reports shall be made by the commissioner or his duly authorized agents from the best information available, and such reports shall be prima facie correct for the purposes of this section, and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payments, and if payment is not made within thirty days after demand therefor by the commissioner or his duly authorized agents, there shall be added not more than one hundred per centum as damages, together with interest at the rate of one per centum per month from the time such tax was due. If such tax be paid within thirty days after notice by the commissioner, then there shall be added not more than ten per centum as damages, per month from the time such tax was due until paid.

The commissioner for good cause may extend the time for making any report required under the provisions of this section, and may grant such additional time within which to make such report as he may deem proper, but the time for filing any such report shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such report. If the time for filing a report be extended, interest at the rate of one-half of one per centum per month from the time the report was required to be filed to the time of payment shall be added and paid.

The taxes levied in this section are in addition to the taxes levied in Schedule E of the Revenue Act. (1939, c. 158, s. 517; c. 370, s. 1; 1941, c. 50, s. 7; c. 339, s. 4; 1943, c. 400, s. 6; 1943, cc. 564, 565.)

Editor's Note.—The 1941 amendments added the last two sentences in subsection (r) and struck out references to former subsection (c) of § 18-64.

The first 1943 amendment added the second and third paragraphs of subsection (o). The second 1943 amendment substituted in the first paragraph of subsection (r) "twenty cents" for "ten cents," and the second 1943 amendment rewrote the other paragraphs of the subsection.

§ 18-82. By whom tax payable.—The tax levied in § 18-81 upon the sale of beverages enumerated in § 18-64, subsection (a) shall be paid to the commissioner of revenue by the manufacturer or bottler of such beverages, and the tax levied in § 18-81 upon the sale of the beverages enumerated in § 18-64, subsection (b) shall be paid to the commissioner of revenue by the wholesale distributor or bottler of such beverages. As a condition precedent to the granting of license by the commissioner of revenue to any wholesale distributor, manufacturer or bottler of beverages under this article, the commissioner of revenue shall require each such wholesale distributor, manufacturer or bottler to furnish bond in an indemnity company licensed to do business under the insurance laws of this state in such sums as the commissioner of revenue shall find adequate to cover the tax liability of each such wholesale distributor, manufacturer or bottler, proportioned to the volume of business of each such wholesale distributor, manufacturer or bottler, but in no event to be less than one thousand dollars ($1,000.00), or to deposit federal, state, county or municipal bonds in required amounts, such county and municipal bonds to be approved by the commissioner of revenue. The commissioner of revenue may grant such extension of time for compliance with this condition as may be found to be reasonable. (1939, c. 158, s. 518; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment struck out the reference to former subsection (c) of § 18-64, appearing in the first sentence of this section.

§ 18-83. Nonresident manufacturers and wholesale dealers to be licensed. From and after April thirtieth, one thousand nine hundred thirty-nine, every non-resident desiring to engage in the business of making sales of the beverages described in § 18-64, to wholesale dealers licensed under the provisions of this article, shall first apply to the commissioner of revenue for a permit so to do. The commissioner of revenue may require of every such applicant that a bond in a sum not to exceed two thousand dollars ($2,000.00) be executed by such applicant and deposited with the commissioner, conditioned upon the faithful compliance by such applicant with the provisions of this article, and particularly that such applicant shall not make sales of any of the beverages described in section 18-64 to any person in this state except a duly licensed wholesale dealer. Upon the payment of a license tax of one hundred fifty dollars ($150.00), if the commissioner is satisfied that said applicant is a bona fide manufacturer or distributor of the beverages defined in § 18-64, he shall then issue a permit to such applicant which shall bear a serial
of any such contract or agreement between any person under this article who pay the tax under § 18-81 upon all such beverages sold to retail bottlers licensed by the commissioner of revenue in § 18-64 only from wholesale distributors or such retail dealer and shall be prima facie evidence of intent to defraud, and any person guilty of violation of any such contract or agreement shall be guilty of a misdemeanor. (1939, c. 158, s. 510.)

§ 18-85. Tax on fortified wines and spirituous liquors; sale of fortified wines in A. B. C. stores.—In addition to other taxes levied in this article, and in lieu of taxes levied in Schedule E of the Revenue Act on the sale of fortified wines and spirituous liquors, there is hereby levied a tax of eight and one-half per cent (8½%) on the retail price of fortified wines and spirituous distilled liquors of every kind that may be sold in this state, including liquors sold in county liquor stores. Provided, however, that in no event shall the amount paid under this section exceed one-half of the net profits from liquors sold through such stores in any county. The taxes levied in this section shall be payable monthly, at the same time and in the same manner as taxes levied in Schedule E of the Revenue Act, and the liability for such tax shall be subject to all the rules, regulations and penalties provided in Schedule E and in other sections of the Revenue Act for the payment of taxes. One-fourteenth of the taxes collected under this section are intended to pay the necessary expenses of the state alcoholic control board, and for other necessary expenses in connection with the enforcement of such laws as may be enacted by this general assembly for the sale of alcoholic liquors and to meet such appropriations there is hereby appropriated and made available for the purpose above set forth one-fourteenth of the amount of taxes collected under this section, such sum to be allocated for such purpose by the director of the budget upon request of the state alcoholic control board and expended and accounted for as other state funds, and the director of the budget is hereby given authority to estimate the revenues to be received under this section, to the end that a sufficient sum shall be made available for the purpose of defraying the expenses of the state alcoholic control board until sufficient revenues have been collected as provided hereunder for said purposes.

Spirituous liquors, as referred to in this section, shall be deemed to include any alcoholic beverages containing an alcoholic content of more than twenty-four per cent (24%) by volume.

Fortified wines may be sold in county alcoholic beverage control stores duly established under the authority of article 3 of this chapter. (1939, c. 158, s. 519½; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment inserted the references to fortified wines in the first sentence of the first paragraph and added the third paragraph.

§ 18-86. Books, records, reports.—Every person licensed under any of the provisions of this article shall keep accurate records of purchase and sale of all beverages taxable under this article, including a separate file and record of all purchases and sales of fortified wines and spirituous liquors; sale of fortified wines in A. B. C. stores duly established under the authority of section 3, chapter 4, General Statutes. The commissioner of revenue or any authorized agent, shall at any time during business hours, have access to such records. The commissioner of revenue may also require regular or special reports to be made by every such person, at such times and in such form as the commissioner may require. (1939, c. 158, s. 520.)

§ 18-87. No license for sales upon school property.—No license shall be issued for the sale of beverages enumerated in § 18-64 upon the campus or property of any public or private school or college in this state. (1939, c. 158, s. 521.)

§ 18-88. License shall be posted.—Each form of license required by this article shall be kept posted in a conspicuous place at each place where the business taxable under this article is carried on, and a separate license shall be required for each place of business. (1939, c. 158, s. 522.)

§ 18-89. Administrative provisions. —The commissioner of revenue and the authorized agents of the state department of revenue shall have and exercise all the rights, duties, powers, and responsibilities in enforcing this article that are enumerated in the Revenue Act in administering taxes levied in Schedule B of that act. (1939, c. 158, s. 523.)

§ 18-90. Appropriation for administration. —For the efficient administration of this article an appropriation is hereby made for the use of the department of revenue in addition to the appropriation in the Appropriation Bill of a sum equal to three per cent (3%) of the total revenue collections under this article to be expended under all allotments made by the budget bureau of such part of the whole of such appropriation as
may be found necessary for the administration of this article. The budget bureau may estimate the yield of revenue under this article and make advance appropriation based upon such estimate. (1939, c. 158, s. 524.)

§ 18-90.1. Sale to minors under 18 a misdemeanor.—It shall be unlawful for any person, firm, or corporation to sell or give any of the products authorized to be sold by this article to any minor under eighteen years of age. (1933, c. 216, s. 8.)

Cross Reference.—As to sale of liquor to minors under the Alcoholic Beverage Control Act, see § 18-46.

§ 18-91. Violation made misdemeanor; revocation of permits; forfeiture of license.—Whosoever violates any of the provisions of this article, or any of the rules and regulations promulgated pursuant thereto, shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine or by imprisonment, or by both fine and imprisonment, in the discretion of the court. If any licensee is convicted of the violation of the provisions of this article, or any of the rules and regulations promulgated pursuant thereto, the court shall immediately declare his permit revoked, and notify the county commissioners accordingly, and no permit shall thereafter be granted to him within a period of three years thereafter. Any licensee who shall sell or permit the sale on his premises or in connection with his business, or otherwise, of any alcoholic beverages not authorized under the terms of this article, unless otherwise permitted by law, shall, upon conviction thereof, forfeit his license in addition to any punishment imposed by law for such offense. (1939, c. 158, s. 525.)

§ 18-92. Effective date.—All taxes levied in this article shall be in effect from and after April thirtieth, one thousand nine hundred thirty-nine. (1939, c. 158, s. 528.)

§ 18-93. Adoption of federal regulations. The "Standards of Identity for Wine" and the regulations relating to "Labeling and Advertising of Wine" promulgated by the Federal Alcohol administration of the United States Treasury Department, and known respectively as Regulation Number Four, Article II, and Regulation Number Four, Articles III and VI, are hereby adopted by North Carolina. (1937, c. 335, s. 2.)

Art. 5. Fortified Wine Control Act of 1941.

§ 18-94. Title of article. — The title of this article shall be the "Fortified Wine Control Act of one thousand nine hundred and forty-one." (1941, c. 339, s. A.)

Editor's Note.—Public Laws 1941, c. 339, § 8, provides: "This act shall be in full force and effect on and after May first one thousand nine hundred and forty-one." And § 7 of said chapter provides: "This act shall be in full force and effect on and after midnight, July first, one thousand nine hundred and forty-one. This act is declared to be an act setting forth grants to the wholesale distributors fifteen (15) days time in which to deplete the entire stock of the retailers, package and return same to such wineries from which said wines were purchased. The commissioner of revenue is hereby empowered and directed to apply to reimburse all wholesale distributors in an amount of money equivalent to the sum represented by North Carolina wine tax stamps in possession of said wholesale distributors, whether affixed to containers or not, as of July second, one thousand nine hundred and forty-one. Such distributors claiming refunds hereunder shall prepare and forward to the commissioner of revenue sworn itemized statements of such tax stamps in their possession, and the commissioner of revenue is hereby empowered and directed to audit and verify such statements before granting refunds."

§ 18-95. Purpose of article.—The purpose of this article is to prevent and prohibit sales of fortified wines at any places in the state except through county operated alcoholic beverage control stores and to regulate such sales. (1941, c. 339, s. B.)

Cross Reference.—As to alcoholic beverage control stores, see § 18-36 to § 18-62. Stated in State v. Tola, 222 N. C. 406, 23 S. E. (2d) 321.

§ 18-96. Definition of "fortified wines."—Fortified wines shall mean any wine or alcoholic beverage made by fermentation of grapes, fruit and berries and fortified by the addition of brandy or alcohol or having an alcoholic content of more than fourteen per cent of absolute alcohol, reckoned by volume. (1941, c. 339, s. 1.)


§ 18-97. Certain sales, etc., prohibited; names of persons ordering wines furnished police or sheriff.—It shall be unlawful for any person, firm or corporation, except alcoholic beverage control stores operated in North Carolina, to sell, or possess for sale, any fortified wines as defined herein. It shall be unlawful for any person to purchase on order and receive by mail or express from any such alcoholic beverage control store fortified wines in quantities not in excess of one gallon at any one time. Upon the request of any chief of police or sheriff any alcoholic beverage control system shall furnish the names of any persons ordering such wines, and the dates and amounts of such orders. Nothing herein contained shall be construed to permit any person to order and receive by mail or express any spirituous liquors. (1941, c. 339, s. 2.)

§ 18-98. Violation made misdemeanor. — The violation of § 18-97 by any person, firm or corporation shall constitute a misdemeanor punishable as provided in § 18-91. (1941, c. 339, s. 5.)

§ 18-99. Application of other laws; sale of sweet wines; licensing of wholesale distributors.—The provisions of article 3 of this chapter shall apply to fortified wines: Provided, that it shall be legal to sell sweet wines in hotels, grade A restaurants, drug stores and grocery stores in any county in which the operation of alcoholic beverage control stores is authorized by law; such sales, however, shall be subject to the rules and regulations of the state alcoholic beverage control board. For the purpose of this article as amended, sweet wines shall be any wine made by fermentation from grapes, fruits, berries and the pure brandy not added, and having an alcoholic content of not less than fourteen per cent (14%) and not more than twenty per cent (20%) of absolute alcohol, reckoned by volume: Provided further that the state alcoholic control board shall approve and authorize the licensing of wholesale wine distributors in such counties where alcoholic board control stores are operated. (1941, c. 339, s. 6.)

Art. 6. Light Domestic Wines; Manufacture and Regulation.

§ 18-100. Manufacture of domestic wines permitted.—It shall be lawful for any person growing crops, either wild or cultivated, of grapes, fruits or berries to make therefrom light domestic wines or wines having only such alcoholic content as natural fermentation may produce, for the use of his family and guests. (1935, c. 393, s. 1.)

§ 18-101. Manufacture by any person, firm or corporation authorized to do business in State.—Any person, firm or corporation authorized to do business in the state may, subject to the requirements of the Beverage Control Act, under regulations prescribed by the commissioner of agriculture and approved by the governor, engage in the business of manufacturing and producing wines and ciders by natural fermentation from the juices of fruits, grapes and berries grown within the state, and such wines and ciders shall be classified and recognized as food and distributed as such. (1935, c. 393, s. 3, c. 466, s. 1.)

§ 18-102. Rules and regulations of commissioner of agriculture.—The commissioner of agriculture shall promulgate and publish such reasonable rules and regulations, with the approval of the governor, for the regulation of such wineries as may be established, and such rules and regulations shall have the force and effect of laws, after the same have been approved by the governor. (1935, c. 393, s. 4.)

§ 18-103. Information furnished farmers. —It shall be the duty of the department of agriculture to disseminate to the farmers of the State in an economical way the best information it can get of the best methods of cultivation of such crops, and the making of such light domestic wines. (1935, c. 393, s. 7.)

Cross Reference.—As to duties of board and commissioner of agriculture with reference to new agricultural industries, especially grapes, etc., see § 106-22, subsec. 6.

§ 18-104. Fruit ciders included.—All the provisions of this article shall also apply to the manufacture of fruit ciders. (1935, c. 393, s. 7½.)

Art. 7. Beer and Wine; Hours of Sale.

§ 18-105. Sale between certain hours unlawful.—It shall be unlawful for any person, firm, or corporation, licensed to sell beer and/or wine in North Carolina to sell, or offer for sale, any beer and/or wine in North Carolina between the hours of eleven-thirty p. m. and seven a. m. every day. (1943, c. 339, s. 1.)

§ 18-106. Permitting consumption on premises during certain hours unlawful.—It shall be unlawful for any person, firm, or corporation, licensed to sell beer and/or wine in North Carolina, to permit or allow the consumption of any beer and/or wine in any place in North Carolina under the control of, or being operated by, said licensee, between the hours of twelve midnight and seven a. m. every day. (1943, c. 339, s. 2.)

§ 18-107. Regulation by counties and municipalities.—In addition to the restrictions on the sale of beer and/or wine set out in §§ 18-105 and 18-106, the county commissioners of the various counties in North Carolina shall have, and they are hereby vested with, full power and authority to regulate and prohibit the sale of beer and/or wine from eleven-thirty p. m. on each Saturday until seven a. m. on the following Monday. The governing bodies of all municipalities in the state shall have, and they are hereby vested with, the full power and authority to regulate and prohibit the sale of beer and/or wine from eleven-thirty p. m. on each Saturday until seven a. m. on the following Monday.

The power herein vested in governing bodies of municipalities shall be exclusive within the corporate limits of their respective municipalities, and the powers herein vested in the county commissioners of the various counties in North Carolina shall be exclusive in all portions of their respective counties not embraced in the corporate limits of municipalities therein. (1943, c. 339, s. 3.)

§ 18-108. Violation a misdemeanor; revocation of license.—Any person, firm, or corporation, licensed to sell beer and/or wine, violating the provisions of this article or any person, firm, or corporation, licensed to sell beer and/or wine, violating any regulations which may be made under this article by the county commissioners of the county in which said person, firm, or corporation is licensed to sell beer and/or wine, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than fifty dollars ($50.00) and/or imprisoned not less than thirty days, and his or its license to sell beer and/or wine shall automatically be revoked, by the court, or as otherwise provided by law. (1943, c. 339, s. 4.)

Chapter 19. Offenses against Public Morals.

Sec.
19-1. What are nuisances under this chapter.
19-3. When triable; evidence; dismissal of complaint.
19-4. Violation of injunction; punishment.

§ 19-1. What are nuisances under this chapter.—Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, prostitution, gambling, or illegal sale of whiskey is guilty of nuisance, and the building, erection, or place, or the ground itself, in or upon which such lewdness, assignation, prostitution,
gaming, or illegal sale of liquor is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 25; C. S. 3180.)

Cross References.— As to criminal actions: For prostitution, see § 14-303 et seq; for gambling, see § 14-369 et seq; for unlawful sale of whiskey, see § 18-31 et seq; for lewdness, etc., see § 14-190.

Constitutionality.—This section, et seq., providing for the abatement of public nuisances is constitutional as a valid exercise of the police power of the state. Carpenter v. Boyles, 213 N. C. 433, 196 S. E. 850. See also, Barker v. Palmer, 217 N. C. 519, 8 S. E. (2d) 610.

Nuisance Need Not Be Nucleus of Crime.— It it not essential that the premises and the business conducted there, should be violations of the criminal law, either generally speaking or under the terms of the statute. It is not necessary that the nuisance declared should have a nucleus of crime essential to its existence. While nuisance is frequently associated with criminal offenses, the law is not under the necessity of predetermining upon the make valid a claim of nuisance of an act which it denominates a nuisance. State v. Brown, 221 N. C. 301, 304, 20 S. E. (2d) 286.

Evidence Supporting Abatement. — The evidence disclosed an establishment with ticker tape and other paraphernalia to facilitate the making of wagers on horse races, and in which offers to lay wagers were transmitted to race tracks outside the state, although wagers were paid off to successful betters, constitutes a public nuisance. State v. Brown, 221 N. C. 301, 20 S. E. (2d) 286.

Authority of Municipalities Concerning Nuisances.— Under the authority conferred upon a municipal corporation to adopt ordinances for the government of the corporation and to abate nuisances, no power is granted to enact that the rent or rent paid to successful betters, constitutes a public nuisance. Carpenter v. Boyles, 213 N. C. 432, 196 S. E. 850.

Cross References.—As to criminal actions: For prostitution, see § 14-190; for gambling, see § 14-369; for unlawful sale of whiskey, see § 18-31 et seq; for lewdness, etc., see § 14-190.

Constitutionality.—This section, et seq., providing for the abatement of public nuisances is constitutional as a valid exercise of the police power of the state. Carpenter v. Boyles, 213 N. C. 433, 196 S. E. 850. See also, Barker v. Palmer, 217 N. C. 519, 8 S. E. (2d) 610.

Nuisance Need Not Be Nucleus of Crime.— It it not essential that the premises and the business conducted there, should be violations of the criminal law, either generally speaking or under the terms of the statute. It is not necessary that the nuisance declared should have a nucleus of crime essential to its existence. While nuisance is frequently associated with criminal offenses, the law is not under the necessity of predetermining upon the make valid a claim of nuisance of an act which it denominates a nuisance. State v. Brown, 221 N. C. 301, 304, 20 S. E. (2d) 286.

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Authority of Municipalities Concerning Nuisances.— Under the authority conferred upon a municipal corporation to adopt ordinances for the government of the corporation and to abate nuisances, no power is granted to enact that the rent or rent paid to successful betters, constitutes a public nuisance. Carpenter v. Boyles, 213 N. C. 432, 196 S. E. 850.


§ 19-2. Action for abatement; injunction.— Whenever a nuisance is kept, maintained, or exists as defined in this chapter, the city prosecuting attorney, the solicitor, or any citizen of the county may maintain civil action in the name of the state of North Carolina upon the relation of such city prosecuting attorney, solicitor, or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists. In such action, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred dollars, or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment. (1919, c. 288; Pub. Loc. 1913, c. 761; s. 27; C. S. 3182.)

Cross Reference.—As to certain evidence relative to keeping disorderly houses admissible in criminal proceedings, see § 14-55.

By provision of this section, evidence of the general reputation of the place in question is competent in an action to abate a public nuisance. Carpenter v. Boyles, 213 N. C. 432, 196 S. E. 850.

§ 19-4. Violation of injunction; punishment.— In case of the violation of any injunction granted under the provisions of this chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred or more than one thousand dollars, or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 28; C. S. 3183.)


§ 19-5. Order abating nuisance; what it shall contain.—If the existence of the nuisance be established in an action as provided in this chapter, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the cause, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale
thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released. If any person shall break and enter, or use said building, erection, or place so directed to be closed, he shall be punished as for contempt, as provided in the proceeding for such action. For moving and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 29; C. S. 3184.)

Fishing in waters when prohibited by law is a public nuisance and the General Assembly has the power to authorize a prompt abatement of the nuisance by seizure and sale of the nets, subject to the right of their owner to contest the fact of his violation of the law by a proceeding in the nature of claim and delivery, or by injunction to prevent sales or by action to recover the proceeds of sales plus damages. Daniels v. Homer, 139 N. C. 219, 51 S. E. 592.

Proceeding Is In Personam.—A proceeding to abate a nuisance against the public morals is not a proceeding in rem against the property itself, but is in personam, and the provisions of the statute for padlocking the premises and for the sale of chattels used in connection with the operation of the nuisance, are penalties prescribed by law for its violation, and therefore innocent lessors of the premises or owners or mortgagees of chattels which do not constitute a nuisance per se may not be deprived of their property rights unless they have actual or constructive notice that the property is used in the operation of the nuisance, and they have the right to have this issue determined by the verdict of a jury. Sinclair v. Croom, 217 N. C. 536, 8 S. E. (2d) 834.

Innocent Mortgagee May Recover Property before Sale.—An innocent mortgagee without knowledge that the property was being used by the mortgagor in operating a nuisance contrary to law and in violation of provisions in the conditional sales contract, may institute action to recover the property after it has been seized by the sheriff but before it has been sold under this section. Habitat v. Stephenson, 217 N. C. 447, 8 S. E. (2d) 245.

Lessors Must Have Knowledge before Personal Judgment Can Be Rendered.—In an action to abate a nuisance against public morals, the lessee or the conditional seller, lessees of the property are entitled to the submission of an issue as to whether they knew the lessee was operating a public nuisance thereon before personal judgment is rendered against lessors taking title, or mortgagee, for the abatement of the nuisance, are penalties prescribed by law for its violation, and therefore innocent lessors of the premises or owners or mortgagees of chattels which do not constitute a nuisance per se may not be deprived of their property rights unless they have actual or constructive notice that the property is used in the operation of the nuisance, and they have the right to have this issue determined by the verdict of a jury. Sinclair v. Croom, 217 N. C. 536, 8 S. E. (2d) 834.

As Must Conditional Seller.—Intervener sold a cash register under a conditional sales contract and same, together with other chattels of the purchaser, was seized for sale upon the determination that the purchaser was using it in the maintenance of a nuisance against public morals. Upon the facts agreed intervenor had no actual or constructive knowledge that the cash register was used in the maintenance of a nuisance. Only the equity of the purchaser could be condemned for sale under the statute and the intervenor may be charged with no part of the cost. Sinclair v. Croom, 217 N. C. 536, 8 S. E. (2d) 834.

Restraining Sale of Part of Personality.—Where judgment directing the sale of personal property used in the operation of a nuisance is entered in a proceeding instituted by the solicitor, the complaint in an independent action thereafter instituted against the sheriff alone by the defendant in the former proceeding to restrain the sale of certain of the personal property upon the ground that it was not used in the operation of the nuisance cannot be treated as a motion in the former action to vacate the judgment in the former action. Humphrey v. Churchhill, 217 N. C. 530, 8 S. E. (2d) 810.

In a proceeding under this chapter, judgment was entered upon determination that the defendant therein was operating a nuisance against public morals, directing that the personal property of defendant used in the operation of the nuisance be sold in accordance with this section. Thereafter the defendant in that proceeding instituted this action against the sheriff to restrain the sale of certain of the personal property upon allegations that the property specified had not been used in the operation of the nuisance and that the sheriff was about to sell it under the prior judgment. There was neither allegation nor contention that the execution was void. The temporary restraining order was properly dissolved, the proper remedy being by motion in the cause and not by independent action to restrain the sheriff from selling the chattels as directed by the prior judgment. Id.


§ 19-6. Application of proceeds of sale.—The proceeds of the sale of the personal property as provided in § 19-5 shall be applied in the payment of the costs of action and abatement, and the balance, if any, shall be paid to the defendant. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 30; C. S. 3185.)


§ 19-7. How order of abatement may be canceled.—If the owner appears and pays all cost of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk of the superior court, conditioned that he will immediately abate said nuisance, and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as same may relate to said property; and if the proceeding be a civil action, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 31; C. S. 3186.)


§ 19-8. Attorney's fees may be taxed as costs. —The court shall tax as part of the cost in any action brought hereunder such fee for the attorney prosecuting the action or proceedings as may in the court's discretion be reasonable remuneration for the services performed by such attorney. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 32; C. S. 3187.)

Division IV.  Motor Vehicles.

Chap. 20. Motor Vehicles 803
Chapter 20. Motor Vehicles.

Art. 1. Department of Motor Vehicles.

Sec. 20-1. Department of motor vehicles created; power and duties.
20-3. Organization of department; operating funds.
20-4. Clarification of conflicts as to transfer of functions.

Art. 2. Uniform Driver's License Act.

20-5. Title of article.
20-6. Definitions.
20-7. Operators and chauffeurs must be licensed.
20-8. Persons exempt from license.
20-10. Age limits for drivers of public passenger-carrying vehicles.
20-12. Instruction.
20-15. Authority of department to cancel license.
20-16. Authority of department to suspend license.
20-17. Mandatory revocation of license by department.
20-18. Conviction for failure to dim, etc., lights not ground for suspension or revocation.
20-19. Period of suspension or revocation.
20-20. Surrender and return of license.
20-21. No operation under foreign license during suspension or revocation in this state.
20-22. Suspending privileges of nonresidents and reporting convictions.
20-23. Suspending resident's license upon conviction in another state.
20-24. When court to forward license to department and report convictions.
20-25. Right of appeal to court.
20-27. Availability of records.
20-28. Unlawful to drive while license suspended or revoked.
20-29. Surrender of license.
20-29.1. Commissioner may require reexamination.
20-32. Unlawful to permit unlicensed minor to drive motor vehicle.
20-33. Unlawful to employ unlicensed chauffeur.
20-34. Unlawful to permit violations of this article.
20-35. Penalties for misdemeanor.
20-36. Fees.
20-37. Limitations on issuance of licenses.


Part 2. Authority and Duties of Commissioner and Department.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

Part 4. Transfer of Title or Interest.

Part 5. Issuance of Special Plates.

CHAPTER 20. MOTOR VEHICLES

Sec. 20-52. Manufacturer or dealer to give notice of sale or transfer.

Part 6. Vehicles of Nonresidents of State, etc.

20-83. Registration by nonresidents.

Part 7. Title and Registration Fees.

20-85. Schedule of fees.

20-86. Penalty for engaging in a "for hire" business without proper license plates.

20-87. Passenger vehicle registration fees.

20-88. Property hauling vehicles.

20-89. Method of computing gross revenue of franchise bus carriers and haulers.

20-90. Due date of franchise tax.

20-91. Records and reports required of franchise carriers.


20-93. Bond or deposit required.

20-94. Partial payments.

20-95. Licenses for less than a year.

20-96. Overloading.

20-97. Taxes compensatory; no additional tax.

20-98. Tax lien.

20-99. Sale under execution; franchise canceled.

20-100. Vehicles junked or destroyed by fire or collision.

20-101. Vehicles to be marked.


20-103. Reports by owners of stolen and recovered vehicles.

20-104. Action by department on report of stolen or embezzled vehicles.

20-105. Unlawful taking of a vehicle.

20-106. Receiving or transferring stolen vehicles.

20-107. Injuring or tampering with vehicle.

20-108. Vehicles without manufacturer's numbers.

20-109. Altering or changing engine or other numbers.

20-110. When registration shall be rescinded.

20-111. Violation of registration provisions.

20-112. Making false affidavit perjury.

20-113. Licenses protected.

20-114. Duty of officer; manner of enforcement.


20-117. Flag or light at end of load.

20-118. Weight of vehicles and load.

20-118.1. Peace officer may weigh vehicle and require removal of excess load.

20-119. Special permits for vehicles of excessive size or weight.

20-120. Operation of flat trucks on state highways regulated.

20-121. When authorities may restrict right to use highways.

20-122. Restrictions as to tire equipment.

20-123. Trailers and towed vehicles.


20-126. Mirrors.

20-127. Windshields must be unobstructed.

Sec. 20-128. Prevention of noise, smoke, etc., muffler cut-outs regulated.

20-129. Required lighting equipment of vehicles.

20-130. Additional permissible light on vehicle.

20-130.1. Use of red lights on front of vehicles prohibited; exceptions.

20-131. Requirements as to head lamps and auxiliary driving lamps.


20-134. Lights on parked vehicles.

20-135. Safety glass.

20-136. Smoke screens.

20-137. Unlawful display of emblem or insignia.


20-138. Persons under the influence of intoxicating liquor or narcotic drugs.

20-139. Operation upon driveways of public or private institutions while under the influence of intoxicating liquors, etc.

20-140. Reckless driving.

20-141. Speed restrictions.

20-142. Railroad warning signals must be obeyed.

20-143. Vehicles must stop at certain railway grade crossings.

20-144. Special speed limitation on bridges.

20-145. When speed limit not applicable.

20-146. Drive on right side of highway.

20-147. Keep to the right in crossing intersections or railroads.


20-149. Overtaking a vehicle.

20-150. Limitations on privilege of overtaking and passing.

20-151. Driver to give way to overtaking vehicle.

20-152. Following too closely.

20-153. Turning at intersection.

20-154. Signals on starting, stopping or turning.


20-156. Exceptions to the right-of-way rule.

20-157. What to do on approach of police or fire department vehicles.

20-158. Vehicles must stop at certain through highways.

20-159. Passing street cars.

20-160. Driving through safety zone prohibited.

20-161. Stopping on highway.

20-162. Parking in front of fire hydrant, fire station or private driveway.

20-163. Motor vehicle left unattended; brakes to be set and engine stopped.

20-164. Driving on mountain highways.

20-165. Coasting prohibited.

20-166. Duty to stop in event of accident.


20-168. Drivers of state, county and city vehicles subject to provisions of this article.


20-170. This article not to interfere with rights of owners of real property with reference thereto.

20-171. Traffic laws apply to persons riding animals or driving animal-drawn vehicles.


20-172. Pedestrians subject to traffic control signals.

20-173. Pedestrians' right-of-way at crosswalks.
Sec. 20-174. Crossing at other than cross-walks.
20-175. Pedestrians soliciting rides.

20-176. Penalty for misdemeanor.
20-177. Penalty for felony.
20-178. Penalty for bad check.
20-179. Penalty for driving while under the influence of intoxicating liquor or narcotic drugs.
20-180. Penalty for reckless driving.
20-181. Penalty for failure to dim, etc., beams of headlamps.
20-182. Penalty for failure to stop in event of accident involving injury or death to a person.
20-183. Duties and powers of law enforcement officers.

Art. 4. State Highway Patrol.
20-185. Personnel; appointment; salaries.
20-186. Oath of office; bond.
20-188. Duties of highway patrol.
20-189. Patrolman assigned to governor's office.
20-190. Uniforms; furnishing motor vehicles.
20-191. Establishment of district headquarters.
20-192. Shifting of patrolmen from one district to another.
20-193. Fees for service of process by patrolmen to revert to county.
20-194. Expense of administration.
20-195. Co-operation between patrol and local officers.
20-196. State-wide radio system authorized; use of telephone lines in emergencies.

Art. 5. Enforcement of Collection of Judgments against Irresponsible Drivers of Motor Vehicles.
20-197. Certain words defined.
20-198. Suspension of driver's license and registration certificates for failure to pay tort judgment.
20-199. Proof of ability to respond in damages; surety bond; withdrawal of license to operate automobile.
20-200. Proof of ability by insurance carrier's certificate.

Art. 1. Department of Motor Vehicles.

§ 20-1. Department of motor vehicles created; power and duties.—A department of the government of this state, to be known as the department of motor vehicles, is hereby created. It is the intent and purpose of this article, and it shall be liberally construed to accomplish that purpose, to transfer and consolidate under one administrative head in the department of motor vehicles agencies now operated under the department of revenue and dealing with the subject of the regulation of motor vehicular traffic, whether such activities are at present handled directly by the commissioner of revenue or by the motor vehicle bureau, the auto theft bureau, the division of highway safety, the major of the state highway patrol, the officials handling the Uniform Drivers License Act; and the department of motor vehicles shall succeed to and is hereby vested with all the powers, duties and jurisdiction now vested by law in any of said agencies; provided, however, all powers, duties and functions relating to the collection of motor fuel taxes, the inspection of gasoline and oil, and the collection of the gasoline and oil inspection taxes, and the duties, powers and functions arising by virtue of §§ 119-41 and 119-42, relating to the issuance of permits to vehicles engaged in the transportation of petroleum prod-
ucts, shall not be affected by such transfer, but shall continue to be vested in and exercised by the commissioner of revenue, and wherever it is now provided by law that reports shall be filed with the commissioner or department of revenue as a basis for collecting the motor fuel or gasoline and oil inspection taxes, or enforcing any of the laws regarding the motor fuel or gasoline and oil inspection taxes, such reports shall continue to be made to the department of revenue and the commissioner of motor vehicles shall make them available to the commissioner of revenue all information from the files of the department of motor vehicles which the commissioner of revenue may request to enable him to better enforce the law with respect to the collection of such taxes: Provided, further, nothing in this article shall deprive the utilities commissioner of any of the duties or powers now vested in him with regard to the regulation of motor vehicle carriers. (1941, c. 36, s. 1.)

Cross Reference.—As to control of motor carriers by utilities commission, see § 62-103, et seq.

Editor's Note.—Public Laws 1941, c. 36, is effective from and after July 1, 1941.

For comment on the 1941 act, see D N. C. Law Rev. 444.

§ 20-2. Commissioner of motor vehicles.—The department of motor vehicles shall be under control of an executive officer to be designated as the commissioner of motor vehicles, who shall be appointed by the governor and be responsible directly to the governor and subject to removal by the governor at his discretion and without requirement of the assignment of any cause. The commissioner shall be paid an annual salary to be fixed by the governor, with the approval of the advisory budget commission, payable in monthly installments, and shall likewise be allowed his traveling expenses when away from Raleigh on official business. (1941, c. 36, s. 2.)

§ 20-3. Organization of department; operating funds.—The commissioner shall organize the department in such manner as he may deem necessary properly to segregate and conduct the work of the department; but the work of the department is hereby divided into at least two divisions, to be known respectively as the division of registration and the division of highway safety and patrol. The commissioner shall, as soon as practicable after appointment, prepare a general plan for the organization of the department, which plan shall not be put into effect until approved by the governor and the advisory budget commission, subject to such changes as may be recommended by the governor and approved by the advisory budget commission. The plan of organization herein provided for may increase or decrease the number of persons now assigned to any of the activities transferred to this department, and the titles may be changed. (1941, c. 36, s. 3.)

§ 20-4. Clarification of conflicts as to transfer of functions.—In the event that there shall arise any conflict as to the transfer of any functions from the department of revenue to the department of motor vehicles, the governor of the state is hereby authorized to issue an executive order clarifying and making certain the issue thus arising. (1941, c. 36, s. 5.)

Art. 2. Uniform Driver's License Act.

§ 20-5. Title of article.—This article may be cited as the Uniform Driver's License Act. (1935, c. 52, s. 31.)

§ 20-6. Definitions.—Terms used in this article shall be construed as follows, unless another meaning is clearly apparent from the language or context or unless such construction is inconsistent with the manifest intention of the legislature.

"Highway" shall include any trunk line highway, state aid road or other public highway, road, street, avenue, alley, driveway, parkway, or place, under the control of the state or any political subdivision thereof, dedicated, appropriated or opened to public travel or other use.

"Motor vehicle" shall mean any rubber-tired vehicle propelled or drawn by any power other than muscular, except aircraft, road rollers, street sprinklers, ambulances owned by municipalities, baggage trucks, and tractors used about railroad stations and yards, agricultural tractors, industrial tractors used in and around warehouses and yards, and such vehicles as run only upon rails or tracks.

"Non-resident" shall mean any person whose legal residence is in some state other than North Carolina or in a foreign country.

"Operator" shall mean any person other than a "chauffeur" who shall operate a motor vehicle or who shall be in the driver's seat of a motor vehicle when the engine is running or who shall steer or direct the course of a motor vehicle which is being towed or pushed by another motor vehicle.

"Chauffeur" shall mean every person who is employed for the principal purpose of operating a passenger motor vehicle, except school busses, and every person who drives any motor vehicle while in use as a public or common carrier for persons or property, and this shall apply to city delivery motor vehicles.

"Person" shall include any individual, corporation, association, co-partnership, company, firm or other aggregation of individuals.

"Vehicle" shall include any device suitable for use on the highways for the conveyance, drawing or other transportation of persons or property, except those propelled or drawn by muscular power or those used exclusively upon tracks.

"Department" shall mean the department of motor vehicles.

As applied to operators' and chauffeurs' licenses issued under this article, the words: "Suspension," "Revocation" and "Canceled." (1935, c. 55, s. 1; 1941, c. 36; 1943, c. 787, s. 1.)

Editor's Note.—The 1943 amendment added the definitions of "Suspension," "Revocation" and "Canceled."

§ 20-7. Operators and chauffeurs must be licensed. — (a) No person except those expressly exempted under § 20-8 shall operate a motor vehicle upon any highway in this State unless such person upon application has been licensed as an operator or chauffeur by the department under the provisions of this article. Provided, that any person over sixteen (16) years of age who has not
Section 20-8

Persons exempt from license

(a) Any person while operating a motor vehicle the property of, and in the service of the Army, Navy or Marine Corps of the United States. This shall not be construed to exempt any chauffeurs or operators of the United States Civilian Conservation Corps motor vehicles;

(b) Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;

(c) A non-resident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country, may operate a motor vehicle in this state either as an operator or chauffeur except any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this state;

(d) A non-resident who is at least eighteen (18) years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home state or country may operate a motor vehicle in this state either as an operator or chauffeur except that no person shall be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this state;
§ 20-9. What persons shall not be licensed.

(a) An operator’s license shall not be issued to any person under the age of eighteen (18) years, and no chauffeur’s license shall be issued to any person under the age of eighteen (18) years.

(b) The department shall not issue an operator’s or chauffeur’s license to any person whose license, either as operator or chauffeur, has been suspended, during the period for which license was suspended; nor to any person whose license, either as operator or chauffeur, has been revoked under the provisions of this article, until the expiration of one year after such license was revoked.

(c) The department shall not issue an operator’s or chauffeur’s license to any person whom it has determined is an habitual drunkard or is addicted to the use of narcotic drugs.

(d) No operator’s or chauffeur’s license shall be issued to any applicant who has been previously adjudged insane or an idiot, imbecile, grand mal epileptic, or feeble-minded, and who has not at the time of such application been restored to competency by judicial decree or released from a hospital for the insane or feeble-minded upon a certificate of the superintendent that such person is competent, nor then unless the department is satisfied that such person is competent to operate a motor vehicle with safety to persons and property.

(e) The department shall not issue an operator’s or chauffeur’s license to any person when in the opinion of the department such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued to any person who is unable to understand highway warnings or direction signs. (1935, c. 52, s. 3.)

Editor’s Note.—Acts 1943, c. 346, § 2, in force for two years from March 1, 1943, amended subsection (e) by changing the age mentioned therein from sixteen to fifteen years.

§ 20-10. Age limits for drivers of public passenger-carrying vehicles.—It shall be unlawful for any person, whether licensed under this article or not, who is under the age of twenty-one years to drive a motor vehicle while in use as a public passenger-carrying vehicle. (1935, c. 52, s. 5.)

§ 20-11. Application of minors.—The department shall not grant the application of any minor between the ages of sixteen (16) and eighteen (18) years for an operator’s license unless such application is signed by the father of the applicant, if the father is living and has custody of the applicant, otherwise by the mother or guardian having the custody of such minor, or in the event a minor under the age of eighteen years has no mother, father, or guardian, then the operator’s license shall not be granted to the minor unless his application therefore is signed by his employer. (1935, c. 52, s. 6.)

Editor’s Note.—Acts 1943, c. 346, § 4, in force for two years from March 1, 1943, amended this section by changing the first age mentioned therein from sixteen to fifteen years. See note under § 20-17.

§ 20-12. Instruction.—Any licensed operator or chauffeur may instruct a person who is sixteen or more years of age, during daylight hours, in the operation of a motor vehicle. Any person so instructing another shall be seated as to be within reach of the controls of the motor vehicle and shall be responsible for the operation thereof. (1935, c. 52, s. 7.)

Cross Reference.—See also, § 20-7, paragraph (a).

Editor’s Note.—Acts 1943, c. 346, § 5, in force for two years from March 1, 1943, amended this section by changing the age mentioned therein from sixteen to fifteen years.

§ 20-13. Expiration of license.—(a) Every operator’s license issued hereunder shall be valid until suspended or revoked as provided in this article except that the department shall hereafter, but not more often than once every three years and after public notice, cancel all outstanding operators’ licenses and issue in lieu thereof new operators’ licenses to persons applying therefor and entitled thereto under the provision of this article. Such licenses shall be issued without fee and without examination except in those instances when the department has reason to believe that the applicant may not be qualified to hold an operator’s license under this article.

(b) Every chauffeur’s license shall expire June thirtieth each year and shall be renewed annually upon application and payment of fees required by law, provided that the department may in its discretion waive the examination of any such applicant previously licensed as a chauffeur under this article. (1935, c. 52, s. 8.)

§ 20-14. Duplicate certificates.—In the event that an operator’s or chauffeur’s license issued under the provisions of this article is lost or destroyed, the person to whom the same was issued may, upon payment of a fee of fifty cents ($0.50), obtain a duplicate, or substitute thereof, upon furnishing proof satisfactory to the department that such license has been lost or destroyed. (1935, c. 52, s. 9; 1943, c. 649, s. 2.)

Editor’s Note.—The 1943 amendment struck out the words “or badge” formerly appearing after the word “license.”

§ 20-15. Authority of department to cancel license.—(a) The department shall have authority to cancel any operator’s or chauffeur’s license upon determining that the licensee was not entitled to the issuance thereof hereunder, or that the license was suspended, revoked or expired; or that the license was surrendered the license so cancelled to the department that such license has been lost or destroyed. (1943, c. 52, s. 10; 1945, c. 649, s. 3.)

Editor’s Note.—The 1943 amendment struck out in subsection (b) the words, “together with chauffeur’s badge, if any,” formerly appearing after the word “cancelled.”
§ 20-16. Authority of department to suspend license.—(a) The department shall have authority to suspend the license of any operator or chauffeur without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction;
2. Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage, which accident is obviously the result of the negligence of such driver;
3. Is an habitually reckless or negligent driver of a motor vehicle;
4. Is incompetent to drive a motor vehicle;
5. Is an habitual violator of the traffic laws;
6. Has committed an unlawful or fraudulent use of such license;
7. Has committed an offense in another state, which if committed in this state would be grounds for suspension or revocation; or
8. Has been convicted of illegal transportation of intoxicating liquors.

(b) Upon suspending the license of any person as hereinbefore in this section authorized, the department shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing as early as practical within not to exceed twenty (20) days after receipt of such request in the county wherein the licensee resides unless the department and the licensee agree that such hearing may be held in some other county. Upon such hearing the duly authorized agents of the department may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a re-examination of the licensee. Upon such hearing the department shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license or revoke such license. (1935, c. 52, s. 11.)

Cross Reference.—As to period of suspension or revocation, see § 20-19.

§ 20-17. Mandatory revocation of license by department.—(a) The department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator’s or chauffeur’s conviction for any of the following offenses when such conviction has become final:
1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle.
2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug.
3. Any felony in the commission of which a motor vehicle is used.
4. Failure to stop and render aid as required under the laws of this State in the event of a motor vehicle accident.
5. Perjury or the making of a false affidavit or statement under oath to the department under this article or under any other law relating to the ownership of motor vehicles.
6. Conviction, or forfeiture of bail not vacated, upon two charges of reckless driving committed within a period of twelve months.
7. Conviction, or forfeiture of bail not vacated, upon one charge of reckless driving while engaged in the illegal transportation of intoxicants for the purpose of sale.

(b) The department, upon receiving a record of the conviction of any person upon a charge of operating a motor vehicle while the license of such person is suspended or revoked, shall immediately extend the period of such first suspension or revocation for an additional like period. (1935, c. 52, s. 12.)

Cross Reference.—As to period of suspension or revocation, see § 20-19.

Editor’s Note.—Section 9 of Chapter 346 of the Public Laws of 1943, makes violation of sections 7 and 8 of the act ground for the revocation of license of 15-year-olds licensed for two years under the act. Section 7 makes it unlawful for any person under 16 to drive a vehicle of more than 1/2 tons in weight or to drive a vehicle hauling any material of a highly inflammable nature. Section 8 provides that no license shall be issued to any person under 16 except upon written application of parent or person in loco parentis.

§ 20-18. Conviction for failure to dim, etc., lights not ground for suspension or revocation.—Conviction of the offense of failure to shift, depress, deflect, tilt or dim the beams of the headlamps whenever a motor vehicle meets another vehicle on the highways of this state shall not be cause for the suspension or revocation of the operator’s or chauffeur’s license under the terms of this article. (1939, c. 351, s. 2.)

Cited in State v. McDaniels, 219 N. C. 763, 14 S. E. (2d) 793.

§ 20-19. Period of suspension or revocation.—The department shall not suspend a license for a period of more than one year and upon revoking a license shall not in any event grant application for a new license until the expiration of one year. (1935, c. 52, s. 13.)

§ 20-20. Surrender and return of license.—The department upon suspending or revoking a license shall require that such license be surrendered to and be retained by the department except that at the end of a period of suspension such license so surrendered shall be returned to the licensee. (1935, c. 52, s. 14; 1943, c. 649, s. 4.)

Editor’s Note.—The 1943 amendment struck out provision relating to chauffeur’s badge.

§ 20-21. No operation under foreign license during suspension or revocation in this state.—Any resident or nonresident whose operator’s or chauffeur’s license or right or privilege to operate a motor vehicle in this State has been suspended or revoked, as provided in this article shall not operate a motor vehicle in this State under a license, permit or registration issued by another jurisdiction or otherwise during such suspension, or after such revocation until a new license is obtained when and as permitted under this article. (1935, c. 52, s. 15.)

§ 20-22. Suspending privileges of nonresidents and reporting convictions.—(a) The privilege of driving a motor vehicle on the highways of this State given to a nonresident hereunder shall be subject to suspension or revocation by the department in like manner and for like cause as an operator’s or chauffeur’s license issued hereunder may be suspended or revoked.

(b) The department is further authorized, upon receiving a record of the conviction in this State of a non-resident driver of a motor vehicle of any
§ 20-23. Suspending resident's license upon conviction in another state.—The department is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction of such person in another state of any offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator or chauffeur. (1935, c. 52, s. 17.)

§ 20-24. When court to forward license to department and report convictions.—(a) Whenever any person is convicted of any violation of the motor vehicle laws of this State, a notation of such conviction shall be entered by the court upon the license of the person so convicted. Whenever any person is convicted of any offense for which this article makes mandatory the revocation of the operator's or chauffeur's license of such person by the department, the court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the department.

(b) Every court having jurisdiction over offenses committed under this article, or any other law of this State regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted.

(c) For the purpose of this article the term "conviction" shall mean a final conviction. Also, for the purposes of this article a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction.

(d) Pending an appeal, the court from which the appeal is taken shall make such recommendation to the department relative to suspension of license until the appeal shall have been finally determined, as to it may seem just and proper under the circumstances.

(e) After November 1, 1935, no operator's or chauffeur's license shall be suspended or revoked except in accordance with the provisions of this article. (1935, c. 52, s. 18.)

§ 20-25. Right of appeal to court.—Any person denied a license or whose license has been cancelled, suspended or revoked by the department, except where such cancellation is mandatory under the provisions of this article, shall have a right to file a petition within thirty (30) days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding the court of that district, or special or emergency judge holding a court in such district in which the violation was committed, and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon thirty (30) days written notice to the department, and thereupon to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this article. (1935, c. 52, s. 19.)

§ 20-26. Records.—The department shall keep a record of proceedings and orders pertaining to all licenses granted, refused, suspended or revoked by the department. It shall furnish without charge, for official use only, certified copies of certificates and licenses and documents relating thereto, to officials of the State, counties and municipalities or to any court in this State. A charge not to exceed one dollar ($1.00) shall be made by the department for copies furnished for other than official use. (1935, c. 52, s. 20.)

§ 20-27. Availability of records. — All records of the department pertaining to application and to operator's and chauffeur's license, except the confidential medical report referred to in section 20-7, of the current or previous five years shall be open to public inspection at any reasonable time during office hours. (1935, c. 52, s. 21.)

§ 20-28. Unlawful to drive while license suspended or revoked.—Any person whose operator's or chauffeur's license has been suspended or revoked, as provided in this article, who shall drive any motor vehicle upon the highways of this State while such license is suspended or revoked, may be guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not more than six months, and there may be imposed in addition thereto a fine of not more than five hundred dollars ($500.00). (1935, c. 52, s. 22.)

§ 20-29. Surrender of license.—Any person operating or in charge of a motor vehicle, when requested by an officer in uniform, or, in the event of accident in which the vehicle which he is operating or in charge of shall be involved, when requested by any other person, who shall refuse to write his name for the purpose of identification or to give his name and address and the name and address of the owner of such vehicle, or who shall give a false name or address, or who shall refuse, on demand of such officer or such other person, to produce his license and exhibit same to such officer or such other person for the purpose of examination, or who shall refuse to surrender his license on demand of the department, or fail to produce same when requested by a court of this State, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this article. (1935, c. 52, s. 23.)

§ 20-29.1. Commissioner may require reexamination.—The commissioner of motor vehicles, having good and sufficient cause to believe that a licensed operator or chauffeur is incompetent or otherwise not qualified to be licensed, may, upon written notice of five days to such licensee, require him to submit to a reexamination to determine his competency to operate a motor vehicle. Upon the conclusion of such
examination, the commissioner shall take such action as may be appropriate, and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions. Refusal or neglect of the licensee to submit to such reexamination shall be grounds for the suspension or revocation of his license. (1943, c. 787, s. 2.)

§ 20-30. Violations of license provisions.—It shall be unlawful for any person to commit any of the following acts:

(a) To display or cause to be displayed or to have in possession any operator's or chauffeur's license, knowing the same to be fictitious or to have been cancelled, revoked, suspended or altered.

(b) To counterfeit, sell, lend to, or knowingly permit the use of, by one not entitled thereto, any operator's or chauffeur's license.

(c) To display or to represent as one's own a license not issued to the person so displaying same.

(d) To fail or refuse to surrender to the department upon demand any license or the badge of any committee whose license has been suspended, cancelled or revoked as provided by law.

(e) To use a false or fictitious name or give a false or fictitious address in any application for an operator's or chauffeur's license, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application.

Any license procured as aforesaid shall be void from the issuance thereof, and any monies paid therefor shall be forfeited to the State. (1935, c. 52, s. 24.)

§ 20-31. Making false affidavits perjury.—Any person who shall make any false affidavit, or shall knowingly swear or affirm falsely, to any matter or thing required by the terms of this article to be sworn to or affirmed shall be guilty of perjury and upon conviction shall be punished by fine or imprisonment as other persons committing perjury are punishable under the laws of this State. (1935, c. 52, s. 25.)

Cross Reference.—As to perjury, see § 14-29, et seq.

§ 20-32. Unlawful to permit unlicensed minor to drive motor vehicle.—It shall be unlawful for any person to cause or knowingly permit any minor over sixteen and under the age of eighteen years to drive a motor vehicle upon a highway as an operator, unless such minor shall have first obtained a license to so drive a motor vehicle under the provisions of this article. (1935, c. 52, s. 26.)

Editor's Note.—Acts 1943, c. 346, § 6, in force for two years from March 1, 1943, amended this section by changing the first age mentioned therein from sixteen to fifteen years. The cases treated below were decided under a corresponding provision of an earlier law, but should be of assistance in the interpretation of the present section.

Violation of Age Limit as Negligence.—Where a person with the age prohibited by the statute runs an automobile upon and injures a pedestrian, the violation of the statute is negligence per se, and a charge by the court that it is a circumstance from which the jury could infer negligence is reversible error. Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134.

Same.—Liability for Injuries.—While it is negligence per se for one within the prohibited age to run an automobile, it is necessary that such negligence proximately cause the injury for damages to be recovered on that account, with the burden of proof on the plaintiff to show it by the preponderance of the evidence. Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134.

Same.—Jurisdiction.—It is for the jury to determine whether a competent and careful chauffeur of matured years could have avoided the injury under the circumstances, or whether it was due to the fact that a lad within the prohibited age was running it at the time. Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134.

Same.—Liability of Father.—While ordinarily a father is not held responsible in damages for the negligent acts of his minor son done without his knowledge and consent, such may be inferred, as where the father constantly permitted his 23-year-old son to run his automobile. Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134.


§ 20-33. Unlawful to employ unlicensed chauffeur.—No person shall employ any chauffeur to operate a motor vehicle who is not licensed as provided by this article. (1935, c. 52, s. 27.)

§ 20-34. Unlawful to permit violations of this article.—No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this article. (1935, c. 53, s. 28.)

§ 20-35. Penalties for misdemeanor.—(a) It shall be a misdemeanor to violate any of the provisions of this article unless such violation is by this article or other law of this State declared to be a felony.

(b) Unless another penalty is in this article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than five hundred ($500.00) dollars or by imprisonment for not more than six (6) months. (1935, c. 53, s. 29.)

§ 20-36. Fees.—(a) The fees charged for the licenses herein provided for shall be as follows:

For an operator's license the sum of one ($1.00) dollar, which shall continue the license in effect until revoked or cancelled; chauffeur's license two ($2.00) dollars annually, or until revoked: Provided, that no charge shall be made for any private operator's license which shall be applied for prior to November first, one thousand nine hundred and thirty-five.

(b) All fees collected under the provisions of this article shall be paid by the commissioner of revenue to the state treasurer to be credited by him to the state highway fund. (1935, c. 52, s. 30.)

§ 20-37. Limitations on issuance of licenses.—There shall be no operator's or chauffeur's license issued within this State other than that provided for in this article, nor shall there be any other examination required: Provided, however, that cities and towns shall have the power to license, regulate and control drivers and operators of taxicabs within the city or town limits and to regulate and control operators of taxicabs operating between the city or town to points, not incorporated, within a radius of five miles of said city or town. (1935, c. 52, s. 34; 1942, c. 659, s. 2.)

Editor's Note.—The 1943 amendment added the proviso.
§ 20-38. Definition of words and phrases.—The following words and phrases when used in this article shall, for the purpose of this article, have the meanings respectively prescribed to them in this section, except in those instances where the context clearly indicates a different meaning:
(a) Business District.—The territory contiguous to a highway where seventy-five per cent or more of the frontage thereon for a distance of three hundred (300) feet or more is occupied by buildings in use for business purposes.
(b) Commissioner.—Commissioner, when herein referred to, shall refer to the commissioner of motor vehicles.
(c) Department.—Department herein used shall mean the department of motor vehicles acting directly or through its duly authorized officers and agents.
(d) Dealer.—Every person engaged in the business of buying, selling, distributing, or exchanging motor vehicles, trailers or semi-trailers in this state, having an established place of business in this state and being subject to the tax levied by § 105-89.
(e) Essential Parts.—All integral and body parts of a vehicle of any type required to be registered hereunder, the removal, alteration or substitution of which would tend to conceal the identity of the vehicle or substantially alter its appearance, model, type, or mode of operation.
(f) Established Place of Business.—The place actually occupied either continuously or at regular periods by a dealer or manufacturer, where his books and records are kept and a large share of his business is transacted.
(g) Explosives.—Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by a detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects or of destroying life or limb.
(h) Farm Tractor.—Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.
(i) Foreign Vehicle.—Every vehicle of a type required to be registered hereunder brought into this state from another state, territory or country, other than in the ordinary course of business, by or through a manufacturer or dealer and not registered in this state.
(j) House Trailer.—Any trailer or semi-trailer so designed and equipped as to provide living and/or sleeping facilities and drawn by a motor vehicle.
(k) Implement of Husbandry.—Every vehicle which is designed for agricultural purposes and used exclusively in the conduct of agricultural operations.
(l) Intersection.—The area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at any angle whether or not one such highway crosses the other.
(m) Local Authorities.—Every county, municipality, or other territorial district with local board or body having authority to adopt local police regulations under the constitution and laws of this state.
(n) Manufacturer.—Every person engaged in the business of manufacturing motor vehicles, trailers or semi-trailers.
(o) Metal Tire.—Every tire the surface of which in contact with the highway is wholly or partly of metal or other hard, non-resilient material.
(p) Motor Vehicle.—Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from trolley wires but not operated upon rails, and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle.
(q) Passenger Vehicles.—(1) Excursion passenger vehicles.
Passenger vehicles kept in use for the purpose of transporting persons on sight-seeing or travel tours.
(2) For hire passenger vehicles.
Passenger motor vehicles engaged in the business of transporting passengers for compensation; but this classification shall not include motor vehicles of seven-passenger capacity or less operated by the owner where the cost of operation is shared by neighbor fellow, workmen between their homes and the place of regular daily employment, when operated for not more than two trips each way per day, nor shall this classification include automobiles operated by the owner where the cost of operation is shared by the passengers on a "share the expense" plan.
(3) Franchise bus carriers.
Passenger motor vehicles operated under a franchise certificate issued by the utilities commission under §§ 62-103 to 62-103, for operation on the public highways of this state between fixed termini or over a regular route for the transportation of persons or property for compensation.
(4) Motorcycle.
Every motor vehicle having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding a tractor.
(5) U-Drive-It passenger vehicles.
Passenger motor vehicles used for the purpose of rent or lease to be operated by the lessee.
(6) Private passenger vehicles.
All other passenger vehicles not included in the above definitions.
Motor vehicles used for the transportation of property for hire, but not licensed as franchise hauler vehicles under the provisions of §§ 62-103 to 62-121: Provided, it shall not be construed to include the transportation of farm crops or products, including logs, bark, pulp and tannic acid wood delivered from farms and forests to the first or primary market, nor to merchandise hauled for neighborhood farmers incidentally and not as a regular business in going to and from farms and primary markets. Provided further, that the term "for hire" as used herein shall include every
§ 20-38  
CH. 20. MOTOR VEHICLES  
§ 20-38

arrangement by which the owner of a motor vehicle uses, or permits such vehicle to be used, for the transportation of the property of another for compensation, subject to the exemptions aforesaid. Provided, however, that the term "for hire shall not include motor vehicles whose sole operation in carrying the property of others is limited to the transportation of T. V. A. or A. A. P. phosphate, and/or agricultural limestone in bulk which is furnished as a grant of aid under the United States agricultural adjustment administration.

(2) Franchise hauler vehicles. Every motor vehicle used for the transportation of property between fixed termini, or over a regular route, with the right to make occasional trips off said route as provided in §§ 62-103 to 62-121: Provided, only such vehicles shall be so classified as the utilities commission shall determine to be reasonably necessary for the proper handling of the business on said route, and the determination so arrived at shall be duly certified by the utilities commissioner to the motor vehicle bureau.

(3) Private hauler vehicles. Every motor vehicle used for the transportation of property not falling within one of the above defined classifications.

(4) Semi-Trailer. Every vehicle without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of its weight and/or its load rests upon or is carried by the pulling vehicle.

(5) Trailers. Every vehicle without motive power designed for carrying property or persons wholly on its own structure and to be drawn by a motor vehicle. This shall include so-called pole trailers or a pair of wheels used primarily to balance a load, rather than for purposes of transportation.

(s) Non-Resident.—Every person who is not a resident of this state.

(t) Owner.—A person who holds the legal title of a vehicle or, in the event a vehicle is subject to an agreement for conditional sale or lease thereof, with the right of purchase upon performance of the conditions stated in the agreement and with the immediate right of possession vested in the original vendee or lessee; or, in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this article.

(u) Person.—Every natural person, firm, copartnership, association, corporation, or governmental agency.

(v) Pneumatic Tire.—Every tire in which compressed air is designed to support the load.

(w) Private Road or Driveway.—Every road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic.

(x) 1. Residential District.—The territory contiguous to a highway not comprising a business district, where seventy-five per cent or more of the frontage thereon for a distance of three hundred (300) feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business purposes.

(x) Reconstructed Vehicle.—Every vehicle of a type required to be registered hereunder materially altered from its original construction by the removal, addition, or substitution of essential parts, new or used.

(y) Road Tractor.—Every motor vehicle designed and used for drawing other vehicles upon the highway and not so constructed as to carry any part of the load, either independently or as a part of the weight of the vehicle so drawn.

(z) Safety Zone.—The area or space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly marked or indicated by proper signs as to be plainly visible at all times while set apart as a safety zone.

(aa) Specially Constructed Vehicles. — Every vehicle of a type required to be registered hereunder not originally constructed under a distinctive name, make, model, or type by a generally recognized manufacturer of vehicles and not materially altered from its original construction.

(bb) Special Mobile Equipment.—Every vehicle not designed or used primarily for the transportation of persons or property, but incidentally operated or moved over the highways, such as farm tractors, road construction or maintenance machinery, ditch-digging apparatus, well-boring apparatus, and concrete mixers. The foregoing enumeration shall be deemed partial and shall not operate to exclude other vehicles which are within the general terms of this section.

(cc) Street and Highway. — The entire width between property lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic.

(dd) Solid Tire.—Every tire of rubber or other resilient material which does not depend upon compressed air for the support of the load.

(ee) Truck Tractor. — Every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry any load independent of the vehicle so drawn.

(ff) Vehicle. — Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively under fixed rails or by water, and so constructed that for the purposes of this article bicycles shall be deemed vehicles, and every rider of a bicycle upon a highway shall be subject to the provisions of this article applicable to the driver of a vehicle except those which by their nature can have no application. (1937, c. 407, s. 2; 1939, c. 275; 1941, cc. 22, 36, 196; 1943, cc. 201, 202.)

Editor's Note.—The 1939 amendment changed subsection (a), added the second proviso to subsection (r) (1), added the proviso to subsection (h) and inserted subsection (w) 1. The second proviso to subsection (r) as it appeared in the original act. It ignored the second proviso which had been added by Public Laws 1939, c. 275, and the last proviso which was added by the first 1941 amendment.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 514.

The first 1941 amendment inserted in subsection (r) (1) that part of the first proviso beginning with the words "nor to merchandise." The second 1941 amendment added at the end of subsection (q) (2) the clause relating to "whore the expenses" plans.

The cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

"Auto Truck" Defined as "Automobile."—See Bethlehem Motors Corp. v. Flynt, 178 N. C. 399, 100 S. E. 693.

Motorcycle. — Statutory definition cited in Anderson v. Life, etc., Ins. Co., 197 N. C. 72, 147 S. E. 693, holding
that the expression "motor driven car" in an insurance policy excludes a motorcycle.

**Intersection.**—Under this section where one public highway joins another, but does not cross it, the point where they join is an intersection of public highways. Williams v. Smith, 145 S. E. 169, citing Vartanian, *Law of Automobiles*, Part II, chapter 1, p. 414, note.

**Bicycle.**—Under this section a bicycle is deemed a vehicle, and the rider of a bicycle upon the highway is subject to the applicable provisions of the statutes relating to motor vehicles. Van Dyke *v.* Atlantic Greyhound Corp., 218 N. C. 283, 10 S. E. (2d) 727.

A bicycle is a vehicle and is subject to provisions of the motor vehicle act except those which by their nature can have no application. Tarrant *v.* Pepsi-Cola Bottling Co., 213 N. C. 295, 20 S. E. (2d) 565.

**Residential District.**—A charge defining a "residential district" as the "territory contiguous to a highway, not comprising a business district, when the frontage on the highway for a distance of 300 feet or more is occupied by dwellings and buildings in use for business" is held without error, the definition of a residential district in chapter 148, Public Laws of 1927, Art. 1, § (a), not having been repealed by this section. Reid *v.* City Coach Co., 215 N. C. 409, 2 S. E. (2d) 578, 123 A. I. R. 140. But note 1939 amendment adding subd. (w) 1.

Where the evidence established that the scene of the accident was not in a business district, and there was no evidence that defendant's vehicle was being driven in excess of 30 miles an hour, whether the accident occurred in a residential district as defined by subsection (w) 1 of this section, was held immaterial, since such speed did not violate the statutory restriction. Mitchell *v.* Metz, 230 N. C. 793, 18 S. E. (2d) 406.

That part of a highway comprising an intersection may not properly be considered in applying subsection (w) 1 of this section to any given locality. Mitchell *v.* Metz, 229 N. C. 793, 800, 18 S. E. (2d) 406.

**Business District.**—Uncontradicted testimony that only two business buildings front on the street in the block in which the accident occurred and that both of them together comprise not more than 40 feet frontage, establishes as a matter of law that the locus in quo is not a business district subject to subsection (a) of this section. Mitchell *v.* Metz, 229 N. C. 793, 18 S. E. (2d) 406.


Part 2. Authority and Duties of Commissioner and Department.

§ 20-39. Administering and enforcing laws; rules and regulations; agents, etc.; seal.—(a) The commissioner is hereby vested with the power and is charged with the duty of administering and enforcing the provisions of this article and of all laws regulating the operation of vehicles or the use of the highways, the enforcement or administration of which is now or hereafter vested in the department.

(b) The commissioner is hereby authorized to adopt and enforce such rules and regulations as may be necessary to carry out the provisions of this article and any other laws the enforcement and administration of which are vested in the department.

(c) The commissioner is authorized to designate and appoint such agents, field deputies, and clerks as may be necessary to carry out the provisions of this article.

(d) The commissioner shall adopt an official seal for the use of the department. (1937, c. 407, s. 4.)

**Cross Reference.**—As to commissioner and organization of department, see §§ 20-2, 20-3.

§ 20-40. Offices of department.—The commissioner shall maintain an office in Raleigh, North Carolina, and in such places in the state as he shall deem necessary to properly carry out the provisions of this article. (1937, c. 407, s. 5.)

§ 20-41. Commissioner to provide forms required.—The commissioner shall provide suitable forms for applications, certificates of title and registration cards, registration number plates and all other forms requisite for the purpose of this article, and shall prepay all transportation charges thereon. (1937, c. 407, s. 6.)

§ 20-42. Authority to administer oaths and certify copies of records.—(a) Officers and employees of the department designated by the commissioner are, for the purpose of administering the motor vehicle laws, authorized to administer oaths and acknowledge signatures, and shall do so without fee.

(b) The commissioner and such officers of the department as he may designate are hereby authorized to prepare under the seal of the department and deliver upon request a certified copy of any record of the department, charging a fee of fifty cents (50c) for each document so authenticated, and every such certified copy shall be admissible in any proceeding in any court in the same manner as the original thereof. (1937, c. 407, s. 7.)

**Cross Reference.**—As to copy of record kept by commissioner, etc., certified by commissioner, as evidence, see § 8-37.

§ 20-43. Records of department.—(a) All records of the department, other than those declared by law to be confidential for the use of the department, shall be open to public inspection during office hours.

(b) The commissioner may destroy any registration records of the department which have been maintained on file for three years which he may deem obsolete and of no further service in carrying out the powers and duties of the department. (1937, c. 407, s. 8.)

§ 20-44. Authority to grant or refuse applications.—The department shall examine and determine the genuineness, regularity and legality of every application for registration of a vehicle and for a certificate of title therefor, and of any other application lawfully made in the department, and may in all cases make investigation as may be deemed necessary or require additional information, and shall reject any such application if not satisfied of the genuineness, regularity, or legality thereof or the truth of any statement contained therein, or for any other reason, when authorized by law. (1937, c. 407, s. 9.)

§ 20-45. Seizure of documents and plates.—The department is hereby authorized to take possession of any certificate of title, registration card, permit, license, or registration plate issued by it upon expiration, revocation, cancellation, or suspension thereof, or which is fictitious, or which has been unlawfully or erroneously issued, or which has been unlawfully used. (1937, c. 407, s. 10.)

§ 20-46. Distribution of synopsis of laws.—The department may publish a synopsis or summary of the laws of this state regulating the operation of vehicles, and deliver to any person on request a copy thereof without charge. (1937, c. 407, s. 11.)
§ 20-47. Department may summon witnesses and take testimony.—(a) The commissioner and officers of the department designated by him shall have authority to summon witnesses to give testimony under oath or to give written deposition upon any matter under the jurisdiction of the department. Such summons may require the production of relevant books, papers, or records.

(b) Every such summons shall be served at least five days before the return date, either by personal service made by any person over eighteen years of age or by registered mail, but return acknowledgment is required to prove such latter service. Failure to obey such a summons so served shall constitute a misdemeanor. The fees for the attendance and travel of witnesses shall be the same as for witnesses before the superior court.

c) The superior court shall have jurisdiction, upon application by the commissioner, to enforce all lawful orders of the commissioner under this section. (1937, c. 407, s. 12.)

Cross References.—As to misdemeanors for which no specific punishment is prescribed, see § 143. As to fees of witnesses generally, see § 252.

§ 20-48. Giving of notice.—Whenever the department is authorized or required to give any notice under this article or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the department. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the department or affidavit of any person over twenty-one years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof. (1937, c. 407, s. 13.)

§ 20-49. Police authority of department.—The commissioner and such officers and inspectors of the department as he shall designate and all members of the highway patrol shall have the power:

(a) Of peace officers for the purpose of enforcing the provisions of this article and of any other law regulating the operation of vehicles or the use of the highways.

(b) To make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of this article or other laws regulating the operation of vehicles or the use of the highways.

(c) At all times to direct all traffic in conformance with law, and in the event of a fire or other emergency or to expedite traffic or to insure safety, to direct traffic as conditions require, notwithstanding the provisions of law.

(d) When on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this article or of any other law regulating the operation of vehicles to require the driver thereof to stop and exhibit his driver’s license and the registration card issued for the vehicle, and submit to an inspection of such vehicle, the registration plates and registration card thereon or to an inspection and test of the equipment of such vehicle.

(e) To inspect any vehicle of a type required to be registered hereunder in any public garage or repair shop or in any place where such vehicles are held for sale or wrecking, for the purpose of locating stolen vehicles and investigating the title and registration thereof.

(f) To serve all warrants relating to the enforcement of the laws regulating the operation of vehicles or the use of the highways.

(g) To investigate traffic accidents and secure testimony of witnesses or of persons involved.

(h) To investigate reported thefts of motor vehicles, trailers and semi-trailers. (1937, c. 407, s. 14.)

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-50. Owner to secure registration and certificate of title.—Every owner of a vehicle intended to be operated upon any highway of this state and required by this article to be registered before the same is so operated, shall apply to the department for and obtain the registration therefor, and attach the registration plates to the vehicle, except when an owner is permitted to operate a vehicle under the registration provisions relating to manufacturers, dealers and non-residents contained in § 20-79: Provided, that nothing herein contained shall require the application for or the issuance of a certificate of title for a trailer having not more than two wheels with a gross weight of vehicle and load of twenty-five hundred (2500) pounds or less, and towed by a passenger car but before operating a trailer as described above upon the highways of the state, the owner thereof must obtain the registration thereof and pay the registration fees as now provided by part seven of this article. (1937, c. 407, s. 15; 1943, c. 648.)

Editor’s Note.—The 1943 amendment rewrote the proviso. The cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

Purpose as Compared with Mortgage Registration Statute.—This statute is a police regulation to protect the general public from fraud, imposition and theft of motor vehicles. The registration statute, secs. 47-20 and 47-23, specifically protects mortgages. Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 160, 129 S. E. 414.

Effect upon Mortgage Registration Statute.—This statute is a police regulation to protect the general public from fraud, imposition and theft of motor vehicles. The registration statute, secs. 47-20 and 47-23, specifically protects mortgages. Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 160, 129 S. E. 414.

Necessity of Registering Conditional Sale Contracts.—All chattel mortgages and conditional-sale contracts on motor vehicles must be registered in the county in which the mortgagor resides, and in case the mortgagor resides out of the State, then in the county where the said motor vehicle is situated, in order to obtain immunity against the creditors and purchasers for value, from the mortgagor. The conditional-sale contract, purchased by the mortgagor, having been registered, is invalid as against the defendant, a purchaser for full value. Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 160, 129 S. E. 414.

§ 20-51. Exempt from registration.—The following shall be exempt from the requirement of registration and certificate of title: (a) Any such vehicle driven or moved upon a highway in conform-
ance with the provisions of this article relating to manufacturers, dealers, or nonresidents:

(b) Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another.

(c) Any implement of husbandry, whether of a type otherwise subject to registration hereunder or not, which is only incidentally operated or moved upon a highway.

(d) Any special mobile equipment as herein defined.

(e) No certificate of title need be obtained for any vehicle of a type subject to registration owned by the government of the United States.

(f) Farm tractors and trailers or semi-trailers with rubber tires used in farming operations, if such farm tractors or trailers or semi-trailers are otherwise exempt from registration, shall not be rendered subject to registration by reason of the use of such vehicles upon public highways by the owner of a farm in transporting wood, fertilizer, farm products, farm supplies, farm implements, or farm equipment from place to place on the same farm or from one farm to another. (1937, c. 407, s. 16; 1943, c. 500.)

Cross References.—As to manufacturers and dealers, see § 20-79. As to non-residents, see § 20-83.

Editor’s Note.—The 1943 amendment added paragraph (f).

§ 20-52. Application for registration and certificate of title.—(a) Every owner of a vehicle subject to registration hereunder shall make application to the department for the registration thereof and issuance of a certificate of title for such vehicle upon the appropriate form or forms furnished by the department, and every such application shall bear the signature of the owner written with pen and ink, and said signature shall be acknowledged by the owner before a person authorized to administer oaths, and said application shall contain:

1. The name, bona fide residence and mail address of the owner or business address of the owner if a firm, association or corporation;

2. A description of the vehicle, including, in so far as the hereinafter specified data may exist with respect to a given vehicle, the make, model, type of body, the serial number of the vehicle, the engine and other identifying numbers of the vehicle and whether new or used, and if a new vehicle, the date of sale and actual date of delivery of vehicle by the manufacturer or dealer to the person intending to operate such vehicle;

3. A statement of the applicant’s title and of all liens or encumbrances upon said vehicle and the names and addresses of all persons having any interest therein and the nature of every such interest;

4. Such further information as may reasonably be required by the department to enable it to determine whether the vehicle is lawfully entitled to registration and the owner entitled to a certificate of title.

(b) When such application refers to a new or foreign vehicle purchased from a dealer, the application shall be accompanied by an application for certificate of title in the name of the dealer containing the description of vehicle, statement of dealer’s title and all liens or encumbrances upon said vehicle, the name and address of person to whom sold, date of sale, actual date vehicle was delivered to purchaser, and such other information as may be required by the department. (1937, c. 407, s. 17.)

§ 20-53. Application for specially constructed, reconstructed, or foreign vehicle.—(a) In the event the vehicle to be registered is a specially constructed, reconstructed, or foreign vehicle, such fact shall be stated in the application, and with reference to every foreign vehicle which has been registered outside of this state, the owner shall surrender to the department all registration cards and certificates of title or other evidence of such foreign registration as may be in his possession or under his control, except as provided in sub-division (b) hereof.

(b) Where, in the course of interstate operation of a vehicle registered in another state, it is desirable to retain registration of said vehicle in such other state, such applicant need not surrender, but shall submit for inspection said evidence of such foreign registration, and the department in its discretion, and upon a proper showing, shall register said vehicle in this state but shall not issue a certificate of title for such vehicle. (1937, c. 407, s. 18.)

§ 20-54. Authority for refusing registration or certificate of title.—The department shall refuse registration or issuance of a certificate of title or any transfer of registration upon any of the following grounds:

(a) That the application contains any false or fraudulent statement or that the applicant has failed to furnish required information or reasonable additional information requested by the department or that the applicant is not entitled to the issuance of a certificate of title or registration of the vehicle under this article;

(b) That the vehicle is mechanically unfit or unsafe to be operated or moved upon the highways;

(c) That the department has reasonable ground to believe that the vehicle is a stolen or embezzled vehicle, or that the granting of registration or the issuance of a certificate of title would constitute a fraud against the rightful owner or other person having valid lien upon such vehicle;

(d) That the registrations of the vehicle stands suspended or revoked for any reason as provided in the motor vehicle laws of this state;

(e) That the required fee has not been paid. (1937, c. 407, s. 19.)

Cross Reference.—As to fees, see § 20-85.

§ 20-55. Examination of registration records and index of stolen and recovered vehicles.—The department, upon receiving application for any transfer of registration or for original registration of a vehicle, other than a new vehicle sold by a North Carolina dealer, shall first check the engine and serial numbers shown in the application against the indexes of registered motor vehicles, and against the index of stolen and recovered motor vehicles required to be maintained by this article. (1937, c. 407, s. 20.)

§ 20-56. Registration indexes.—The department shall file each application received, and when satisfied as to the genuineness and regularity thereof, and that the applicant is entitled to register such vehicle and to the issuance of a certificate of title, shall register the vehicle therein described.
§ 20-57. The department to issue certificate of title and registration card.—(a) The department upon registering a vehicle shall issue a registration card and a certificate of title as separate documents.

(b) The registration card shall be delivered to the owner and shall contain upon the face thereof of the name and address of the owner, space for owner's signature, the registration number assigned to the vehicle, and such description of the vehicle as determined by the commissioner, and upon the reverse side a form for endorsement of notice to the department upon transfer of the vehicle.

c) Every owner, upon receipt of a registration card, shall write his signature thereon with pen and ink in the space provided. Every such registration card shall at all times be carried in the vehicle to which it refers, or shall be carried by the person operating or in control of such vehicle, who shall display the same upon demand of any peace officer or any officer of the department: Provided, however, no person charged with failing to so carry such registration card shall be convicted if he produces in court a registration card theretofore issued to him and valid at the time of his arrest.

d) The certificate of title shall contain upon the face thereof the identical information required upon the face of the registration card, and in addition thereto the date of issuance and a statement of the owner's title and of all liens and encumbrances upon the vehicle therein described, and whether possession is held by the owner under a lease, contract or conditional sale, or other like agreement.

e) The certificate of title shall also contain upon the reverse side form of assignment of title or interest and warranty thereof, with space for notation of liens and encumbrances upon such vehicle at the time of a transfer.

f) Certificates of title upon which liens or encumbrances are shown shall be delivered or mailed by the department to the holder of the first lien or encumbrance.

g) Certificates of title shall bear thereon the seal of the department.

(h) Certificates of title need not be renewed annually, but shall remain valid until canceled by the department with an application for a permit to dismantle such vehicle. The department shall thereupon issue to the purchaser a permit to dismantle the same, which shall authorize such person to possess or transport such vehicle or to transfer ownership for a period of more than three years from the date of issue, shall become null and void and of no further force and effect as it relates to the issuance or transfer of title by the department. (1937, c. 407, s. 22.)

§ 20-58. Unlawful for lienor who holds certificate of title not to surrender same when lien satisfied.—It shall be unlawful and constitute a violation of this article to refuse or fail to surrender such certificate of title to the person legally entitled thereto, when called upon by such person, within ten days after his lien shall have been paid and satisfied, and any person convicted under this section shall be fined not more than fifty dollars ($50.00) or imprisoned not more than thirty days. (1937, c. 407, s. 23.)

§ 20-59. Owner after transfer not liable for negligent operation.—The owner of a motor vehicle who has made a bona fide sale or transfer of his title or interest, and who has delivered possession of such vehicle and the certificate of title thereto properly endorsed to the purchaser or transferee, shall not be liable for any damages thereafter resulting from negligent operation of such vehicle by another. (1937, c. 407, s. 24.)

§ 20-60. Owner dismantling or wrecking vehicle to return evidence of registration.—Any owner dismantling or wrecking any vehicle shall forward to the department the certificate of title, registration card and/or other proof of ownership, and the registration plate or plates last issued for such vehicle. No person, firm or corporation shall dismantle or wreck any motor vehicle without first complying with the requirements of this section. (1937, c. 407, s. 25.)

§ 20-61. Sale of motor vehicles to be dismantled.—Any owner who sells a motor vehicle as scrap or to be dismantled or destroyed shall assign the certificate of title thereto to the purchaser, and shall deliver such certificate so assigned to the department with an application for a permit to dismantle such vehicle. The department shall thereupon issue to the purchaser a permit to dismantle the same, which shall authorize such person to possess or transport such vehicle or to transfer ownership for a period of more than thirty days from the date of permit. A certificate of title shall not again be issued for such motor vehicle in the event it is scrapped, dismantled, or destroyed. In any case, where the owner for any reason fails to send in title for a junked or dismantled vehicle, the department shall have authority to take possession of such title for cancellation. (1937, c. 407, s. 26.)
§ 20-63. Registration plates to be furnished by the department.—(a) The department upon registering a vehicle shall issue to the owner one registration plate for a motorcycle, trailer or semi-trailer and two registration plates for every other motor vehicle. Registration plates issued by the department under this article shall be and remain the property of the state, and it shall be lawful for the commissioner or his duly authorized agents to summarily take possession of any plate or plates which he has reason to believe is being illegally used, and to keep in his possession such plate or plates pending investigation and legal disposition of the same.

(b) Every registration plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, also the name of the state of North Carolina, which may be abbreviated, and the year number for which it is issued or the date of expiration thereof.

(c) Such registration plate and the required numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of one hundred feet during daylight.

(d) Registration plates issued for a motor vehicle other than a motorcycle, trailer or semi-trailer shall be attached thereto, one in the front and the other in the rear. The registration plate issued for a motorcycle, trailer or semi-trailer shall be attached to the rear thereof.

(e) Preservation and cleaning of registration plates: It shall be the duty of each and every registered owner of a motor vehicle to keep the registration plates assigned to such motor vehicle reasonably clean and free from dust and dirt, and such registered owner, or any person in his employ, or who operates such motor vehicle by his authority, shall, upon the request of any proper officer, immediately clean such registration plates so that the numbers thereon may be readily distinguished, and any person who shall neglect or refuse to so clean a registration plate, after having been requested to do so, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding thirty days.

(f) Operating with false numbers. Any person who shall wilfully operate a motor vehicle with a registration plate which has been repainted or altered or forged, or which was issued by the commissioner for a motor vehicle other than the one on which used, shall be guilty of a misdemeanor.

(g) Alteration, disguise, or concealment of numbers. Any operator of a motor vehicle who shall wilfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, or who shall paint, enam el, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a misdemeanor. (1937, c. 407, s. 27; 1943, c. 726.)

Editor's Note.—The 1943 amendment struck out the words "and with intent to defraud the state of registration fees" formerly appearing after the word "wilfully" in line two of paragraph (f). The amendment also struck out the words "and with intent to conceal the identity of such motor vehicle or the identity of the registered owner thereof" formerly appearing after the word "wilfully" in line three of paragraph (g).

§ 20-64. Transfer of registration plates. — (a) Registration plates issued by the department for vehicles privately owned and operated shall not be transferred from one vehicle to another, but shall be assigned and transferred from one owner to another, upon the assignment of title as required by this article, and shall remain on the vehicle for which originally issued.

(b) Registration plates issued by the department for vehicles owned and operated by the state or any department thereof, or by any county, city or town, school district or other political subdivision of the state, shall not be assigned and transferred from one owner to another, but shall be retained by the owner to whom originally issued and may be used by the owner on another vehicle: Provided, that the owner shall make application to the department for said transfer and comply with the requirements of this article relative to certificate of title for vehicle the registration plates are to be transferred to.

(c) Registration plates issued by the department for vehicles operated for hire shall be subject to the same transfer provision as of vehicles owned by the state or any department thereof as set forth in subsection (b) of this section. (1937, c. 407, s. 28.)

§ 20-65. Expiration of registration.—Every vehicle registration under this article and every registration card and registration plate issued hereunder shall expire at midnight on the thirty-first day of December of each year: Provided, however, that it shall not be unlawful to continue to operate any vehicle upon the highways of this state after the expiration of the registration of said vehicle, registration card and registration plate during the period between the thirty-first day of December and the thirty-first day of January, inclusive. (1937, c. 407, s. 29; 1943, c. 592, s. 1.)

Editor's Note.—The 1943 amendment added the proviso.

§ 20-66. Application for renewal of registration.—(a) Application for renewal of a vehicle registration shall be made by the owner upon proper application and by payment of the registration fee for such vehicle, as provided by law.

(b) The department may receive applications for renewal of registration and grant the same, and issue new registration cards and plates at any time prior to expiration of registration, but no person shall display upon a vehicle the new registration plates prior to December first. (1937, c. 407, s. 30.)

§ 20-67. Notice of change of address or name. —(a) Whenever any person, after making application for or obtaining the registration of a vehicle or a certificate of title, shall move from the address named in the application or shown upon a registration card or certificate of title, such person shall within ten days thereafter notify the
§ 20-68. Replacement of lost or damaged certificates, cards and plates.—(a) In the event any registration card or registration plate is lost, mutilated, or becomes illegible, the owner or legal representative of the owner of the vehicle for which the same was issued, as shown by the records of the department, shall immediately make application for and may obtain a duplicate or a substitute or a new registration under a new registration number, as determined to be most advisable by the department, upon the applicant furnishing under oath information satisfactory to the department and payment of required fee.

(b) When a dealer acquires a motor vehicle which has been previously licensed, he should advise the party from whom he acquires the vehicle as to the provisions of the law which require that the dealer report to the motor vehicle bureau the sale or disposal of the vehicle. If the dealer wishes to have the license transferred to his name or the name of any person whose name appears on the registration card purporting to have been issued by the department, no replacement may be issued unless the party to whom the vehicle was sold shall forthwith notify the motor vehicle bureau of the sale or disposal of the vehicle. Nor shall any subsequent owner secure replacement plates until application for transfer of title and license has been made.

(c) In the event any certificate of title is lost, mutilated, or becomes illegible, the owner or legal representative of the owner of the vehicle for which the same was issued, as shown by the records of the department, shall immediately make application for and may obtain a duplicate upon the applicant furnishing under oath information satisfactory to the department and payment of required fee. Upon issuance of any duplicate certificate of title the previous certificate last issued shall be void. (1937, c. 407, s. 32.)

Cross Reference.—As to fee for duplicate certificate, see § 20-85.

§ 20-69. Department authorized to assign new engine number.—The owner of a motor vehicle upon which the engine number or serial number has become illegible or has been removed or obliterated shall immediately make application to the department for a new engine or serial number for such motor vehicle. The department, when satisfied that the applicant is the lawful owner of the vehicle referred to in such application is hereby authorized to assign a new engine or serial number thereto, and shall require that such number, together with the name of this state, or a symbol indicating this state, be stamped upon the engine, or in the event such number is a serial number, then upon such portion of the motor vehicle as shall be designated by the department. (1937, c. 407, s. 33.)

§ 20-70. Department to be notified when another engine is installed or body changed.—(a) Whenever a motor vehicle registered hereunder is altered by the installation of another engine in place of an engine, the number of which is shown in the registration records, or the installation of another body in place of a body, the owner of such motor vehicle shall immediately give notice to the department in writing on a form prepared by it, which shall state the number of the former engine and the number of the newly installed engine, the registration number of the motor vehicle, the name of the owner and any other information which the department may require. Whenever another engine has been substituted as provided in this section, and the notice given as required hereunder, the department shall insert the number of the newly installed engine upon the registration card and certificate of title issued for such motor vehicle.

(b) Whenever a new engine or serial number has been assigned to and stamped upon a motor vehicle as provided in section 20-69, or whenever a new engine has been installed or body changed as provided in this section, the department shall require the owner to surrender to the department the registration card and certificate of title previously issued for said vehicle. The department shall also require the owner to make application for a duplicate registration card and a duplicate certificate of title showing the new motor or serial number thereon or new style of body, and upon receipt of such application and fee, as for any other duplicate title, the department shall issue to said owner a duplicate registration and a duplicate certificate of title showing thereon the new number in place of the original number or the new style of body. (1937, c. 407, s. 34; 1943, c. 726.)

Cross Reference.—As to fee for duplicate registration card and certificate of title, see § 20-85.

Editor's Note.—The 1940 amendment made this section applicable to change of body of motor vehicle.

§ 20-71. Altering or forging certificate of title a felony.—Any person who shall alter with fraudulent intent any certificate of title or registration card issued by the department, or forge or counterfeet any certificate of title or registration card purporting to have been issued by the department under the provisions of this article, or who shall alter or falsify with fraudulent intent or forge any assignment thereof, or who shall hold or use any such certificate, registration card or assignment knowing the same to have been altered, forged or falsified, shall be guilty of a felony and upon conviction thereof shall be punished in the discretion of the court. (1937, c. 407, s. 35.)

Cross Reference.—As to punishment of felonies for which no specific punishment is prescribed, see § 14-2.

Part 4. Transfer of Title or Interest.

§ 20-72. Transfer by owner.—(a) Whenever the owner of a registered vehicle transfers or assigns his title or interest thereto, he shall endorse upon the reverse side of the registration card issued for such vehicle the name and address of the transferee and the date of transfer, and shall immediately forward such card to the department.

(b) The owner of any vehicle registered under the foregoing provisions of this article, transferring or assigning his title or interest thereto, shall
also endorse an assignment and warranty of title in form approved by the department upon the reverse side of the certificate of title or execute an assignment and warranty of title of such vehicle and a statement of all liens or encumbrances thereon, which statement shall be verified under oath by the owner, who shall deliver the certificate of title to the purchaser or transferee at the time of delivering the vehicle, except that where a deed of trust, mortgage, conditional sale or title retaining contract is obtained from purchaser or transferee in payment of purchase price or otherwise, the lien holder shall forward such certificate of title papers to the department within twenty days together with necessary fees, or deliver such papers to the purchaser at the time of delivering the vehicle, as he may elect, but in either event the penalty provided in section 20-74 shall apply if application for transfer is not made within twenty days. (1937, c. 407, s. 36.)

Cross Reference.—As to fees, see § 20-85.

Editor’s Note.—The case cited below was decided under the corresponding provisions of the former law:

Transfer of Certificate as a Prerequisite to Passing of Title.—A careful perusal of this article fails to disclose any provision prohibiting a sale or transfer of the title of a motor vehicle without a transfer and delivery of a certificate of registration of title, and there is no provision that a sale so made is either fraudulent or void. Its provisions operate upon the parties who make a sale or a purchase without complying with its terms. Its penal provisions are clear. They are directed against those who violate after the sale, or transfer, has been made. Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 160, 129 S. E. 414.

Necessity for Writing to Pass Title.—"A sale of personal property is not required to be evidenced by any written instrument in order to be valid. This rule had been of such long standing prior to the enactment of the Motor Vehicle Registration Act, we cannot assume that the Legislature intended to change this rule, unless it says so." Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 160, 129 S. E. 414.

§ 20-73. New owner to secure transfer of registration and new certificate of title. —The transferee within twenty days after the purchase shall apply to the department for a transfer of registration and a new certificate of title of said vehicle and shall pay all fees as herebefore provided to the department, and make application for and obtain a new certificate of title for such vehicle except as otherwise permitted in sections 20-75 and 20-76. (1937, c. 407, s. 31; 1939, c. 275.)

Editor’s Note.—The 1939 amendment substituted “twenty” for “fifteen” with reference to number of days.

§ 20-74. Penalty for failure to make application for transfer within the time specified by law. —It is the intent and purpose of this article that every new owner or purchaser of a vehicle previously registered shall make application for transfer of title and registration within twenty days after acquiring same, or see that such application is sent in by the lien holder with proper fees, and responsibility for such transfer shall rest on the purchaser. Any person, firm or corporation failing to do so shall pay a penalty of two dollars ($2.00) in addition to the fees otherwise provided in this article and clause. It is further provided that any dealer or owner who shall knowingly make any false statement in any application required by this department as to the date a vehicle was sold or acquired shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars ($50.00) or imprisoned not more than thirty days. All moneys collected under this section shall go to the state highway fund. (1937, c. 407, s. 38; 1939, c. 275.)

Editor’s Note.—The 1939 amendment substituted “twenty” for “fifteen” with reference to number of days.

§ 20-75. When transferee is a dealer. —When the transferee of a vehicle is a dealer who holds the same for resale and operates the same only for purposes of demonstration under a dealer’s number plate such transferee shall not be required to register such vehicle nor forward the certificate of title to the department as provided in section 20-73, but such transferee, upon transferring his title or interest to another person, shall give notice of such transfer to the department and shall execute and acknowledge an assignment and warranty of title in form approved by the department, and deliver the same to the person to whom such transfer is made at the same time the vehicle is delivered, except as provided in section 20-72, sub-section (b). (1937, c. 407, s. 38.)

§ 20-76. Title lost or unlawfully detained. —Whenever the applicant for the registration of a vehicle or a new certificate of title thereto is unable to present a certificate of title thereto by reason of the same being lost or unlawfully detained by one in possession, or the same is otherwise not available, the department is hereby authorized to receive such application and to examine into the circumstances of the case, and may require the filing of affidavits or other information; and when the department is satisfied that the applicant is entitled thereto is hereby authorized to register such vehicle and issue a new registration card, registration plate or plates and certificates of title to the person entitled thereto, upon payment of proper fee for duplicate title and/or replacement. (1937, c. 407, s. 40.)

Cross Reference.—As to proper fee, see § 20-85.

§ 20-77. Transfer by operation of law. —(a) Whenever the title or interest of an owner in or to a vehicle shall pass to another by operation of law, as upon order in bankruptcy, execution sale, repossession upon default in performing the terms of a lease or executory sales contract, or otherwise than by voluntary transfer, the transferee shall secure a transfer of registration to himself and a new certificate of title upon proper application, payment of the fees provided by law, and presentation of the last certificate of title, if available and such instruments or documents of authority or certified copies thereof as may be sufficient or required by law to evidence or effect a transfer of interest in or to chattels in such cases: Provided, however, transfers of registration shall only be made as provided for in § 20-64, sub-sections (a), (b) and (c).

(b) In the event of transfer as upon inheritance, devise or bequest, the department shall, upon receipt of a certified copy of a will, letters of administration and/or a certificate from the clerk of the superior court showing that the motor vehicle registered in the name of the decedent owner has been assigned to his widow as part of her year's support, transfer both title and license as otherwise provided for transfers. However, if no administrator has qualified or the clerk of the superior court refuses to issue a certificate, the department may upon affidavit showing satisfactory
reasons therefor effect such transfer, but the new title so issued shall not affect the validity nor be in prejudice of any creditor's lien.

(c) Mechanic's or Storage Lien.—In any case where a vehicle is sold under a mechanic's or storage lien, the department shall be given a twenty-day notice as provided in § 20-114. (1937, c. 407, s. 41; 1943, c. 726.)

Cross Reference.—As to fees required, see § 20-85.

Editor's Note.—The 1943 amendment substituted the word "twenty-day" for the word "thirty-day" in subsection (c).

§ 20-78. When department to transfer registration and issue new certificate.—(a) The department, upon receipt of a properly endorsed certificate of title and application for transfer of registration, accompanied by the required fee, shall transfer the registration thereof under its registration number to the new owner, and shall issue a new registration card and certificate of title as upon an original registration.

(b) The department shall retain and appropriately file every application for certificate of title upon which certificate of title was issued and every surrendered certificate of title, such file to be so maintained as to permit the tracing of title of the vehicle designated therein.

After such applications for certificate of title or surrendered certificates of title have been on file with the department for a period of three years, the commissioner is hereby authorized and empowered to provide for the photographic or photostatic recording of such documents in such manner as he may deem expedient. The photographic or photostatic copies herein authorized shall be sufficient as evidence in the tracing of the titles of the motor vehicles designated therein, and shall also be admitted in evidence in all actions or proceedings to the same extent that the originals would have been admitted. (1937, c. 407, s. 42; 1943, c. 726.)

Cross Reference.—As to required fees, see § 20-85.

Editor's Note.—The 1943 amendment added the second and third sentences of subsection (b).

Part 5. Issuance of Special Plates.

§ 20-79. Registration by manufacturers and dealers.—(a) A manufacturer of or dealer in motor vehicles, trailers or semi-trailers, owning or operating any such vehicle or any vehicle known as a wrecker upon any highway, in lieu of registering such vehicle, may obtain from the department, upon application therefor upon the proper official forms and payment of the fees required by law, and attach to each such vehicle, two number plates, which plates shall each bear thereon a distinctive number, also the name of this state, which may be abbreviated, and the year for which issued. Together with the word "dealer" or a distinguishing symbol indicating that such plate or plates are issued to a dealer may, during the calendar year for which issued, be transferred from one such vehicle to another owned and operated by such manufacturer or dealer.

(b) Every manufacturer of or dealer in motor vehicles shall obtain and have in his possession a certificate of title issued by the department to such manufacturer or dealer of each vehicle, owned and operated upon the highways by such manufacturer or dealer, except that a certificate of title shall not be required for any new vehicle to be sold as such by a manufacturer or dealer prior to the sale of such vehicle by the manufacturer or dealer; and except that any dealer or any employee of any dealer who operates any motor vehicle, trailer or semi-trailer, the property of the dealer, for the purpose of furthering the business interest of the dealer in the sale, demonstration and servicing of motor vehicles, trailers and semi-trailers, of collecting accounts, contacting prospective customers and generally carrying on routine business necessary for conducting a general motor vehicle sales business: Provided, that no use shall be made of dealer's demonstration plates on vehicles operated in any other business dealers may be engaged in: Provided further, that dealers may allow the operation of motor vehicles owned by dealers and displaying dealer's demonstration plates in the personal use of persons other than those employed in the dealer's business: Provided further, that said persons shall, at all times while operating a motor vehicle under the provisions of this section, have in their possession a certificate on such form as approved by the commissioner from the dealer, which shall be valid for not more than forty-eight hours: Provided further, that motor vehicles, trailers and semi-trailers sold by dealers may be operated for a period not exceeding ten days from the date of sale by the purchaser thereof with dealer's demonstration plates, provided the purchasers have in their possession receipts from the dealers upon which the dealer has certified that the necessary amount of money to pay for titles and licenses has been paid by the purchasers to the dealers to be forwarded to the motor vehicle bureau, either direct or through one of its branch offices, on such form as approved by the commissioner.

(c) No manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall cause or permit any such vehicle owned by such person to be operated or moved upon a public highway without there being displayed upon such vehicle a number plate or plates issued to such person, either under section 20-63 or under this section.

(d) No manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall cause or permit any such vehicle owned by such person or by any person in his employ, which is in the personal use of such person or employee, to be operated or moved upon a public highway with a "dealer" plate attached to such vehicle.

(e) Transfer of Dealer Registration.—No change in the name of a firm, partnership or corporation, nor the taking in of a new partner, nor the withdrawal of one or more of the firm, shall be considered a new business; but if any one or more of the partners remain in the firm, or if there is change in ownership of less than a majority of the stock, if a corporation, the business shall be regarded as continuing and the dealers' plates originally issued may continue to be used. (1937, c. 407, s. 43.)

§ 20-80. National guard plates.—The commissioner shall cause to be made each year a sufficient number of automobile license plates to furnish each officer of the North Carolina National Guard with a set thereof, said license plates to be in the same form and character as other license plates now or hereafter authorized by law to be used upon private passenger vehicles registered in this state, ex-
cept that such license plates shall bear on the face thereof the following words, “National Guard.” The said license plates shall be issued only to officers of the North Carolina National Guard, and for which license plates the commissioner shall collect fees in an amount equal to the fees collected for the licensing and registering of private vehicles. The adjutant general of North Carolina shall furnish to the commissioner each year, prior to the date that licenses are issued, a list of the officers of the North Carolina National Guard, which said list shall contain the rank of each officer listed in the order of his seniority in the service, and the said license plates shall be numbered, beginning with the number two hundred and one and in numerical sequence thereafter up to and including the number five hundred, according to seniority, the senior officer being issued the license bearing the numerals two hundred and one. Upon transfer of the ownership of a private passenger vehicle upon which there is a license plate bearing the words national guard, said plates shall be removed and the authority to use the same shall thereby be canceled; however, upon application to the commissioner, he shall reissue said plate to the officer of the national guard to whom the same were originally issued, and upon said reissue the commissioner shall collect fees in an amount equal to the fees collected for the original licensing and registering of said private passenger vehicle as is now or may be prescribed by law. (1937, c. 407, s. 44; 1941, c. 38.)

§ 20-81. Official license plates.—Official license plates issued as a matter of courtesy to state officials shall be subject to the same transfer provisions as provided in section 20-80. (1937 c. 407, s. 45.)

§ 20-82. Manufacturer or dealer to give notice of sale or transfer.—Every manufacturer or dealer, upon transferring a motor vehicle, trailer or semi-trailer, whether by sale, lease or otherwise, to any person other than the manufacturer or dealer shall, on or before the tenth of each month, give written report of all such transfers made during the preceding calendar month to the department upon the official form provided by the department. Every such report shall contain the date of such transfer, the names and addresses of the transferee, and such description of the vehicle as may be called for in such official form. Every manufacturer or dealer shall keep a record of all vehicles received or sold containing such information regarding same as the department may require. (1937, c. 407, s. 46.)

Part 6. Vehicles of Non-Residents of States, etc.

§ 20-83. Registration by non-residents. — (a) Nonresidents of this state, except as otherwise provided in this article, will be exempt from the provisions of this article as to the registration of motor vehicles for the same time and to the same extent as like exemptions are granted residents of this state under laws of another state, district or territory: Provided, that they shall have complied with the provisions of the law of the state, district or territory of their residence relative to the registration and equipment of their motor vehicles, and shall conspicuously display the registration plates as required thereby, and have in their possession the registration certificates issued for such motor vehicles, and that nothing herein contained shall be construed to permit a bona fide resident of this state to use any registration plate or plates from a foreign state, district or territory, under the provisions of this section. The commissioner shall determine what exemptions the non-resident vehicle operators of the several states, districts or territories, are entitled to under the provisions of this section, and ordain and publish rules and regulations for making effective the provisions of this section, which rules and regulations shall be observed and enforced by all the officers of this state whose duties require the enforcement of the motor vehicle registration laws, and any violations of such rules and regulations shall constitute a misdemeanor.

(b) Motor vehicles duly registered in a state or territory which are not allowed exemptions by the commissioner, as provided for in the preceding paragraph, desiring to make occasional trips into or through the state of North Carolina, or operate in this state for a period not exceeding thirty days, may be permitted the same use and privileges of the highways of this state as provided for similar vehicles regularly licensed in this state, by procuring from the commissioner trip licenses upon forms and under rules and regulations to be adopted by the commissioner, good for use for a period of thirty days upon the payment of a fee in compensation for said privilege equivalent to one-tenth of the annual fee which would be chargeable against said vehicle if regularly licensed in this state: Provided, however, that nothing in this provision shall prevent the extension of the privileges of the use of the roads of this state to vehicles of other states under the reciprocity provisions provided by law: Provided further, that nothing herein contained shall prevent the owners of vehicles from other states from licensing such vehicles in the state of North Carolina under the same terms and the same fees as like vehicles are licensed by owners resident in this state.

(c) Every non-resident, including any foreign corporation carrying on business within this state and owning and operating in such business any motor vehicle, trailer or semi-trailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state. (1937, c. 407, s. 47; 1941, cc. 99, 365.)

Local Modification.—Buncombe, Catawba, Lee, New Hanover, Pender, Sampson, Wake: 1941, c. 99, s. 2.

Editor's Note.—Public Laws 1941, c. 99, amended by c. 365, inserted in subsection (b) the words "or operate in this state for a period not exceeding thirty days."

For comment on the 1941 amendment, see 19 N. C. Law Rev. 514.

§ 20-84. Vehicles owned by state, municipalities or orphanages, etc.—The department, upon proper proof being filed with it that any motor vehicle for which registration is herein required is owned by the state or any department thereof, or by any county, township, city or town, or by any board of education, or by any orphanage, shall collect one dollar for the registration of such motor vehicles, but shall not collect any fee for application for certificate of title in the name of the state or any department thereof, or by any county, township, city or town, or by any board of education or orphanage: Provided, that the term "owned" shall be construed to mean that such motor vehicle is
§ 20-85. Schedule of fees.—There shall be paid to the department for the issuance of certificates of title, transfer of registration and replacement of registration plates fees according to the following schedules:

(a) Each application for certificate of title...... $5.00
(b) Each application for duplicate certificate of title...... $5.00
(c) Each application for repossessor for certificate of title...... $5.00
(d) Each transfer of registration...... 1.00
(e) Each set of replacement registration plates...... 1.00
(f) Each duplicate registration card...... 25

§ 20-86. Penalty for engaging in a “for hire” business without proper license plates.—Any person, firm or corporation engaged in the business of transporting persons or property for compensation, except as otherwise provided in this article, shall, before engaging in such business, pay the license fees prescribed by this article and secure the license plates provided for vehicles operated for hire. Any person, firm or corporation operating vehicles for hire without having paid the tax prescribed or using private plates on such vehicles shall be liable for an additional tax of twenty-five dollars ($25.00) for each vehicle in addition to the normal fees provided in this article. (1937, c. 407, s. 50.)

§ 20-87. Passenger vehicle registration fees.—There shall be paid to the department annually, as the first day of January, for the registration and licensing of passenger vehicles, fees according to the following classifications and schedules:

(a) Franchise Bus Carriers.—Franchise bus carriers shall pay an annual license tax of ninety cents per hundred pounds weight of each vehicle unit, and in addition thereto six per cent of the gross revenue earned in such intrastate hauls. Franchise bus carriers operating between a point or points within this state and a point or points outside this state that the mileage in North Carolina bears to the total mileage between the respective terminals shall be liable for a six per cent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. Franchise bus carriers operating through this state that the mileage in North Carolina bears to a point or points outside this state shall be liable for a six per cent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such franchise bus carriers be less than ninety cents per hundred pounds weight for each vehicle. The tax prescribed in this subsection is levied as compensation for the use of the highways of this state and for the special privileges extended such franchise bus carriers by this state.

(b) U-Drive-It Passenger Vehicles.—U-drive-it passenger vehicles shall pay the following tax:

- Motorcycles: 1-passenger capacity ......... $12.00
- 2-passenger capacity ......... 15.00
- 3-passenger capacity ......... 18.00
- Automobiles: $1.00 per hundred pounds weight of each vehicle.

(c) For Hire Passenger Vehicles.—For hire passenger vehicles shall be taxed at the rate of $1.00 per hundred pounds of weight.

(d) Excursion Passenger Vehicles.—Excursion passenger vehicles shall be taxed at the rate of $8.00 per passenger capacity, with a minimum charge of $25.00, but such vehicles operating under a certificate as a restricted common carrier under §§ 62-103 to 62-121, shall also be liable to the gross revenue six per cent tax to the extent it exceeds the tax herein levied under the same provisions provided for franchise bus carriers.

(e) Private Passenger Vehicles.—Private passenger vehicles shall be taxed at thirty-five cents per hundred pounds of weight or major fraction thereof, according to the manufacturer’s shipping weight: Provided, that no fee for any private passenger vehicles shall be less than $7.00.

(f) Private Passenger Motorcycles.—Private passenger motorcycles shall pay for each motorcycle $5.00, and for each side car $5.00.

(g) Manufacturers and Motor Vehicle Dealers.—Manufacturers and dealers in motor vehicles for demonstration tags shall pay as a registration fee and for one set of plates $25.00, and for each additional set of plates $1.00.

(h) Driveaway Companies.—Any person, firm or corporation engaged in the business of driving new motor vehicles from the place of manufacture to the place of sale in this state for compensation shall pay as a registration fee and for one set of plates one hundred dollars ($100.00) and for each additional set of plates five dollars ($5.00). (1937, c. 407, s. 51; 1939, c. 785; 1943, c. 83.)

Editor’s Note.—The 1939 and 1943 amendments made changes in subsection (a).

For case citing corresponding provisions of former law, see Safe Bus v. Maxwell, 214 N. C. 12, 197 S. E. 567.

§ 20-88. Property hauling vehicles.—(a) Determination of Weight.—For the purpose of licensing the weight of the several classes of motor vehicles used for transportation of property shall be the gross weight and load, to be determined
by the manufacturer's gross weight capacity as shown in an authorized national publication, such as "Commercial Car Journal" or the statistical issue of "Automotive Industries," all such weights subject to verification by the commissioner or his authorized deputy, and if no such gross weight on any vehicle is available in such publication, then the gross weight shall be determined by the commissioner or his authorized agent: Provided, that any determination of weight shall be made only in units of one thousand pounds or major fraction thereof, weights of over five hundred pounds being counted as one thousand and weights of five hundred pounds or less being disregarded. Semi-trailers licensed for use in connection with a truck or truck-tractor shall in no case be licensed for less gross weight capacity than the truck or truck-tractor with which it is to be operated. The gross weight of a single unit equipped with three or more axles may be computed for license fee at a rate not in excess of the rate on trucks and semi-trailers of the same gross weight.

(b) There shall be paid to the department annually, as of the first day of January, for the registration and licensing of trucks, truck-tractors, trailers and semi-trailers, fees according to the following classifications and schedules:

Schedule of Weights and Rates

<table>
<thead>
<tr>
<th>Rate per hundred pounds gross weight:</th>
<th>Private Contract Franchise Hauler</th>
<th>Hauler (Deposit)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross weight not over 4,501 pounds</td>
<td>$0.30</td>
<td>$0.75</td>
</tr>
<tr>
<td>inclusive to 8,500 inclusive</td>
<td>$0.40</td>
<td>$0.75</td>
</tr>
<tr>
<td>pounds inclusive to 12,500 inclusive</td>
<td>$0.50</td>
<td>$1.00</td>
</tr>
<tr>
<td>Over 12,500 pounds inclusive</td>
<td>$0.70</td>
<td>$1.15</td>
</tr>
</tbody>
</table>

(c) The minimum rate for any vehicle licensed under this section shall be twelve dollars ($12.00), except that the license fee for a trailer having not more than two wheels with a gross weight of vehicle and load not exceeding fifteen hundred (1500) pounds and towed by a passenger car shall be two dollars ($2.00) for any part of the license year for which said license is issued, and the license fee for a two-wheel trailer with gross weight for vehicle and load of more than fifteen hundred (1500) pounds but not more than twenty-five hundred (2500) pounds and towed by a passenger car shall be ten dollars ($10.00) for the entire year, subject to the provision for quarterly license as provided for other vehicles: Provided, however, that any such trailers operated for hire shall be taxed at the same rate as contract hauler vehicles: Provided, further, that in addition to the motor vehicle licenses authorized to be issued pursuant to the provisions of this chapter, the department shall issue, upon application therefor, a license plate for trucks marked "farmer", which shall be issued upon evidence satisfactory to the department that the applicant is a farmer and is actually engaged in the growing, raising and producing of farm products as an occupation. License plates issued under authority of this section shall be placed upon motor trucks engaged exclusively in the carrying or transportation of applicant's farm products, raised or produced on his farm, and farm supplies, and not engaged in hauling for hire: Provided further that the department shall issue necessary rules and regulations providing for the recall, transfer, exchange or cancellation of "farmer" license plates issued hereunder when trucks bearing such shall be sold and/or transferred. Applicants for license plates herein authorized shall pay therefor at a rate equal to one-half the present registration fee provided for trucks by this chapter; provided that the minimum rate for any vehicle licensed under this proviso shall be ten dollars ($10.00): and provided, further, persons applying for "farmer" license under the provisions of this section shall not be entitled to the benefits of § 20-85. The term "farmer" as used in this section means any person engaged in the raising, growing and producing of farm products on a farm not less than ten acres in area, and who does not engage in the business of buying farm products for resale; and the term "farm products" means any food crop, cattle, hogs, poultry, dairy products and other agricultural products designed and to be used for food purposes.

(d) Rates on trucks, trailers and semi-trailers wholly or partially equipped with solid tires shall be double the above schedule.

(e) Franchise Haulers.—Franchise haulers shall pay an annual license tax as per the above schedule of rates for each vehicle unit, and in addition thereto six per cent of the gross revenue derived from such operations: Except on vehicles licensed for interstate routes and used exclusively for interstate business where more than fifty per cent of the designated route lies outside of the state of North Carolina, the required deposit may be reduced by the commissioner to fifty per cent of the above schedule of rates as to deposit only: Provided, said additional six per cent shall not be collectible unless and until and only to the extent that such amount exceeds the license tax or deposit per the above schedule: Provided, further, franchise haulers operation from a point or points in this state to another point or points in this state shall be liable for a tax of six per cent on the gross revenue earned in such intra-state hauls. Franchise haulers operating between a point or points within this state and a point or points outside this state shall be liable for a tax of four per cent on the gross revenue earned in such intra-state hauls. Franchise haulers operating through this state from a point or points outside this state or from points within this state to another point or points outside this state shall be liable for a tax of six per cent on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. Franchise haulers operating through this state from a point or points outside this state to a point or points outside this state shall be liable for six per cent on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such franchise haulers less than the license tax or deposit shown on the above schedule, except where a franchise is hereafter issued by the utilities commission for service over a route within the state which is not now served by any franchise hauler the six per cent gross revenue tax may be reduced to four per
cent for the first two years only. The tax prescribed in this subsection is levied as compensation for the use of the highways of this state and forms prescribed by the commissioner; and any person, firm, or corporation operating such franchise carriers shall become due and payable on or before the twentieth day of the month following the month in which it accrues.

(2) Non-resident motor vehicle carriers which do not operate in intrastate commerce in this state, and the title to whose vehicles are not required to be registered under the provisions of this article, shall be taxed for the use of the roads of this state as franchise haulers as provided above: Provided further, that this provision shall not prevent the extension to vehicles of other states of the benefits of the reciprocity provisions provided by law.

(3) Contract haulers under the definitions of this article who receive and operate under a certificate or permit or other authority from the utilities commission as restricted common carriers under the provisions of §§ 62-103 to 62-121, shall, in addition to the rate of tax for contract carriers provided above, be subject to the gross six per cent tax to the extent that it exceeds the rate for contract haulers to be levied and collected in the same manner provided for franchise haulers, and the tax in the schedule provided for contract haulers shall be deemed a deposit only.

(4) Every person operating a motor vehicle upon the highways of the state equipped with motors of the Diesel type shall make a report to the commissioner upon forms to be prescribed and furnished by the commissioner at least four times a year on dates to be designated by the commissioner; and such reports shall show, among other things, the purchases of motor fuel for use in said Diesel type motor and whether or not the tax levied upon motor fuels has been paid or assumed by the person from whom bought; and it shall be unlawful to operate any such motor equipment upon the highways of this state except with fuel upon which the tax has been paid. It shall be unlawful for any person, firm, or corporation operating such Diesel type motor to fail, refuse, or neglect to make returns in accordance with the forms prescribed by the commissioner; and any person knowingly making false returns shall be guilty of a felony.

(5) The 1941 amendment, which added that part of subsection (a) and made changes in subsection (e).

§ 20-90. Due date of franchise tax.—The six per cent additional tax on franchise bus carriers and franchise haulers shall become due and payable on or before the twentieth day of the month following the month in which it accrues.

§ 20-91. Records and reports required of franchise carriers.—(a) Every franchise bus carrier and franchise hauler shall keep a record of all business transacted and all revenue received on such forms as may be prescribed by or satisfactory to the commissioner, and such records shall be preserved for a period of three years, and shall be subject to inspection by the commissioner or his deputics or such other agents as may be duly authorized by the commissioner. Any operator of such a franchise line failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

(b) All franchise bus carriers and franchise haulers shall, on or before the twentieth day of each month, make a report to the department of gross revenue earned and gross mileage operated during the month previous, in such manner as the department may require and on such forms as the department shall furnish.

(c) It shall be the duty of the commissioner, by competent auditors, to have the books and records of every franchise bus carrier and franchise hauler examined at least once each year to determine if such operators are keeping complete records as provided by this section of this article, and to determine if correct reports have been made to the department of motor vehicles covering the total amount of tax liability of such operators.

(d) If any franchise bus carrier or franchise hauler shall fail, neglect, or refuse to keep such records or to make such reports as required, and within the time provided in this article, the commissioner shall immediately inform himself as to the time, manner of matters and things required to be set forth in such records and reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the state from such delinquent operator for the period covering the delinquency, adding to the tax so determined and as a part thereof an amount equal to five per cent (5%) of the tax, to be collected and paid. The said commissioner shall proceed immediately to collect the tax including the additional five per cent (5%).

(e) Except in accordance with proper judicial order, or as otherwise provided by law, it shall...
be unlawful for the commissioner of motor vehicles, any deputy, assistant, agent, clerk, other officer, employee, or former officer or employee, to divulge or make known in any manner the amount of gross revenue or tax paid by any franchise bus carrier or franchise hauler as set forth or disclosed in any report or return required in remitting said tax, or as otherwise disclosed. Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the governor, attorney general, utilities commission, or their or its duly authorized representatives; or the inspection by a legal representative of the state of the report or return of any franchise bus carrier or franchise hauler which shall bring an action to set aside or review the tax based thereon, or against which action or proceeding has been instituted to recover any tax or penalty imposed by this article. Any person, officer, agent, clerk, employee, or former officer or employee violating the provisions of this section shall be guilty of a misdemeanor. (1937, c. 407, s. 55, 1939, c. 375; 1941, c. 36; 1943, c. 726.)

Editor's Note.—The 1939 amendment struck out the word "willfully" formerly appearing after the word "shall" in subsection (d). The 1943 amendment added subsection (e).

—The failure of any franchise bus carrier or any franchise hauler to pay any tax levied under this article, and/or to make reports as is required, shall constitute cause for revocation of registration and franchise, and the commissioner is hereby authorized to seize the registration plates of any such delinquent carrier and require the cessation of the operation of such vehicles. (1937, c. 407, s. 56.)

§ 20-93. Bond or deposit required.—The commissioner, before issuing any registration plates to a franchise bus carrier or a franchise hauler, shall either satisfy himself of the financial responsibility of such carrier or require a bond or deposit in such amount as he may deem necessary to insure the collection of the tax imposed by this section. (1937, c. 407, s. 57.)

§ 20-94. Partial payments.—In the purchase of licenses, where the gross amount of the license to any one owner amounts to more than four hundred dollars ($400.00), half of such payment may, if the commissioner is satisfied of the financial responsibility of such owner, be deferred until April first in any calendar year upon the execution to the commissioner of a draft upon any bank or trust company upon forms to be provided by the commissioner in an amount equivalent to one-half of such tax, plus a carrying charge of two per cent (2%): Provided, that any person using any tag so purchased after the first day of April in any such year, without having first provided for the payment of such draft, shall be guilty of a misdemeanor. Any such drafts being dishonored and not paid shall be subject to the penalties prescribed in § 20-178 and shall be immediately turned over by the commissioner to his duly authorized agents and/or the state highway patrol, to the end that this provision may be enforced. (1937, c. 407, s. 58; 1943, c. 726.)

Editor's Note.—The 1943 amendment added after the word "may" in line five the words "if the commissioner is satisfied of the financial responsibility of such owner." It also inserted in the last sentence the following: "shall be subject to the penalties prescribed in section 20-178 and." 

§ 20-95. Licenses for less than a year.—Licenses issued on or after April first of each year and before July first for all vehicles, except franchise haulers and two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be three-fourths of the annual fee. Licenses issued on or after July first and before October first, except two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be one-half the annual fee. Licenses issued on or after October first, except on two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be one-fourth of the annual fee. (1937, c. 407, s. 59.)

§ 20-96. Overloading. — The commissioner, or his authorized agent, may allow any owner of a motor vehicle for transportation of property to overload said vehicle by paying the tax at the rate per hundred pounds which would be assessed against such vehicle if its gross weight capacity provided for such load; but such calculation shall be made only in units of one thousand pounds or major fraction thereof, excessive weights of five hundred pounds or less being disregarded and weights of more than five hundred pounds and not more than one thousand pounds being counted as one thousand. It is the intent of this section that every owner of a motor vehicle shall procure license in advance to cover any overload which may be carried. Any owner failing to do so, and whose vehicle shall be found in operation on the highways carrying an overload in excess of one ton over the weight for which such vehicle is licensed, shall pay in addition to the normal tax levied in this article an additional tax of three dollars ($3.00) per each thousand pounds in excess of the licensed weight of such vehicle. Any person who shall willfully violate the provisions of this section shall be guilty of a misdemeanor in addition to being liable for the additional tax herein prescribed. (1937, c. 407, s. 60; 1943, c. 726.)

The 1943 amendment added the last sentence.

§ 20-97. Taxes compensatory; no additional tax.
(a) All taxes levied under the provisions of this article are intended as compensatory taxes for the use and privileges of the public highways of this state, and shall be paid by the commissioner to the state treasurer, to be credited by him to the state highway fund; and no county or municipality shall levy any license or privilege tax upon the use of any motor vehicle licensed by the state of North Carolina, except that cities and towns may levy not more than one dollar ($1.00) per year upon any such vehicle resident therein: Provided, however, that cities and towns may levy, in addition to the one dollar ($1.00) per year, herein set forth, a sum not to exceed fifteen dollars ($15.00) per year upon each vehicle operated in such city or town as a taxicab.
(b) No additional franchise tax, license tax, or other fee shall be imposed by the state against...
any franchise motor vehicle carrier taxed under this article nor shall any county, city or town impose a franchise tax or other fee upon them, except that cities and towns may levy a license tax not in excess of fifteen dollars ($15.00) per year on each vehicle operated in such city as a taxicab as provided in subsection (a) hereof.

(c) In addition to the appropriation carried in the Appropriations Act there shall be appropriated to the motor vehicle department the additional sum of ten thousand dollars ($10,000.00) from the state highway fund: Provided, that such additional sum shall be made available only in the event that the regular appropriation is insufficient and it shall be determined by the director of the budget that such additional amount is necessary to carry out the provisions of this article. (1937, c. 407, s. 61; 1941, c. 36; 1943, c. 639, ss. 3, 4.)

§ 20-98. Tax lien—In the distribution of assets in case of receivership or insolvency of the owner against whom the tax herein provided is levied and in the order of payment thereof, the state shall have priority over all other debts or claims except prior recorded liens or rights given by statute an express priority. (1937, c. 407, s. 62.)

§ 20-99. Sale under execution; franchise canceled. —Whenever any tax imposed by this article shall be in default for a period of ten days, it shall be the duty of the commissioner to certify the same to the sheriff of any county of this state in which such delinquent motor vehicle operator is operating, which said certificate said sheriff shall have all the force and effect of a judgment and execution, and the said sheriff is hereby authorized and directed to levy upon any property in said county owned by said delinquent motor vehicle operator and to sell the same for the payment of said tax as other property is sold in the state for the non-payment of taxes; and for such services the sheriff shall be allowed the fees now prescribed by law for sales under execution, and the cost in such cases shall be paid by the delinquent taxpayer or out of the proceeds of the said property, and upon the filing of said certificate with the sheriff, in the event the delinquent taxpayer shall be the operator of any franchise bus carrier or franchise hauler vehicle, the franchise certificate issued to such operator shall become null and void and shall be canceled by the utilities commissioner, and it shall be unlawful for any such franchise bus carrier or the operator of any franchise hauler vehicle to continue the operation under said franchise. (1937, c. 407, s. 63.)

Cross References.—As to fees of sheriffs, see § 162-6. As to cancellation of franchise certificates, see § 62-111.

§ 20-100. Vehicles junked or destroyed by fire or collision.—Upon satisfactory proof to the commissioner that any motor vehicle, duly licensed, has been completely destroyed by fire or collision, or has been junked and completely dismantled so that the same can no longer be operated as a motor vehicle, the owner of such vehicle may be allowed on the purchase of a new license for another vehicle a credit equivalent to the unexpired proportion of the cost of the original license, dating from the first day of the next month after the vehicle's such destruction. (1937, c. 407, s. 64; 1939, c. 390, s. 1.)

Editor's Note.—The 1939 amendment inserted the provision relating to junked vehicle.

§ 20-101. Vehicles to be marked. — All motor vehicles licensed as franchise bus carriers, franchise hauler vehicles and contract hauler vehicles, shall have printed on the side thereof in letters not less than three inches in height the name and home address of the owner, or such other identification as the utilities commissioner may approve. (1937, c. 407, s. 65.)


§ 20-102. Report of stolen and recovered motor vehicles.—Every sheriff, chief of police, or peace officer upon receiving reliable information that any vehicle registered hereunder has been stolen shall immediately report such theft to the department. Any said officer upon receiving information that any vehicle, which he has previously reported as stolen, has been recovered, shall immediately report such fact to the department. (1937, c. 407, s. 66.)

§ 20-103. Reports by owners of stolen and recovered vehicles.—The owner, or person having a lien or encumbrance on a registered vehicle which has been stolen or embezzled, may notify the department of such theft or embezzlement, but in the event of an embezzlement may make such report only after having procured the issuance of a warrant for the arrest of the person charged with such embezzlement. Every owner or other person who has given any such notice must notify the department of the recovery of such vehicle. (1937, c. 407, s. 67.)

§ 20-104. Action by department on report of stolen or embezzled vehicles.—(a) The department, upon receiving a report of a stolen or embezzled vehicle as hereinafore provided, shall file and appropriately index the same and shall immediately suspend the registration of the vehicle so reported, and shall not transfer the registration of the same until such time as it is notified in writing that such vehicle has been recovered.

(b) The department shall at least once each month compile and maintain at its headquarters office a list of all vehicles which have been stolen or embezzled or recovered as reported to it during the preceding month, and such lists shall be open to inspection by any peace officer or other
persons interested in any such vehicle. (1937, c. 407, s. 68.)

§ 20-105. Unlawful taking of a vehicle.—Any person who drives or otherwise takes and carries away a vehicle, not his own, without the consent of the owner thereof, and with intent to temporarily or permanently deprive the owner of his possession of such vehicle, without intent to steal the same, is guilty of a misdemeanor. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person. Any person who assists in, or is a party or accessory to or an accomplice in any such unauthorized taking or driving, is guilty of a misdemeanor. (1937, c. 407, s. 69; 1943, c. 548.)

Cross Reference.—As to misdemeanors for which no specific punishment is prescribed, see § 14-3.

Editor's Note.—The 1943 amendment inserted after the word "drives" in the second line the words "or otherwise takes and carries away."

The cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

Civil Liability of Owner for Injuries.—The owner is not liable for injury or damage caused by his automobile while it is operated by another without his consent. This applies to parent and child and where the father forbade his child from taking his car he is not liable. Linville v. Nissen, 163 N. C. 95, 77 S. E. 106.

An indictment charging larceny and receiving does not include a charge of driving a motor vehicle without the knowledge or consent of the owner, and a defendant charged in the indictment only with larceny and receiving may not be convicted under this section. State v. Stinnett, 203 N. C. 829, 167 S. E. 63.

§ 20-106. Receiving or transferring stolen vehicles.—Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, is guilty of a felony. (1937, c. 457, s. 70.)

Cross Reference.—As to felonies for which no specific punishment is prescribed, see § 14-2.

§ 20-107. Injuring or tampering with vehicle.—(a) Any person who either individually or in association with one or more other persons willfully injures or tampers with any vehicles or breaks for removal any part or parts of or from a vehicle without the consent of the owner is guilty of a misdemeanor.

(b) Any person who, with intent to steal, commits any malicious mischief, injury or other crime, climbs into or upon a vehicle, whether it is in motion or at rest, or with like intent attempts to manipulate any of the levers, starting mechanism, brakes, or other mechanism or device of a vehicle while the same is at rest and unattended or with like intent sets in motion any vehicle while the same is at rest and unattended, is guilty of a misdemeanor. (1937, c. 407, s. 71.)

§ 20-108. Vehicles without manufacturer's numbers.—Any person who knowingly buys, receives, disposes of, sells, offers for sale, conceals, or has in his possession any motor vehicle, or engine removed from a motor vehicle, from which the manufacturer's serial or engine number or other distinguishing number or identification mark or number placed thereon under assignment from the department has been removed, defaced, covered, altered, or destroyed for the purpose of concealing or misrepresenting the identity of said motor vehicle or engine is guilty of a misdemeanor. (1937, c. 407, s. 72.)

§ 20-109. Altering or changing engine or other numbers.—No person shall wilfully deface, destroy, or alter the manufacturer's serial or engine number or other distinguishing number or identification mark of a motor vehicle, nor shall any person place or stamp any serial, engine, or other number or mark upon a motor vehicle, except one assigned thereto by the department. Any violation of this provision is a misdemeanor. (1937, c. 407, s. 73; 1943, c. 726.)

The 1943 amendment substituted the word "wilfully" in line one for the words "with fraudulent intent."

§ 20-110. When registration shall be rescinded. —(a) The department shall rescind and cancel the registration of any vehicle which the department shall determine is unsafe or unfit to be operated or is not equipped as required by law.

(b) The department shall rescind and cancel the registration of any vehicle whenever the person to whom the registration card or registration number plates thereto have been issued shall make or permit to be made any unlawful use of the said card or plates or permit the use thereof by a person not entitled thereto.

(c) The department shall rescind and cancel the license of any dealer to whom such license has been issued when such dealer allows his registration number plates to be used for other than demonstration purposes except as provided by § 20-79, fails to carry out the provisions of § 20-79 and § 20-82, or is convicted of a felony. (1937, c. 407, s. 74.)

§ 20-111. Violation of registration provisions. —It shall be unlawful for any person to commit any of the following acts:

(a) To operate or for the owner thereof knowingly to permit the operation upon a highway of any motor vehicle, trailer, or semi-trailer which is not registered or for which a certificate of title has not been issued, or which does not have attached thereto and displayed thereon the registration number plate or plates assigned thereto by the department for the current registration year, subject to the exemption mentioned in §§ 20-65 and 20-79.

(b) To display or cause or permit to be displayed or to have in possession any registration card, certificate of title or registration number plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

(c) The giving, lending, or borrowing of a license plate for the purpose of using same on some motor vehicle other than that for which issued shall make the giver, lender, or borrower guilty of a misdemeanor, and upon conviction he shall be fined not more than fifty dollars ($50.00), or imprisoned not more than thirty days. Where license plate is found being improperly used, such plate or plates shall be revoked or canceled, and new license plates must be purchased before further operation of the motor vehicles. [828]
§ 20-112. Making false affidavit perjury. — Any person who shall knowingly make any false affidavit or shall knowingly swear or affirm falsely to any matter or thing required by the terms of this article to be sworn or affirmed to shall be guilty of perjury, and upon conviction shall be punishable by a fine and imprisonment as other persons committing perjury are punishable. (1937, c. 407, s. 76.)

Cress References. — As to punishment for perjury, see § 14-209. As to revocation of license in event of conviction of perjury or the making of false affidavits, etc., see § 20-113.

§ 20-113. Licenses protected. — No person, partnership, association or corporation shall maintain an office or place of business in which or through which persons desiring transportation for themselves or their baggage are brought into contact by advertisement or otherwise with persons owning or operating motor vehicles and willing to transport other persons, or baggage, for compensation, or on a division of expense basis, unless the owner or operator of such motor vehicles furnishing the transportation has qualified under the tax provisions of this article for the class of service he holds himself out to perform. (1937, c. 407, s. 77.)

§ 20-114. Duty of officer; manner of enforcement. — (a) For the purpose of enforcing the provisions of this article, it is hereby made the duty of every police officer, every marshal, deputy marshal, or watchman of any incorporated city or village, and every sheriff, deputy sheriff, and all other lawful officers of any county, and every constable of any township, to arrest within the limits of their jurisdiction any person known personally to any such officer, or upon the sworn information of a creditable witness, to have violated any of the provisions of this article, and to immediately bring such offender before any justice of the peace or sheriff having jurisdiction, and any such person so arrested shall have the right of immediate trial, and all other rights given to any person arrested for having committed a misdemeanor. Every officer herein named who shall neglect or refuse to carry out the duties imposed by this chapter shall be liable on his official bond for such neglect or refusal as provided by law in like cases.

(b) It shall be the duty of all sheriffs, police officers, deputy sheriffs, deputy police officers, and all other officers within the state to co-operate with and render all assistance in their power to the officers herein provided for, and nothing in this article shall be construed as relieving said sheriffs, police officers, deputy sheriffs, deputy police officers, and other officers of the duties imposed on them by this chapter.

§ 20-115. Scope and effect of regulations in this title. — It shall be unlawful and constitute a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this title, or any vehicle or vehicles which are not so constructed or equipped as required in this title, or the rules and regulations of the commission adopted pursuant thereto and the maximum size and weight of vehicles herein specified shall be lawful throughout this state, and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this article. (1937, c. 407, s. 79.)

§ 20-116. Size of vehicles and loads. — (a) The total outside width of any vehicle or the load thereon shall not exceed ninety-six inches, except as otherwise provided in this section.

(b) No passenger-type vehicle shall be operated on any highway with any load carried thereon extending beyond the line of the fenders on the left side of such vehicle nor extending more than six inches beyond the line of the fenders on the right side thereof.

(c) No vehicle unladen or with load shall exceed a height of twelve feet, six inches.

(d) No vehicle shall exceed a length of thirty-five feet extreme over-all dimension, inclusive of front and rear bumpers. A truck-tractor and semitrailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of forty-five feet exclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at night-time by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided,
that the state highway and public works commis-

§ 20-117

sion shall have authority to designate any high-

ways upon the state system as light-traffic roads

when, in the opinion of the commission, such

roads are inadequate to carry and will be in-

juriously affected by the maximum load, size, and/
or width of trucks or busses using such roads as

herein provided for, and all such roads so design-

ated shall be conspicuously posted as light-

traffic roads and the maximum load, size and/or

width authorized shall be displayed on proper

signs erected thereon. The operation of any ve-

hicle whose gross load, size and/or width exceed

the maximum shown on such signs over the roads

thus posted shall constitute a misdemeanor: Pro-

vided further, that no standard concrete highway,
or other highway built of material of equivalent
durability, and not less than eighteen feet in

width, shall be designated as a light-traffic road:
Provided further, that the limitations placed on

any road shall not be less than eighty per cent
(80%) of the standard weight, unless there shall be
available an alternate improved route of not

more than twenty per cent (20%) increase in the
distance.

(f) The load upon any vehicle operated alone,
on the road upon the front vehicle of a combina-
tion of vehicles, shall not extend more than three
feet beyond the front wheels of such vehicle or
the front bumper of such vehicle, if it is equipped
with such a bumper.

(g) No vehicle shall be driven or moved on any
highway unless such vehicle is so constructed or
loaded as to prevent any of its load from dropping,
sifting, leaking or otherwise escaping therefrom,
except that sand may be dropped for the purpose
of securing traction, or water or other substance
may be sprinkled on a roadway in cleaning or
maintaining such roadway.

(h) Wherever there exist two highways of the
state system of approximately equivalent construc-
tion, convenience and distance between two or
more points, the state highway and public works
commission shall have authority, when in the
opinion of the commission the public interest is
served thereby, to designate one of said roads for
heavy or truck-line traffic between said points, and
to prohibit the use of the other or parallel road
by heavy or truck-line traffic thereon; and in such
instances the roads selected for heavy or truck-
line traffic shall be so designated by signs con-
picuously posted thereon, and the roads upon
upon which heavy or truck-line traffic is prohibited
shall likewise be so designated by signs conspicu-
ously posted thereon showing the maximum load
authorized for said roads. The operation of any
vehicle whose gross load exceeds the maximum
load shown on such signs over the road thus posted
shall constitute a misdemeanor: Provided, that
nothing herein shall prohibit a truck or other
motor vehicle whose gross load exceeds that pre-
scribed for the light traffic roads from using said
light traffic road when the destination of said truck
is located solely upon said light traffic road: Pro-
vided, further, that nothing herein shall prohibit
passenger or other light traffic vehicles from using
any road or roads so designated for heavy or
truck-line traffic.

(i) The total width of any vehicle propelled
by electric power obtained from trolley wires, but
not operated upon rails, commonly known as an
electric trackless trolley coach, which is operated
as a part of the general trackless trolley system
of passenger transportation of the city of Greens-
boro and vicinity, shall not exceed one hundred
and two inches, and the total length, inclusive
of front and rear bumpers, of any such vehicle
shall not exceed thirty-six feet, and the height of
any such vehicle, exclusive of trolley pole for
operating same, shall not exceed twelve feet, six
inches. (1937, c. 246; 1937, c. 407, s. 80; 1943, c.
213, s. 1.)

Cross Reference.—As to size and weight limitations for
motor vehicle carriers applying for franchise certificates, see
§ 62-105, subsec. (c).

Editor's Note.—The 1943 amendment added subsection (i).

This section prohibiting the extension of any part of the
load of a passenger vehicle beyond the line of the fenders on
the left side of such vehicle imposes a duty for the safety of
other vehicles on the highway, and is not conclusive on
the question of contributory negligence of a passenger riding
on the running board, with none of his body extending be-

§ 20-118. Weight of vehicles and load. — No

vehicle or combination of vehicles shall be moved

or operated on any highway or bridge when the
gross weight thereof exceeds the limits specified

below:

(a) When the wheel is equipped with high-

pressure pneumatic, solid rubber or cushion
tire, eight thousand pounds.

(b) When the wheel is equipped with low-

pressure pneumatic tire, nine thousand pounds.

(c) The gross weight on any one axle of the

vehicle when the wheels attached to said axle are
equipped with high-pressure solid rubber or cushion
tires, sixteen thousand pounds.

(d) When the wheels attached to said axle are
equipped with low-pressure pneumatic tires, eight-
een thousand pounds.

(e) For the purposes of this section an axle load
shall be defined as the total load on all wheels
whose centers are included within two parallel
transverse vertical planes not more than forty
inches apart.

(f) For the purposes of this section every

pneumatic tire designed for use and used when
inflated with air to less than one hundred pounds
pressure shall be deemed a low-pressure pneu-
matic tire, and every pneumatic tire inflated to
one hundred pounds pressure or more shall be,
deoemed a high-pressure pneumatic tire.

(g) No vehicle shall be operated on any high-
way the weight of which, resting on the surface
of such highway, exceeds six hundred pounds up-
on any inch of tire roller or other support.
(h) Subject to the foregoing limitations, the gross weight of any vehicle having two axles shall not exceed twenty-six thousand pounds.

(i) Subject to the foregoing limitations, the gross weight of any vehicle or combination of vehicles having three or more axles shall not exceed forty thousand pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes.

(j) The gross weight with normal load of pass-

gengers of any vehicle propelled by electric power obtained from trolley wires, but not operated upon rails, commonly known as an electric trackless trolley coach, which is operated as a part of the general trackless trolley system of passenger transportation of the city of Greensboro and vicinity, shall not exceed thirty thousand pounds. (1937, c. 407, s. 8; 1943, c. 213, s. 2; 1943, cc. 726, 784.)

Cross Reference.—As to size and weight limitations for motor vehicle carriers applying for franchise certificates, see § 62-105, subsec. (e).

Editor's Note.—The first 1943 amendment added subsection (j). The second 1943 amendment as changed by the third amendment substituted "twenty-six" for "twenty" in subsection (o).

§ 20-118.1. Peace officer may weigh vehicle and require removal of excess load.—Any peace officer having reason to believe that the weight of a vehicle and load thereof is unlawful is authorized to weigh the same either by means of portable or stationary scales, and may require that such vehicle be driven to the nearest scales in the event such scales are within two miles. The officer may then require the drive to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this article. (1927, c. 148, s. 37.)

§ 20-119. Special permits for vehicles of excessive size or weight.—The state highway and public works commission may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant for seasonal operations to operate or move a vehicle of a size or weight exceeding a maximum specified in this article upon any highway under the jurisdiction and for the maintenance of which the body granting the permit is responsible. Every such permit shall be carried in the vehicle to which it refers and the maintenance of which the body granting the permit is responsible, and the permit is responsible. Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any peace officer; and it shall be a misdemeanor for any person to violate any of the terms or conditions of such special permit: Provided, the authorities in any incorporated city or town may grant permits in writing and for good cause shown, authorizing the applicant to move a vehicle over the streets of such city or town, the size or width exceeding the maximum expressed in this article. (1937, c. 407, s. 83.)

§ 20-120. Operation of flat trucks on state highways regulated.—It shall be unlawful for any person, firm or corporation to operate, or have operated on any public highway in the state any open, flat truck loaded with logs, cotton bales, boxes or other load piled on said truck, without having the said load securely fastened on said truck. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1939, c. 114.)

§ 20-121. When authorities may restrict right to use highways. — The state highway and public works commission or local authorities may prohibit the operation of vehicles upon or impose restrictions as to the weight thereof, for a total period not to exceed ninety days in any one calendar year, when operated upon any highway under the jurisdiction of and for the maintenance of which the body adopting the ordinance is responsible, whenever any said highway by reason of deterioration, rain, snow or other climatic conditions will be damaged unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced. The local authority enacting any such ordinance shall erect, or cause to be erected and maintained, signs designating the provisions of the ordinance at each end of that portion of any highway to which the ordinance is applicable, and the ordinance shall not be effective until or unless such signs are erected and maintained. (1937, c. 407, s. 84.)

Cross Reference.—As to powers of municipal corporations as to streets, see § 166-200, subsections 11, 31.

§ 20-122. Restrictions as to tire equipment.—(a) Every solid rubber tire on a vehicle moved on any highway shall have rubber on its entire traction surface at least one and a half inches thick above the edge of the flange of the entire periphery.

(b) No tire on a vehicle moved on a highway shall have on its periphery any block, stud, flange, cleat or spike or any other protuberance of any material other than rubber which projects beyond the tread of the traction surface of the tire, except that it shall be permissible to use tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice or other conditions tending to cause a vehicle to slide or skid.

(c) The state highway and public works commission or local authorities in their respective jurisdictions may, in their discretion, issue special permits authorizing the operation upon a highway of traction engines or tractors having movable tracks with transverse corrugation upon the periphery of such movable tracks or farm tractors or other farm machinery.

(d) It shall not be unlawful to drive farm tractors on dirt roads from farm to farm: Provided, in doing so they do not damage said dirt roads or interfere with traffic. (1937, c. 407, s. 85; 1939, c. 266.)

Editor's Note.—The 1939 amendment added subsection (d).

§ 20-123. Trailers and towed vehicles.—(a) No motor vehicle shall be driven upon any highway drawing or having attached thereto more than one trailer or semi-trailer.

(b) No trailer or semi-trailer shall be operated over the highways of the state unless such trailer or semi-trailer be firmly attached to the rear of the motor vehicle drawing same, and unless so equipped that it will not shake, but will travel in the path of the wheels of the vehicle drawing such trailer or semi-trailer, which equipment shall at all times be kept in good condition. (1937, c. 407, s. 86.)
§ 20-124. Brakes. — (a) Every motor vehicle when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop such vehicle or vehicles, and such brakes shall be maintained in good working order and shall conform to regulations provided in this section.

(b) No person having control or charge of a motor vehicle shall allow such vehicle to stand on any highway unattended without first effectively setting the hand brake thereon, stopping the motor and turning the front wheels into the curb or side of the highway.

On a dry, hard, approximately level stretch of highway free from loose material, the service (foot) brake shall be capable of stopping the motor vehicle at a speed of twenty miles per hour within a distance of twenty-five feet with four wheel brakes or forty-five feet with two wheel brakes. The hand brake shall be capable of stopping the vehicle under like conditions of this section within a distance of not more than seventy-five feet.

(d) Motor trucks and tractor-trucks with semi-trailers attached shall be capable of stopping on a dry, hard, approximately level stretch of highway free from loose material at a speed of twenty miles per hour within the following distances: thirty feet with both hand and service brake applied simultaneously and fifty feet when either is applied separately, except that vehicles maintained and operated permanently for the transportation of property and which were registered in this or any other state or district prior to August, nineteen hundred and twenty-nine, shall be capable of stopping on a dry, hard, approximately level stretch of highway free from loose material at a speed of twenty miles per hour within a distance of fifty feet with both hand and service brake applied simultaneously, and within a distance of seventy-five feet when either applied separately.

(e) Every semi-trailer, or trailer, or separate vehicle, attached by a draw-bar or coupling to a towing vehicle, and having a gross weight of two tons, and all house trailers of one thousand pounds gross weight or more, shall be equipped with brakes controlled or operated by the driver of the towing vehicle, which shall conform to the specifications set forth in sub-section (d) of this section and shall be of a type approved by the commissioner. (1937, c. 407, s. 87.)

§ 20-125. Windshields must be unobstructed. — (a) It shall be unlawful for any person to drive any vehicle upon a highway with any sign, poster or other non-transparent material upon the front windshield, side windows, side or rear window of such motor vehicle other than a certificate or other paper required to be so displayed by law.

(b) It shall be unlawful to use a "muffler cut-out" on any motor vehicle upon a highway. (1937, c. 407, s. 91.)

§ 20-126. Mirrors. — No person shall drive a motor vehicle on a highway which motor vehicle is so constructed or loaded as to prevent the driver from obtaining a view of the highway to the rear by looking backward from the driver's position, unless such vehicle is equipped with a mirror of a type to be approved by the commissioner so located as to reflect to the driver a view of the highway for a distance of at least two hundred feet to the rear of such vehicle. (1937, c. 407, s. 89.)

§ 20-127. Horns and warning devices. — (a) Every vehicle upon a highway within this state during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, shall be equipped with lighted front and rear lamps as in this section respectively required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in § 20-134.

(b) Every police and fire department and fire patrol vehicle and every ambulance used for emergency calls shall be equipped with a bell, siren or exhaust whistle of a type approved by the commissioner. (1937, c. 407, s. 88.)

§ 20-128. Required lighting equipment of vehicles. — (a) When vehicles must be equipped: Every vehicle upon a highway within this state during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, shall be equipped with lighted front and rear lamps as in this section respectively required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in § 20-134.

(b) Head Lamps on Motor Vehicles: Every motor vehicle other than a motorcycle, road-roller, road machinery, or farm tractor shall be equipped with two head lamps, no more and no less, at the front of and on opposite sides of the motor vehicle, which head lamps shall comply with the requirements and limitations set forth in §§ 20-131 or 20-132.

(c) Head Lamps on Motorcycles: Every motorcycle shall be equipped with at least one and not more than two head lamps which shall com-
ply with the requirements and limitations set forth in § 20-131 or 20-132.

(d) Rear Lamps: Every motor vehicle and every trailer or semi-trailer which is being drawn at the end of a train of vehicles shall carry at the rear a lamp of a type which has been approved by the commissioner and which exhibits a red light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the rear of such vehicle, and so constructed and placed that the number plate carried on the rear of such vehicle shall under like conditions be so illuminated by a white light as to be read from a distance of not less than five hundred feet to the rear of such vehicle, or in lieu of said lights shall be equipped with reflectors of a type which has been approved by the commissioner and which is so designed, located as to a height and maintained as to be visible for at least five hundred feet when opposed by a vehicle displaying lawful undimmed headlights at night on an unlighted highway. Such reflector shall be placed at the extreme end of the load.

(e) Clearance Lamps: Every motor vehicle having a width at any part in excess of eighty inches shall carry two clearance lamps at the front, one at each side reflecting an amber light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the front of said vehicle and two clearance lamps at the rear, one on each side and reflecting a red light visible under like conditions from a distance of five hundred feet to the rear of the vehicle. As relates to truck-trailer or tractor-trailer combinations, such lights shall be required only at the front and rear of the overall dimensions.

(f) Lamps on Bicycles: Every bicycle shall be equipped with a lighted lamp on the front thereof, visible under normal atmospheric conditions from a distance of at least three hundred feet in front of such bicycle, and shall also be equipped with a reflex mirror or lamp on the rear, exhibiting a red light visible under like conditions from a distance of at least two hundred feet to the rear of such bicycle, when used at night.

(g) Lights on Other Vehicles: All vehicles not heretofore in this section required to be equipped with specified lighted lamps shall carry on the left side one or more lighted lamps or lanterns projecting a white light, visible under normal atmospheric conditions from a distance of not less than five hundred feet to the front of such vehicle and visible under like conditions from a distance of not less than five hundred feet to the rear of such vehicle, or in lieu of said lights shall be equipped with reflectors of a type which is approved by the commissioner. (1937, c. 407, s. 93; 1939, c. 275.)

Editor's Note.—The 1939 amendment changed subsection (e).

Effect of Violation in Civil Action.—Negligence in not having a light on the rear of a truck will not preclude recovery against one who drove his car into the truck, unless it contributed to the injury. Hughes v. Luther, 189 N. C. 841, 128 S. E. 145.

Absence of Rear Lights on Smoke Covered Road.—Where plaintiff's evidence tended to show that he was driving at night along a highway covered with smoke from fires along its side and that he collided with the rear of an oil truck which was headed in the same direction and which had been stopped on the highway without rear lights in violation of this section it was held that conceding negligence on the part of defendant, plaintiff's evidence disclosed contributory negligence barring recovery as a matter of law, either in driving at a speed in excess of that at which he could stop within the distance to which his lights would disclose the existence of obstructions, or, if he could have seen the oil truck in time to have avoided a collision, in failing to do so. Sibbitt v. R. & W. Transit Co., 230 N. C. 704, 55 S. E. 2d 823.

Whether Obstruction Should Have Been Seen Is Jury Question.—Generally speaking, where the statutes, as this section, or the decisions of the courts, require red lights of the vehicle operated by him by shifting, adjusting that, except as provided in sub-section (c) of this section, they will at all times mention in § 20-129, and under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but any person operating a motor vehicle upon the highways when meeting another vehicle, shall so control the lights of the vehicle operated by him by shifting,
§ 20-132. Acetylene lights.—Motor vehicles may be equipped with two acetylene head lamps of approximately equal candle power when equipped with clear plane glass fronts, bright six-inch spherical mirrors, and standard acetylene five-eighths foot burners not more and not less and which do not project a glaring or dazzling light to persons in front of such head lamp.

Head lamps shall be deemed to comply with the foregoing provisions prohibiting glaring and dazzling lights if none of the main bright portion of the head lamp beams rises above a horizontal plane passing through the lamp centers parallel to the level road upon which the loaded vehicle stands, and in no case higher than forty-two inches, seventy-five feet ahead of the vehicle.

(c) Whenever a motor vehicle is being operated upon a highway, or portion thereof, which is sufficiently lighted to reveal a person on the highway at a distance of two hundred feet ahead of the vehicle, it shall be permissible to dim the head lamps or to tilt the beams downward or to substitute therefor the light from an auxiliary driving lamp or pair of such lamps, subject to the restrictions as to tilted beams and auxiliary driving lamps set forth in this section.

(d) Whenever a motor vehicle meets another vehicle on any highway it shall be permissible to tilt the beams of the head lamps downward or to substitute therefor the light from an auxiliary driving lamp or pair of such lamps subject to the requirement that the tilted head lamps or auxiliary lamp or lamps shall give sufficient illumination under normal atmospheric conditions and on a level road to render clearly discernible a person seventy-five feet ahead, but shall not project a glaring or dazzling light to persons in front of the vehicle: Provided, that at all times required in § 20-129 at least two lights shall be displayed on the front of and on opposite sides of every motor vehicle other than a motorcycle, roadroller, road machine, or farm tractor.

(e) No city or town shall enact an ordinance in conflict with this section. (1937, c. 407, s. 94; 1939, c. 351, s. 1.)

Cross References.—As to failure to dim headlights not cause for suspension or revocation of driver’s license, see § 20-18.

Editor’s Note.—The 1939 amendment inserted in subsection (a) the provision as to controlling lights.

Contributory Negligence.—In an action for damages due to negligence of defendants, where the evidence showed that plaintiffs, on a joint enterprise, driving their car about 2:00 o’clock a.m., at 40 or 45 miles per hour, with lights dimmed so that they could not see ahead over 75 to 100 feet, never applied the brakes and failed to see defendants’ truck until after the collision, crashing into the back of the truck with terrific force, plaintiffs were guilty of contributory negligence which was a proximate cause of the accident, thereby barring their recovery. Pike v. Seymour, 222 N. C. 421, 21 S. E. (2d) 884.

Quoted in Newborn v. Leary, 215 N. C. 134, 1 S. E. (2d) 384.

§ 20-133. Enforcement of provisions.—(a) The commissioner is authorized to designate, furnish instructions to and to supervise official stations for adjusting head lamps and auxiliary driving lamps to conform with the provisions of § 20-129. When head lamps and auxiliary driving lamps have been adjusted in conformity with the instructions issued by the commissioner, a certificate of adjustment shall be issued to the driver of the motor vehicle on forms issued in duplicate by the commissioner and showing date of issue, registration number of the motor vehicle, owner’s name, make of vehicle and official designation of the adjusting station.

(b) The driver of any motor vehicle equipped with approved head lamps, auxiliary driving lamps, rear lamps or signal lamps, who is arrested upon a charge that such lamps are improperly adjusted or are equipped with bulbs of a candle power not approved for use therewith, shall be allowed forty-eight hours within which to bring such lamps into conformance with the requirements of this article. It shall be a defense to any such charge that the person arrested produce in court or submit to the prosecuting attorney a certificate from an official adjusting station showing that within forty-eight hours after such arrest such lamps have been made to conform with the requirements of this article. (1937, c. 407, s. 96.)

§ 20-134. Lights on parked vehicles.—Whenever a vehicle is parked or stopped upon a highway, whether attended or unattended during the times mentioned in § 20-129, there shall be displayed upon such vehicle one or more lamps projecting a white light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle, and projecting a red light visible under like conditions from a distance of five hundred feet to the rear, except that local authorities may provide by ordinance that no lights need be displayed upon any such vehicle when parked in accordance with local ordinances upon a highway where there is sufficient light to reveal any person within a distance of two hundred feet upon such highway. (1937, c. 407, s. 97.)

It is not necessarily unlawful in all cases to park a vehicle at night on the paved portion of a highway about lights thereon, as an emergency may arise thereby making it impossible to move such vehicle immediately. Pike v. Seymour, 222 N. C. 421, 21 S. E. (2d) 884.

Violation Is Negligence Per Se.—The parking of a truck on a public highway at night without lights in violation of this section is negligence per se, and the question of proximate cause is for the determination of the jury. (This case was decided under the corresponding section of the former law.] Barrier v. Thomas, etc., Co., 205 N. C. 425, 171 S. E. 626.

§ 20-135. Safety glass.—(a) It shall be unlawful to operate knowingly, on any public highway or street in this state, any motor vehicle which is registered in the state of North Carolina and which shall have been manufactured or assembled on or after January first, one thousand nine hundred and thirty-six, unless such motor vehicle be equipped with safety glass wherever glass is used in doors, windows, windshield, wings or partitions; or for a dealer to sell a motor vehicle manufactured or assembled on or after January first, one thousand nine hundred and thirty-six, for operation upon the said highways or streets unless it be so equipped. The provisions of this article shall not apply to any motor vehicle if such motor vehicle shall have been registered previously in another state by the owner while the owner was a bona fide resident of said other state.

(b) The term “safety glass” as used in this
article shall be construed as meaning glass so treated or combined with other materials as to reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by glass when the glass is cracked or broken.

(c) The department of motor vehicles shall approve and maintain a list of the approved types of glass, conforming to the specifications and requirements for safety glass as set forth in this article, and in accordance with standards recognized by the United States bureau of standards, and shall not issue a license for or relinquent any motor vehicle subject to the provisions of this article unless such motor vehicle be equipped as herein provided with such approved type of glass.

(d) The owner of any motor vehicle which is operated knowingly or any dealer who sells a motor vehicle in violation of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than twenty-five dollars or be imprisoned not more than thirty days, or both, in the discretion of the court. (1937, c. 407, s. 98; 1941, c. 36.)

§ 20-136. Smoke screens.—(a) It shall be unlawful for any person or persons to drive, operate, equip or be in the possession of any automobile or other motor vehicle containing, or in any manner provided with, a mechanical machine or device designed, used or capable of being used for the purpose of discharging, creating or causing, in any manner, to be discharged or emitted, either from itself or from the automobile or other motor vehicle to which attached, any unusual amount of smoke, gas or other substance not necessary to the actual propulsion, care andkeep of said vehicle, and the possession by any person or persons of any such device or whether the same be attached to any such motor vehicle, or detached therefrom, shall be prima facie evidence of the guilt of such person or persons of a violation of this section.

(b) Any person or persons violating the provisions of this section shall be guilty of a felony, and upon conviction shall be imprisoned in the state's prison for a period of not less than one year or not more than ten years, in the discretion of the court. (1937, c. 407, s. 99.)

§ 20-137. Unlawful display of emblem or insignia.—It shall be unlawful for any person to display on his motor vehicle, or to allow to be displayed on his motor vehicle, any emblem or insignia of any organization, association, club, lodge, order, or fraternity, unless such person be a member of the organization, association, club, lodge, order, or fraternity, the emblem or insignia of which is so displayed.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine not exceeding fifty dollars ($50) or imprisonment for a period not exceeding thirty days. (Ex. Sess. 1924, c. 63.)

Editor's Note.—The effect of this act was summarized in 3 N. C. Law Rev. 25.


§ 20-138. Persons under the influence of intoxicating liquor or narcotic drugs.—It shall be unlawful and punishable, as provided in § 20-179, for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this state. (1937, c. 407, s. 101.)

Editor's Note.—Most of the cases cited below were decided under the corresponding provisions of the former law.

Surrounding Circumstances Govern Case.—Driving an automobile with tires which are known to be worn out and slick, on a highway which is wet and slippery, at a rate of speed not ordinarily unlawful, under this section may be unlawful under all the circumstances shown by the evidence. Waller v. Hipp, 206 N. C. 117, 120, 179 S. E. 428.

Care Required in Emergency.—While the operator of a public automobile is obligated to exercise a high degree of care, he is not charged with the necessity of possessing superhuman powers of anticipation or of exercising such powers in a threatened emergency. Love v. Queen City Lines, 206 N. C. 575, 579, 174 S. E. 514.

When Person Guilty of Reckless Driving.—Under this section, a person is guilty of reckless driving (1) if he drives an automobile on a public highway in this state, carelessly and heedlessly, in a willful or wanton disregard of the rights or safety of others, or (2) if he drives an automobile on a public highway in this state without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving, and upon conviction shall be punished as provided in § 20-180. (1937, c. 407, s. 102.)

Editor's Note.—The effect of using prudence after violation.—A reckless vio-
§ 20-141

CH. 20. MOTOR VEHICLES

§ 20-141

Sufficiency of Evidence for Jury.—The better rule under this and the following section is that except where the evidence is so conclusive that there could be, in the minds of reasonable men, no doubt as to the plaintiff's negligence contributing to the injury, the question should be left to the jury. Morris v. Sells-Floto Circus, 65 F. (2d) 782, 784.


An indictment under this section may be consolidated for trial with an indictment under § 28-217, which prohibits the driver of a motor vehicle from passing a standing school bus on the highway without first bringing said motor vehicle to a complete stop. State v. Webb, 210 N. C. 350, 186 S. E. 241.


An acquittal of reckless driving in the recorder's court will not bar a prosecution of manslaughter in the in the superior court arising out of the same occurrence, the two offenses differing both in grade and kind and not being the same in law or in fact, and the one not being a lesser degree of the other. Karp v. The Recorder, 211 N. C. 159, 199 S. E. 654.

Sufficiency of Evidence for Jury.—Evidence of the individual defendant drove his car in a negligent manner in violation of this and other sections and that such negligence proximately contributed to the plaintiff's injury is held sufficient to have been submitted to the jury. Puckett v. Dyer, 231 N. C. 684, 167 S. E. 43.

The better rule under this and the following section is that except where the evidence is conclusive that there could be, in the minds of reasonable men, no doubt as to the plaintiff's negligence contributing to the injury, the question should be left to the jury. Morris v. Sells-Floto Circus, 65 F. (2d) 782, 784.


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shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident.

(i) Whenever local authorities within their respective jurisdictions determine, upon the basis of an engineering and traffic investigation that the prima facie speed permitted under this article at any intersection is greater than is reasonable or safe under the conditions found to exist at such intersection, such local authority shall determine and declare a reasonable and safe prima facie speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or upon the approaches thereof.

(g) Local authorities in their respective jurisdictions may, in their discretion, authorize by ordinance higher prima facie speeds than those stated in subsection (b) herein upon through highways or upon highways or portions thereof where there are no intersections or between widely spaced intersections: Provided, signs are erected giving notice of the authorized speed, but local authorities shall not have authority to modify or alter the basic rules set forth in sub-section (a) herein, nor give an event to authorities by ordinance a speed in excess of forty-five miles per hour.

(h) No person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law. Police officers are hereby authorized to enforce this provision by directions to drivers, and in the event of apparent willful disobedience to this provision and refusal to comply with direction of an officer in accordance herewith, the continued slow operation by a driver shall be a misdemeanor.

(i) The state highway and public works commission shall have authority to designate and appropriately mark certain highways of the state as truck routes, even though such a truck route shall at no time exceed a speed limit of twenty miles per hour. Any person violating the provisions of this section shall be guilty of a misdemeanor.

§ 20-141

Cross Reference—See also, § 20-216.

Editor's Note.—The 1939 amendment added item 5 to subsection (b).

The 1941 amendment added the proviso in the third subparagraph of subsection (b).

For comment on the 1941 amendment, see 19 N. C. Law Rev. 452. Most of the cases cited below were decided under the corresponding provisions of the former law.

This section applies to criminal actions only and not to civil actions for damages. Finer v. Richter, 202 N. C. 573, 163 S. E. 561. See Jones v. Charlotte, 183 N. C. 630, 112 S. E. 423.

Regulation of Speed at Night.—The motorist upon a public highway on a dark, misty and foggy night, is required to give timely signals of his approach, and also give timely signals of its intention to withdraw from another car being properly driven on the highway, is sufficient actionable negligence to take the case to the jury; and the fact that this negligence did not actually result in a collision of the two cars, but proximately caused the injury in the reasonable effort of the driver of the plaintiff's car to avoid it, does not vary the application of the rule. Fowler v. Underwood, 193 N. C. 402, 137 S. E. 185.

The words "intersecting highways" include all space made by the junction of frequented streets of a town, though one of the streets enters the other without crossing or going beyond. Manly v. Abernathy, 167 N. C. 220, 83 S. E. 343; Fowler v. Underwood, 193 N. C. 402, 137 S. E. 137.

The words "intersecting highways" include all space made by the junction of frequented streets of a town, though one of the streets enters the other without crossing or going beyond. Manly v. Abernathy, 167 N. C. 220, 83 S. E. 343; Fowler v. Underwood, 193 N. C. 402, 137 S. E. 137.

§ 20-141

Application of Speed Limitation upon Privilege of Driving at Maximum Rate.—The speed limit prescribed by statute at which an automobile driver may go at various places, does not alone excuse those who drive within that specified by the statute, and it is likewise required that they use proper care where other conditions require it within the limitations given. Hinton v. Southern R. Co., 172 N. C. 587, 90 S. E. 756.

Same.—Purpose of Regulation.—Statutory regulation of speed at intersections has for its purpose the protection of those who are in, entering, or about to enter, the intersecting highway, Etteridge v. Etheridge, 222 N. C. 616, 50 S. E. (2d) 477.

Application to Approach from Private Drive.—In approaching a highway from a yard the driver of an automobile must have his car under control, and not exceed a speed of ten miles an hour, and also give timely signals of its approach, and in case of his failure to do so causing an accident to another car being properly driven on the highway, is sufficient actionable negligence to take the case to the jury; and the fact that this negligence did not actually result in a collision of the two cars, but proximately caused the injury in the reasonable effort of the driver of the plaintiff's car to avoid it, does not vary the application of the rule. Fowler v. Underwood, 193 N. C. 402, 137 S. E. 155.

Care as to Children.—The law requires more than ordinary care as to children. Moore v. Powell, 205 N. C. 636, 167 N. C. 229, 14 S. E. (2d) 242.

Limitation upon Privilege of Driving at Maximum Rate.—The speed limit prescribed by statute at which an automobile driver may go at various places, does not alone excuse those who drive within that specified by the statute, and it is likewise required that they use proper care where other conditions require it within the limitations given. Hinton v. Southern R. Co., 172 N. C. 587, 90 S. E. 756.

Motorist may not lawfully drive at speed which is not reasonable and prudent under the circumstances notwithstanding the speed is less than limit set by this section. Kolman v. Silbert, 219 N. C. 134, 12 S. E. (2d) 915.

The trial court's instruction correctly defining "residential district" and charging that the lawful speed therein was 25 miles an hour, but that this limitation did not apply to the driver from further increasing his speed if made necessary by special hazards in order to avoid colliding with [837]
any person or vehicle, is without error, whether the scene of the accident was in a "residential district" as defined by statute and the conflicting evidence as to the speed of the bus being left to the determination of the court. Reid v. City Coach Co., 215 N. C. 469, 2 S. E. (2d) 578, 123 A. L. R. 140.

The driver of an automobile upon a through highway did not have the right to assume absolutely that a driver approaching the intersection along a servient highway would keep a proper lookout and to keep his car at a reasonable speed under the circumstances in order to avoid injury to life or limb, § 4 of the 1927 act, and the driver of the car along the through highway forfeited his right to rely upon the assumption that the other driver would stop before entering or crossing the intersection when he approached and attempted to traverse it himself at an unlawful or excessive speed, and the driver of the car along the through highway was hold to have failed in his duty to exercise due care to ascertain if the driver of the other car was going to violate the statutory requirement in order to avoid the consequences of such negligence, being necessary to construe the pertinent statutes in pari materia and this result being consonant with such construction. Groome v. Davis, 215 N. C. 530, 2 S. E. (2d) 771.

Violation as Constituting Negligence.—It is negligence per se to drive an automobile upon a public highway at a speed greater than that permitted by statute, and where in an action to recover damages for the negligent killing of plaintiff's intestate, a voluntary passenger in the car thus driven, a motion as of nonsuit upon such evidence is properly denied. Albritton v. Hill, 190 N. C. 429, 130 S. E. 5.

When Negligence Not Imputed to Passenger.—The negligent driving of the owner of the car or his agent is not attributable to a passenger therein who has the authority or the manner in which it was being driven at the time his injury was caused, the subject of his action for damages, nor will the principles of law applicable to those engaged in a common purpose apply from the fact that the injured party and the driver of the car were riding together to the same destination. Albritton v. Hill, 190 N. C. 429, 130 S. E. 5.

Necessity for Criminal Negligence.—Under an indictment which charges a person with operating an automobile; operating a motor vehicle on a public highway while under the influence of intoxicating liquor; and recklessly, and in breach of this section, wherein it was admitted by the defendant that he was driving the automobile; and the jury having returned for their verdict that defendant was guilty of an assault, but not with reckless driving, "the admission and the verdict on the last two counts dispelled the criminal negligence and the criminal intent, and a conviction on the first count will not be sustained. State v. Rawlings, 191 N. C. 265, 131 S. E. 623. See also State v. Rountree, 181 N. C. 535, 106 S. E. 689.

As to evidence establishing negligence per se or substantial, yet it may be sufficient evidence to be submitted to the jury that defendant was exceeding the speed limit, and a charge disallowing it was erroneous. Woods v. Freeman, 213 N. C. 742, 178 S. E. 611; Norfleet v. Hall, 204 N. C. 573, 169 S. E. 143; Exum v. Baumrind, 210 N. C. 650, 188 S. E. 200. An instruction that such speed constitutes negligence per se is reversible error. Latham v. Elizabeth City Orange Crush Bottling Co., 213 N. C. 158, 195 S. E. 372.

As to violation of the statutory restrictions is prima facie evidence that the speed is not reasonable or prudent and it is unlawful, but it does not establish that the speed is unlawful as a matter of law, and is not prima facie proof of proximate cause, and does not make out a prima facie case. See an instruction that such speed constitutes prima facie evidence of negligence, and if the jury should so find they should answer the issue of negligence in the affirmative, is erroneous. Woods v. Freeman, 213 N. C. 742, 178 S. E. 611; Norfleet v. Hall, 204 N. C. 573, 169 S. E. 143.

Evidence of Excessive Speed Is Not Prima Facie Evidence of Proximate Cause.—Speed in excess of twenty miles per hour is only prima facie evidence of negligence which would constitute negligence per se, and where the evidence established that the scene of the accident was not in a residential district, there being no evidence that defendant exceeded the speed limit prescribed for highway travel general under the provisions of the act, no evidence was sufficient to submit to the jury the question of negligence as a matter of law, but only prima facie evidence that the speed was lawful. State v. Webber, 210 N. C. 137, 185 S. E. 659.

Driving Automobile in Excess of Forty-Five Miles Per Hour Is Only Prima Facie Negligence.—The driving of an automobile upon a highway at a speed in excess of forty-five miles per hour is prima facie evidence of negligence, but in order to establish negligence it was necessary to show that the speed was unlawful it would constitute negligence per se, is held not prejudicial under the evidence in this case tending to show special hazards in that defendant was driving into a school zone and wet pavement;" and that driving at a speed in excess of twenty miles per hour is not prima facie evidence of negligence, and if the jury should so find they should answer the issue of negligence in the affirmative, is erroneous. Woods v. Freeman, 213 N. C. 742, 178 S. E. 611; Norfleet v. Hall, 204 N. C. 573, 169 S. E. 143; Exum v. Baumrind, 210 N. C. 650, 188 S. E. 200. An instruction that such speed constitutes negligence per se is reversible error. Latham v. Elizabeth City Orange Crush Bottling Co., 213 N. C. 158, 195 S. E. 372. As to violation of the statutory speed limit as constituting negligence per se, see James v. Carolina Coach Co., 207 N. C. 742, 178 S. E. 607; Norfleet v. Hall, 204 N. C. 573, 169 S. E. 143; Williams v. Woodward, 218 N. C. 305, 10 S. E. (2d) 913. As to violation of statutory speed limit as constituting negligence per se or substantial, yet it may be sufficient evidence to be submitted to the jury that defendant was exceeding the speed limit contrary to the law of the section. Jones v. Bagwell, 207 N. C. 378, 352, 177 S. E. 671; State v. Rountree, 181 N. C. 535, 106 S. E. 689.

An instruction that the jury might find, but were not required to find, that a speed in excess of forty-five miles per hour was negligent was not so prejudicial as to require defendant to object to such finding. York v. York, 212 N. C. 695, 194 S. E. 486.

An instruction that the jury might find, but were not required to find, that a speed in excess of forty-five miles per hour was negligent was sufficient to support the evidence of the accused that the speed was unlawful it would constitute negligence per se, is held not prejudicial under the evidence in this case tending to show special hazards in that defendant was driving into a school zone and wet pavement;" and that driving at a speed in excess of forty-five miles per hour is only prima facie evidence of negligence, and if the jury should so find they should answer the issue of negligence in the affirmative, is erroneous. Woods v. Freeman, 213 N. C. 742, 178 S. E. 611; Norfleet v. Hall, 204 N. C. 573, 169 S. E. 143; Exum v. Baumrind, 210 N. C. 650, 188 S. E. 200. As to evidence establishing negligence per se but not wanton negligence, see Turner v. Lipe, 210 N. C. 627, 188 S. E. 108. See also, Smart v. Rodgers, 217 N. C. 560, 8 S. E. (2d) 312.

Driving Automobile in Excess of Forty-Five Miles Per Hour Is Only Prima Facie Negligence.—The driving of an automobile upon a highway at a speed in excess of forty-five miles per hour is prima facie evidence of negligence which would constitute negligence per se, and where the evidence established that the scene of the accident was not in a residential district, there being no evidence that defendant exceeded the speed limit prescribed for highway travel general under the provisions of the act, no evidence was sufficient to submit to the jury the question of negligence as a matter of law, but only prima facie evidence that the speed was lawful. State v. Webber, 210 N. C. 137, 185 S. E. 659, citing State v. Spencer, 207 N. C. 742, 178 S. E. 607; Norfleet v. Hall, 204 N. C. 573, 169 S. E. 143; Exum v. Baumrind, 210 N. C. 650, 188 S. E. 200. Evidence of Excessive Speed Is Not Prima Facie Evidence of Proximate Cause.—Speed in excess of twenty miles per hour in a business district is prima facie evidence that...
§ 20-142

The speed is excessive and unlawful, but such evidence is not prima facie proof of proximate cause, but is merely evidence of one factor, other evidence in making actionable negligence. Templeton v. Kelley, 215 N. C. 277, 2 S. E. 2d (2d) 696.

A violation of subsection (a) would be negligence per se and if injury proximately result therefrom, it would be actionable. Tarrant v. Pepsi-Cola Bottling Co., 221 N. C. 390, 20 S. E. 2d (2d) 565.

§ 20-143

Truck with Trailer Attached.—Where the evidence in a prosecution for manslaughter is not conclusive as to whether the driver of the truck had attached thereto a trailer or semitrailer, and all the evidence shows that the defendant was driving the truck between thirty and thirty-five miles per hour, it was held that the evidence is not sufficient to charge the defendant with speeding since the allowable speed was limited to thirty miles per hour. State v. Brooks, 210 N. C. 273, 186 S. E. 2d.

Where it was admitted that when the driver of a truck first saw a cow at a distance of several hundred feet, the truck was then traveling in excess of 30 miles an hour, the limit imposed upon motor vehicles with trailers by this section, it was held that this admission was of significance in determining whether the driver of the truck was negligent in the management of the vehicle in the descent of the hill, if the jury should find, as the witnesses for the plaintiff assert, that the truck was driven to its left side of the road in order to avoid collision with the cow. Jarman v. Philadelphia & Detroit Lines, 131 F. (2d) 728, 729.

The burden is upon the State to prove that a truck has a trailer attached thereto in order to reduce the maximum lawful speed at which such truck might lawfully proceed, the evidence in the case being otherwise insufficient to prove such fact. State v. Brooks, 210 N. C. 273, 186 S. E. 2d.

Warrant Charging No Offense.—A warrant charging merely that defendant operated his automobile at a designated speed in excess of the maximum prescribed by statute and the applicable municipal ordinance, charges no criminal offense, and defendant's motion to dismiss the warrant on these grounds is proper. State v. Earnest, 196 N. C. 378, 177 S. E. 170; Hancock v. Wilson, 211 N. C. 129, 189 S. E. 631; Gaffney v. Phelps, 207 N. C. 553, 178 S. E. 231 (speed in entering intersection).


§ 20-144

Railroad warning signals must be obeyed.—Whenever any person driving a vehicle approaches a highway and interurban or steam railway grade crossing, and a clearly visible and positive signal gives warning of the immediate approach of a railway train or car, it shall be unlawful for the driver of the vehicle to fail to bring the vehicle to a complete stop before traversing such grade crossing. (1937, c. 407, s. 104.)

§ 20-143

Vehicles must stop at certain railway grade crossings.—The road governing body (whether state or county) is hereby authorized to designate grade crossings of steam or interurban railways by state and county highways, at which vehicles are required to stop, respectively, and such railways are required to post direct signals to notify drivers of vehicles upon any such highway to come to a complete stop before crossing such railway tracks, and whenever any such crossing is so designated and sign-posted it shall be unlawful for the driver of any vehicle to fail to stop within fifty feet, but not closer than ten feet, from such railway tracks before traversing such crossing. No failure so to stop, however, shall be considered contributory negligence per se in any action against the railroad or interurban company for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence. Provided, that all school trucks and passenger busses be required to come to a complete stop at all railroad crossings. (1937, c. 407, s. 105.)

Editor's Note.—Most of the cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

Failure to Stop May Be Mixed Question of Law and Fact.—A driver of an automobile is not required by this section under all circumstances to stop before driving upon a railroad grade crossing, and whether he is required to do so under the particular circumstances disclosed by the evidence is ordinarily a mixed question of law and fact to be submitted to the jury upon proper instruction from the court. Keller v. Southern R. Co., 205 N. C. 269, 171 S. E. 73.

Necessity for Section.—Although a railroad is a highway, Hinton v. Southern R. Co., 197 N. C. 135, 147 S. E. 817; Rudd v. Holmes, 198 N. C. 93, 174 S. E. 750, an amendment of the statute (Acts of 1923) was necessary in order to compel the operator of a motor vehicle to bring it to a full stop before crossing or attempting to cross a railroad track. State v. Stalings, 189 N. C. 104, 106, 126 S. E. 187.

Failure to Stop as Negligence Per Se—Contributory Negligence.—The failure of a motorist to stop his automobile at a railroad grade crossing is a grade crossing on a public highway, as directed by this section, "at a distance not exceeding fifty feet from the nearest rail," does not constitute contributory negligence per se in his action against the railroad company to recover damages to his car caused by a collision with a train standing upon the track, and where the evidence tends only to show that the proximate cause of the plaintiff's injury was his own negligence in exceeding the speed he should have used under the circumstances, a judgment as of nonsuit thereon should be entered on defendant's motion therefor properly entered. Weston v. Southern R. Co., 194 N. C. 210, 139 S. E. 237.

The failure of a motorist to come to a full stop before entering upon a railroad crossing as required by statute is not contributory negligence per se, but such failure is a circumstance of which the jury may take account in determining whether there was contributory negligence or whether such evidence is sufficient to show contributory negligence in the case upon the question. White v. North Carolina R. Co., 216 N. C. 79, 139 S. E. 237.


§ 20-144. Special speed limitation on bridges.

—It shall be unlawful to drive any vehicle upon any public bridge, causeway or viaduct at a speed which is greater than the maximum speed at such place with safety to such structure be maintained thereon, when such structure is sign-posted as provided in this section.

The state highway and public works commission, upon request from any local authorities, shall, or upon its own initiative may conduct an investigation of any public bridge, causeway or viaduct, and if it shall thereupon find that such structure cannot with safety to itself withstand vehicles traveling at the speed otherwise permissible under this article, the commissioner shall determine and declare the maximum speed of vehicles which such structure can withstand, and such speed shall be a maximum speed to be posted and maintained at a distance of one hundred feet beyond each end of such structure. The findings and determination of the commission shall be conclusive evidence of the maximum speed which can with safety to any such structure be maintained thereon. (1937, c. 407, s. 106.)

Cross Reference.—As to power of state highway and pub-
lie works commission to fix maximum load limits on bridges, see § 136-72.

§ 20-145. When speed limit not applicable. — The speed limitations set forth in this article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in response to emergency calls. This exemption shall, however, not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others. (1937, c. 407, s. 107.)

§ 20-146. Drive on right side of highway. — Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway, and shall drive a slow-moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle subject to the limitations applicable in overtaking and passing, set forth in §§ 20-149 and 20-150. (1937, c. 407, s. 108.)

Editor's Note.—Most of the cases annotated were decided under the corresponding provisions of the former law. For discussion of the subject matter of statutes similar to this and succeeding sections, see 2 N. C. Law Rev. 178; 5 N. C. Law Rev. 248.

Proximate Cause.—A violation of this section is negligence per se, but such negligence is not actionable unless there is a causal relation between the breach and the injury. Grimes v. Carolina Coach Co., 203 N. C. 605, 608, 166 S. E. 599; See Stovall v. Ragland, 211 N. C. 556, 190 S. E. 409.

Burden on Plaintiff to Establish Negligence. — Where plaintiff's evidence leaves in speculation and conjecture the determinative fact of whether defendant's car was being driven on the wrong side of the highway at the time of the collision, defendant's motion to nonsuit is properly granted, but this burden is not absolute. It may be qualified by the particular circumstances existing at the time. Brown v. Southern Paper Products Co., 222 N. C. 626, 628, 24 S. E. (2d) 344.

§ 20-147. Keep to the right in crossing intersections or railroads. — In crossing an intersection of highways or the intersection of a highway by a railroad right-of-way, the driver of a vehicle that is approaching the intersection or right-of-way shall cause such vehicle to travel on the right half of the highway unless such right side is obstructed or impassable. (1937, c. 407, s. 109.)

§ 20-148. Meeting of vehicles. — Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible. (1937, c. 407, s. 110.)

Editor's Note.—The cases cited below were decided under the corresponding provisions of the former law.

§ 20-149. Overtaking a vehicle. — (a) The driver of any such vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle. (b) The driver of an overtaking motor vehicle not within a business or residence district, as hereinafter in defined, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction. (1937, c. 407, § 111.)

Editor's Note.—The cases cited below were decided under the corresponding provisions of the former law.

Purpose of Section.—This section was enacted for the protection of the public upon the roads and highways of the State, and its violation is negligence per se entitling the person injured to his damages when there is a causal connection between the negligent act and the injury complained of. Wolfe v. Independent Coach Line, 198 N. C. 340, 150 S. E. 876.

The violation of this section is negligence and if such negligence was the proximate cause of plaintiff's injuries, the defendant, nothing else appearing, is liable to the plaintiff for this violation. Stovall v. Ragland, 211 N. C. 556, 190 S. E. 409.

Evidence Sufficient to Raise Issue of Last Clear Chance. — Where the evidence tended to show that plaintiff, in avoiding a chicken standing on the hard surface of the highway, drove his automobile gradually to the left, so that the car was traveling in about the center of the highway at the time of the accident in suit, and that the bus was approaching in the same direction and hit plaintiff's car when the bus attempted to pass, it was held that, conceding plaintiff was negligent in driving to the left without giving any signal of intent, if the bus could have driven to the left in time to avoid a collision, but this is not absolute, the issue as to whether defendant's motion to nonsuit was erroneously granted, since the pleadings and evidence are sufficient to raise the issue of the last clear chance upon the evidence tending to establish defendant's negligence in failing to keep a safe distance between the vehicles and in failing to take the precautions and give the signals required by this section for passing cars on the highway. Morris v. Seashore Transp. Co., 198 N. C. 340, 172 S. E. 881.

Quoted in Leary v. Norfolk Southern Bus Corp., 220 N. C. 745, 18 S. E. (2d) 436 (dis. op.).

§ 20-150. Limitations on privilege of overtaking and passing. — (a) The driver of a vehicle shall not drive to the left side of the center of a highway, in overtaking and passing another vehicle proceeding in the same direction, unless such
Duty of Passer from Rear.—The driver of an automobile who wishes to pass another ahead of him, must keep his automobile under control, so as to avoid a collision if the other ahead of him suddenly, unexpectedly turns in the wrong direction, or is not aware of his intention to pass, or of the condition of the road makes it unsafe not only to himself, but to those who are driving from the opposite direction. Dreher v. Divine, 192 N. C. 325, 135 S. E. 29.


Same.—Violation as Evidence of Intent to Assail.—Since the intentional driving of a motor vehicle on the wrong side of the road in disregard of the statute is malum prohibitum, not malum in se, the performance of such a unlawful act is evidence of a specific intent to commit an assault. State v. Rawlings, 191 N. C. 265, 267, 131 S. E. 591.

Act Must Have Been Likely to Cause Harm.—One who violated the provisions of this section, not intentionally or recklessly, but merely through a failure to exercise due care thereby proximately caused the death would not be culpably negligent unless in the light of the attendant circumstances his negligent act was likely to result in death or bodily harm. State v. Stansell, 203 N. C. 69, 74, 164 S. E. 590.

Questions for Jury.—Where there was evidence that the plaintiff, desiring to pass a truck on the highway going in the same direction, blew his horn, and that the driver of the truck failed to make a suitable and audible signal, but instead of driving to the right of the center of the highway, kept on his own track and did not pass on the left, drove to the left and stopped or came almost to a stop, that the plaintiff, thinking that the truck was going to stop, and having his vision obstructed, attempted to pass on the right, when the truck suddenly turned to the left, forcing the plaintiff to turn to the right to avoid hitting the truck, causing the plaintiff’s car to run off the embankment on the right of the road, resulting in his being injured in the ensuing suit: Held, the evidence should have been submitted to the jury upon issues of negligence, contributory negligence and damages. Stevens v. Rostan, 196 N. C. 314, 145 S. E. 555.

§ 20-152. Following too closely. — (a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway.

(b) The driver of any motor truck, when traveling upon a highway outside of a business or residence district, shall not follow another motor truck within one hundred feet, but this shall not be construed to prevent one motor truck overtaking and passing another. (1937, c. 407, s. 113.)

Editor's Note.—Most of the cases cited below were decided under the corresponding provisions of the former law, and, as such, should be of assistance in the interpretation of the present section.

Degree of Care in Observing Traffic in Rear.—The driver of an auto-truck along a public highway is not held to the same degree of care in observing those who may wish to pass him as coming from the rear, as in front, and is not required to turn to the right for such purpose, unless he is apprised of the one who wishes to pass, by proper signal, of his intention to do so. Dreher v. Divine, 192 N. C. 325, 135 S. E. 29.

Driver Shall Turn to Right.—The driver of an automobile upon the signal of a faster car approaching from the rear, must turn to the right so that the other may pass to his left, when the conditions existing there at the time are reasonably likely to permit the other to pass. Dreher v. Divine, 192 N. C. 325, 135 S. E. 29.

When Question One of Reasonable Prudence.—Where the driver of an automobile violates the statute by turning to the right to avoid a motorcycle traveling in the same direction upon a public road, and collides therewith, and action is brought to recover damages therefor, and the evidence is that the motorcyclist while traveling was unexpectedly turned out in the wrong direction, resulting in the injury, the question of proximate cause depends upon whether the driver of the automobile acted with reasonable prudence under the circumstances, to avoid the injury, or whether the collision was caused by the wrongful and unexpected act of the one on the motorcycle. Cooke v. Jerome, 172 N. C. 566, 90 S. E. 767.
§ 20-154. Signals on starting, stopping or turning.—(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.

(b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any approved mechanical or electrical signal device, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the department.

Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth.

Left turn—hand and arm horizontal, forefinger pointing.

Right turn—hand and arm pointed upward.

Stop—hand and arm pointed downward.

All signals to be given from left side of vehicle during last fifty feet traveled. (1937, c. 407, s. 116.)

In General.—One driving an automobile upon a public highway is required by provision of this section to give specific signals before stopping or turning thereon, and the failure of one so driving to give the signal required by statute is negligence, and when the proximate cause of injury, damages may be recovered therefor by the one injured. Murphy v. Asheville-Knoxville Coach Co., 214 N. C. 314, 199 S. E. 90; Newbern v. Leary, 215 N. C. 134, 1 S. E. (2d) 384.

§ 20-155. Right-of-way.—(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right except as otherwise provided in § 20-156.

(b) The driver of a vehicle approaching, but not having entered an intersection and/or junction, shall yield the right-of-way to a vehicle within such intersection and turning therein to the left across the line of travel of such first mentioned vehicle.

(c) The driver of any vehicle upon a highway within a business or residence district shall yield the right-of-way to a pedestrian crossing such highway within any clearly marked crosswalk, or any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices.

Instruction.—Under this section where damages are sought for defendant's negligent driving at a street intersection and there is evidence tending to show that the defendant was approaching the intersection at an unlawful rate of speed, and defendant did not slow down before the happening of the collision with another car; an instruction correctly charging the rule of the road that if one of the cars was already in the intersection it was the duty of the driver of the other car to slow down and permit it to pass will not be held for error. Piner v. Richter, 202 N. C. 573, 163 S. E. 561.


§ 20-156. Exceptions to the right-of-way rule.—(a) The driver of a vehicle entering a public highway from a private road or drive shall yield the right-of-way to all vehicles approaching on such public highway.

(b) The driver of a vehicle upon a highway shall yield the right-of-way to police and fire department vehicles and public and private ambulances when the latter are operated upon official business and the drivers thereof sound audible signal by bell, siren or exhaust whistle.

This provision shall not operate to relieve the driver of a police or fire department vehicle or public or private ambulance from the duty to drive with due regard for the safety of all persons using the highway, nor shall it prohibit the driver of any such [842]
vehicle from the consequence of any arbitrary ex-

ercise of such right-of-way. (1937, c. 407, s. 118.)

Cited in Swinson v. Nance, 219 N. C. 772, 15 S. E. (2d)

284 (dis. op.).

§ 20-157. What to do on approach of police

or fire department vehicles. — (a) Upon the ap-

proach of any police or fire department vehicle

giving audible signal by bell, siren or exhaust whistle, the driver of every other vehicle shall im-

mediately drive the same to a position as near as

possible and parallel to the right-hand edge or
curb, clear of any intersection of highways, and

shall stop and remain in such position unless other-

wise directed by a police or traffic officer until

the police or fire department vehicle shall have

passed.

(b) It shall be unlawful for the driver of any

vehicle other than one on official business to fol-

low any fire apparatus traveling in response to a

fire alarm closer than one block, or to overtake

or park such vehicle within one block where fire

apparatus has stopped in answer to a fire alarm.

(1937, c. 407, s. 119.)


436.

§ 20-158. Vehicles must stop at certain through

highways.—(a) The State highway and public

works commission, with reference to state high-

ways, and local authorities, with reference to high-

ways under their jurisdiction, are hereby author-

ized to designate main traveled or through high-

ways under their jurisdiction, are hereby author-

ized to designate main traveled or through high-

ways by erecting at the entrance thereto from

intersecting highways signs notifying drivers of

vehicles to come to full stop before entering or
crossing such designated highway, and whenever

any such signs have been so erected it shall be

unlawful for the driver of any vehicle to fail to

stop in obedience thereto. No failure so to stop,

however, shall be considered contributory negli-
gence per se in any action at law for injury to per-

son or property; but the facts relating to such

failure to stop may be considered with the other

facts in the case in determining whether the plain-
tiff in such action was guilty of contributory

negligence.

(b) This section shall not interfere with the

regulations prescribed by towns and cities.

(c) Any person violating the provisions of this

section shall be guilty of a misdemeanor, and upon

conviction shall be fined not more than ten dollars

or imprisoned not more than ten days. (1937, c.

407, s. 120; 1941, c. 82.)

Editor's Note.—The 1941 amendment struck out former subsections (b) and (d) and relettered the remaining sub-

sections.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 48.

Failure to come to a complete stop before entering a through

street intersection is not negligence per se, but only evidence

of negligence to be considered with other facts in the case, such

holding being a necessary corollary to the provision of this section, that failure to stop before entering a through

street intersection should not be considered contributory

go negligence per se, but only evidence to be considered with

the other facts in the case upon the issue of contributory

negligence. Sebastian v. Horton Motor Lines, 213 N. C. 770,

197 S. E. 539; Reeves vs. Staley, 220 N. C. 573, 18 S. E. (2d)

239.

This rule is unaffected by a municipal ordinance making

such failure to stop unlawful, since this section prevails over

the ordinance. Swinson v. Nance, 219 N. C. 772, 15 S. E.

(2d) 284.

Negligence of Car Approaching on Through Highway.—

The driver of an automobile upon a through highway did

not have the right to assume absolutely that a driver ap-

proaching the intersection along a servient highway would

obey the stop sign before entering or crossing the through

highway. Pearson v. Luther, 212 N. C. 412, 193 S. E. 739.

Proximate Cause Must Be Shown Beyond a Mere Chance.

—Where a conviction of involuntary manslaughter is sought

for the failure to observe a positive duty imposed by stat-

utes with reference to the driving of automobiles upon the

public highways, the question of proximate cause must be

shown beyond a mere chance or casualty. State v. Sat-

terfield, 198 N. C. 682, 153 S. E. 155.

The manifest object of this section is to protect the pub-

lic by requiring the driver of an automobile upon the pub-

lic highways of the State to stop and ascertain the

circumstances and conditions at highway intersections,

particularly with reference to traffic, with a view of de-

termining whether in the exercise of due care he may go

upon the intersecting highway with reasonable safety to

himself and others, and where the defendant in a prosecu-

tion for manslaughter fails to stop, but has knowledge

of the conditions and has an unobstructed view of the high-

way for a long distance, and there is no evidence tending

to show that he had violated any other statute or that

he was negligent in any other respect, the evidence alone

that he had violated the statute in the respect stated is

insufficient to take the case to the jury, there being no

evidence that the violation of the statute was a proximate

cause of the death or in causal relation thereto, and

defendant's motion as of nonsuit, made in apt time, should

have been granted. State v. Satterfield, 198 N. C. 682, 153

S. E. 155.

Instruction as to negligence held error since it was counter

to the provision of this section. Stephens v. Johnson, 215 N. C.

133, 16 S. E. (2d) 536.


Cited in Leary v. Norfolk Southern Bus Corp., 220 N.

C. 745, 18 S. E. (2d) 436.

§ 20-159. Passing street cars.—(a) The driver

of a vehicle shall not overtake and pass upon the

left any street car proceeding in the same direc-
tion, whether actually in motion or temporarily at

rest, when a travelable portion of the highway

exists to the right of such street car.

(b) The driver of a vehicle overtaking any rail-

way, interurban or street car stopped or about to

stop for the purpose of receiving or discharging

any passenger, shall bring such vehicle to a full

stop not closer than ten feet to the nearest limit

of such street car and remain standing until any

such passenger has boarded such car or reached

the adjacent sidewalk, except that where a safety

zone has been established, then a vehicle may be

driven past any such railway, interurban or street

car at a speed not greater than ten miles per hour

and with due caution for the safety of pedestrians.

(1937, c. 407, s. 121.)

§ 20-160. Driving through safety zone pro-
hibited.—The driver of a vehicle shall not at any
time drive through or over a safety zone as defined in part one of this article. (1937, c. 407, s. 123.)

CROSS REFERENCE.—As to definition of safety zone, see § 20-38, subsec. (2).

§ 20-161. Stopping on highway.—(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway: Provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in both directions upon such highway: Provided further, that in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless it is impossible to avoid stopping temporarily and leaving such vehicle upon the highways.

(b) Whenever any peace officer shall find a vehicle standing upon a highway in violation of the provisions of this section, he is hereby authorized to move such vehicle or require the driver or person in charge of such vehicle to move such vehicle to a position permitted under this section.

(c) The provisions of this section shall not apply to the driver of any vehicle which is disabled while so parked or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping temporarily and leaving such vehicle in such position. (1937, c. 407, s. 123.)

The word "park" means the permitting of such vehicles to remain standing on a public highway or street, while not in use. State v. Carter, 205 N. C. 761, 763, 172 S. E. 416.

To "park" means something more than a mere temporary or momentary stoppage on the road for a necessary purpose. Stailings v. Buchanan Transport Co., 210 N. C. 201, 203, 185 S. E. 643.

Thus where the driver of a truck with a trailer stopped on the highway at night on the right-hand side, with lights burning, because two automobiles in front of him were interlocked in a wreck, and at the time of the collision the truck and trailer had been standing still only a fraction of a minute, and it remained parked for about five minutes thereafter, it was held that at the time of the collision the truck was not parked on the highway within the meaning of this section, and the length of time it remained after the collision is immaterial to plaintiff's right to recover; substantial evidence of the defendant's affirmative answer upon the issue of contributory negligence, and the question of contributory negligence in failing to see the parked car under the circumstances in time to have avoided the collision is also properly submitted to the jury. Lambert v. Caronna, 206 N. C. 616, 175 S. E. 303.

Exception in Subsection (c) Is Question for Jury.—Where there is evidence tending to show that the defendant had parked his truck upon the hard surface of a highway in violation of this section, resulting in injury to the plaintiff, and where the defendant claims that under the facts it came within the exception, subsection (c), where the defendant's only evidence in excuse of parking was that he had a flat tire, such evidence being insufficient to bring defendant within the exception. Smithwick v. Colonial Pine Co., 200 N. C. 519, 157 S. E. 612.

Exception Disclosed in Case Where Truck was Parked on Shoulder of Highway.—See State v. McDonald, 211 N. C. 672, 676, 191 S. E. 733.

Evidence Disclosing Contributory Negligence of Plaintiff.—Contributory negligence of defendant in parking the car on the hard surface in violation of this section, the evidence discloses contributory negligence of plaintiff as a matter of law in attempting to pass the parked car without first ascertaining that he could pass the car in safety. McNair v. Kilmer & Co., 210 N. C. 65, 185 S. E. 481.

Cited in White v. Chappell, 219 N. C. 652, 14 S. E. (2d) 943 (dis. op.).

§ 20-162. Parking in front of fire hydrant, fire station or private driveway.—No person shall park a vehicle or permit it to stand, whether attended or unattended, upon a highway in front of a private driveway or within fifteen feet in either direction of a fire station or a fire hydrant, fire station, or within twenty-five feet from the intersection of curb lines or if none, then within fifteen feet of the intersection of property lines at an intersection of highways; provided, that local authorities may by ordinance decrease the distance within which a vehicle may park in either direction of a fire hydrant. (1937, c. 407, s. 124; 1939, c. 111.)

§ 20-163. Motor vehicle left unattended; brakes to be set and engine stopped.—No person having control or charge of a motor vehicle shall allow such vehicle to stand on any highway unattended without first effectively setting the brakes
§ 20-164. Driving on mountain highways.—
The driver of a motor vehicle traversing defiles, canyons or mountain highways shall hold such motor vehicle under control and as near the right-hand side of the highway as reasonably possible, and upon approaching any curve where the view is obstructed within a distance of two hundred feet along the highway, shall give audible warning with a horn or other warning device. (1937, c. 407, s. 126.)

§ 20-165. Coasting prohibited.—The driver of a motor vehicle when traveling upon a down grade upon any highway shall not coast with the gears of such vehicle in neutral. (1937, c. 407, s. 127.)

The violation of this section is negligence per se, and, if injury to the violator proximately result therefrom, it would bar his right to recover therefor. Dillon v. Winston-Salem, 221 N. C. 512, 519, 20 S. E. (2d) 845.

§ 20-166. Duty to stop in event of accident.—(a) The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident, and any person violating this provision shall upon conviction be punished as provided in § 20-182.

(b) The driver of any vehicle involved in an accident resulting in damage to property and in which there is not involved injury or death of any person, shall immediately stop such vehicle at the scene of the accident, and any person violating this provision shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court.

(c) The driver of any vehicle involved in an accident resulting in injury or death to any person or damage to property shall also give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person, and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in § 20-182.

(d) The driver of any vehicle involved in an accident resulting in injuries or death to any person, or property damage to an apparent extent of twenty-five dollars ($25.00) or more, shall, within twenty-four hours, file or cause to be filed a report of such accident with the department, except that when such accident occurs within a city such report shall be made within twenty-four hours to the police department of such city. Every police department shall forward on the fifth day of each month every such report received during the previous calendar month, or a copy thereof, so filed with it to the main office of the department. All accident reports shall be made on forms approved with it to the main office of the department. All accident reports shall be made on forms approved by the department. With respect to any such accident involving a collision between a common carrier and another vehicle, such common carrier shall also make a report of the accident to the department, such report to be filed on or before the tenth day of the month following the accident.

(e) Where a person required to report an accident by the preceding subsection is physically incapable of making such report, and there is another occupant in the vehicle at the time of the accident, such occupant shall make the report.

The department may require drivers, or common carriers involved in accidents, to file supplemental reports, and may require witnesses of accidents to render reports to it upon forms furnished by it whenever the original report is insufficient in the opinion of the department between any conflict.

All accident reports together with all supplemental reports above mentioned shall be without prejudice and shall be for the use of the department, and shall not be used in any manner whatsoever as evidence, or for any other purpose in any trial, civil or criminal, arising out of such accident: Provided, however, that all reports made by state, city or county police shall be subject to inspection by members of the general public at all reasonable times. The department shall be required to furnish, upon demand of any court, a properly executed certificate stating that a specific accident report has or has not been filed with the department solely to prove a compliance with this section.

(f) The department shall prepare and shall upon request supply to police, coroners, sheriffs and other suitable agencies, or individuals, forms for accident reports calling for sufficiently detailed information to disclose with reference to a highway accident the cause, conditions then existing, and the persons and vehicles involved.

The department shall receive accident reports required to be made by this section and may tabulate and analyze such reports and publish annually, or at more frequent intervals, statistical information based thereon as to the number, cause and location of highway accidents.

Based upon its findings after such analysis, the department may conduct further necessary detailed research to more fully determine the causes and control of highway accidents. It may further conduct experimental field tests within areas of the state from time to time to prove the practicability of various ideas advanced in traffic control and accident prevention.

(g) Every person holding the office of coroner in this state shall, on the tenth day of each month, report to the department the death of any person during the preceding calendar month as the result of an accident involving a motor vehicle and the circumstances of such accident. (1937, c. 407, s. 128; 1939, c. 10, ss. 1, 12; 1943, c. 439.)

Editor's Note.—The 1939 amendatory act clarified inconsistencies between this section and § 20-182. See 17 N. C. Law Rev. 349.

The 1943 amendment increased the amount named in line four of subsection (d) from ten dollars to twenty-five dollars.

§ 20-181. Evidence sufficient for jury.—Where all the evidence tended to show that the car of the prosecuting witness was struck by a car which was traveling at the time of the accident with its left wheels over the center line of the highway, that an occupant in the car of the prosecuting witness was injured, and that the car which collided with her car failed to stop after the collision, in violation of this section, and the state's circumstantial evidence, including marks on the highway leading uninterruptedly from the point of collision to a car parked at defendant's place of
business, which defendant admitted to be his, the condition of defendant's car, a hub cap and other automobile parts found at the scene of the collision which were missing from defendant's car, and other circumstances tending to show efforts on the part of defendant to conceal the identity of his car as the one involved in the collision, together with testimony by defendant that no one else had driven his car on the evening in question, it was held sufficient to have been submitted to the jury on the question of defendant's guilt, and his motions for judgment as of nonsuit were held properly refused. State v. King, 219 N. C. 667, 14 S. E. (2d) 803.

**Instruction.—**In a prosecution for "hit and run driving" an instruction that defendant was charged with the violation of one of the motor vehicle statutes designed for the protection of life and property, cannot be held for error, the statement being related to any fact in issue or any evidence introduced in the case, and containing no inference as to the guilt or innocence of defendant, further appearing that the court correctly charged upon the presumption of innocence and the burden of proof. State v. King, 219 N. C. 667, 14 S. E. (2d) 803.


**§ 20-167. Vehicles transporting explosives.**—Any person operating any vehicle transporting any explosive as a cargo or part of a cargo upon a highway shall at all times comply with the provisions of this section.

(a) Said vehicle shall be marked or placarded on each side and the rear with the word "Explosives" in letters not less than eight inches high, or there shall be displayed on the rear of such vehicle a red flag not less than twenty-four inches square marked with the word "Danger" in white letters six inches high.

(b) Every said vehicle shall be equipped with not less than two fire extinguishers, filled and ready for immediate use, and placed at a convenient point on the vehicle so used.

(c) The commissioner is hereby authorized and directed to promulgate such additional regulations governing the transportation of explosives and other dangerous articles by vehicles upon the highways as he shall deem advisable for the protection of the public. (1937, c. 407, s. 129.)

**Cross Reference.**—As to provision that vehicles transporting motor fuels shall be labelled, see § 119-41.


**§ 20-168. Drivers of state, county and city vehicles subject to provisions of this article.**—The provisions of this article applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by this state or any political subdivisions thereof, or of any city, town or district, except persons, teams, motor vehicles and other equipment while actually engaged in work on the surface of the road, but not when traveling to or from such work. (1937, c. 407, s. 130.)


**§ 20-169. Powers of local authorities.**—Local authorities, except as expressly authorized by § 20-141, subsection (g) and § 20-158, shall have no power or authority to alter any speed limitations declared in this article or to enact or enforce any rule or regulations contrary to the provisions of this article, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic signs or other signaling devices on any portion of the highway where traffic is heavy or continuous and may prohibit other than one-way traffic upon certain highways, and may regulate the use of the highways by processions or assembles and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations. (1937, c. 407, s. 131.)

**For application of former statute prohibiting ordinance in conflict, see State v. Freshwater, 183 N. C. 763, 111 S. E. 161.**

**§ 20-170. This article not to interfere with rights of owners of real property with reference thereto.**—Nothing in this article shall be construed to prevent the owner of real property used by the public for purposes of vehicular travel by permission of the owner, and not as matter of right from prohibiting such use nor from requiring other or different or additional conditions than those specified in this article or otherwise regulating such use as may seem best to such owner. (1937, c. 407, s. 132.)

**§ 20-171. Traffic laws apply to persons riding animals or driving animal-drawn vehicles.**—Every person riding an animal or driving any animal drawing a vehicle upon a highway shall be subject to the provisions of this article applicable to the driver of a vehicle, except those provisions of the article which by their nature can have no application. (1939, c. 275.)


**§ 20-172. Pedestrians subject to traffic control signals.**—Pedestrians shall be subject to traffic control signals at intersections as heretofore declared in this article, but at all other places pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in part eleven of this article. (1937, c. 407, s. 133.)

**Duty to Charge Sections in Civil Actions.**—It is the duty of the court to charge the duty of drivers to pedestrians, imposed by this and the following sections, in an action for damages for their violation and this error is not cured by a general charge as to the use of necessary prudence, and is reversible even in the absence of a prayer for more specific instructions. Bowen v. Schnibben, 184 N. C. 248, 114 S. E. 179.

**§ 20-173. Pedestrians' right-of-way at crosswalks.**—(a) Where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in part eleven of this article.

(b) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle. (1937, c. 407, s. 134.)


**§ 20-174. Crossing at other than cross-walks.**—(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

(b) Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedes-
A crossing between adjacent intersections at which traffic control signals are in operation. It is unlawful for a pedestrian to cross the streets between intersections at which traffic control signals are in operation. Where the evidence failed to sustain plaintiff's allegation that his intestate was walking along the edge of the highway on his left hand side at the place provided by law and was struck by a board projecting from defendants' truck, defendant's motion to nonsuit was properly allowed for failure to establish contributory negligence proximately causing the fatal injury. Pack v. Auman, 220 N. C. 704, 18 S. E. 2d (1943) 297.

§ 20-157. Penalty for bad check.—When any person, firm, or corporation shall tender any uncashed check for payment of any tax or fees found to be due by him under the provisions of this article, and such check shall have been returned to the commissioner unpaid on account of insufficient funds of the drawer of said check in the amount thereof and it is due, such person shall pay an additional tax shall be imposed equal to ten per cent of the fees due, and in no case shall the increase of said tax, because of said failure, be less than one dollar ($1.00), and the said additional tax shall not be waived or diminished by the commissioner. (1937, c. 407, s. 138.)

§ 20-178. Penalty for bad check.—When any person, firm, or corporation shall tender any uncashed check for payment of any tax or fees found to be due by him under the provisions of this article, and such check shall have been returned to the commissioner unpaid on account of insufficient funds of the drawer of said check in the amount thereof and it is due, such person shall pay an additional tax shall be imposed equal to ten per cent of the fees due, and in no case shall the increase of said tax, because of said failure, be less than one dollar ($1.00), and the said additional tax shall not be waived or diminished by the commissioner. (1937, c. 407, s. 138.)

§ 20-179. Penalty for bad check.—When any person, firm, or corporation shall tender any uncashed check for payment of any tax or fees found to be due by him under the provisions of this article, and such check shall have been returned to the commissioner unpaid on account of insufficient funds of the drawer of said check in the amount thereof and it is due, such person shall pay an additional tax shall be imposed equal to ten per cent of the fees due, and in no case shall the increase of said tax, because of said failure, be less than one dollar ($1.00), and the said additional tax shall not be waived or diminished by the commissioner. (1937, c. 407, s. 138.)
than one year, or by fine of not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00), or by both such fine and imprisonment. On a second or subsequent conviction for the same offense he shall be punished by imprisonment for not more than two years or fined not more than one thousand dollars: ($1,000.00), or by both fine and imprisonment, in the discretion of the court. (1937, c. 407, s. 140.)

Cross Reference.—As to mandatory revocation of license for driving under influence of liquor or drugs, see § 20-17, paragraph 2.

Sentence Not Excessive.—A sentence to the county jail for a term of six months, and to be assigned to work on the public roads, upon defendant's plea of nolo contendere to a warrant charging him with the operation of an automobile upon the public highways while under the influence of intoxicating liquor, is not excessive. State v. Parker, 220 N. C. 416, 17 S. E. 475.

§ 20-180. Penalty for reckless driving.—Every person convicted of reckless driving under section 20-140 shall be punished by imprisonment in the county or municipal jail for a period of not more than six months, or by fine of not more than five hundred dollars ($500.00), or by both such fine and imprisonment, and on a second or subsequent conviction of such offense shall be punished by imprisonment for not more than one year or by a fine of not less than fifty dollars nor more than one thousand dollars ($1,000.00), or by both such fine and imprisonment. (1937, c. 407, s. 141.)

Cross Reference.—As to revocation of license for 2 convictions on reckless driving charges, see § 20-17, paragraph 6.

Penalty Not Excessive.—Upon conviction of reckless driving, sentence of defendant to six months in the county jail to be assigned to work the roads under the direction of the state highway and public works commission is within the limitations prescribed by this section and therefore cannot be held excessive. State v. Wilson, 218 N. C. 769, 12 S. E. (2d) 654.

§ 20-181. Penalty for failure to dim, etc., beams of headlamps.—Any person operating a motor vehicle on the highways of this state, who shall fail to shift, depress, deflect, tilt or dim the beams of the head lamps thereon whenever another vehicle is met on such highways shall, upon conviction thereof, be fined not more than ten ($10.00) dollars or imprisoned for not more than ten (10) days. (1939, c. 351, s. 3.)

Cross Reference.—As to conviction not being ground for revocation of operator's or chauffeur's license, see § 20-18.

§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person.—Every person convicted of wilfully violating § 20-166, relative to the duties to stop in the event of accidents, except as otherwise provided, involving injury or death to a person, shall be punished by imprisonment for not less than one nor more than five years, or in the state prison for not less than one nor more than five years, or by fine of not less than five hundred dollars or by both such fine and imprisonment. The commissioner shall revoke the operator's or chauffeur's license of the person so convicted. In no case shall the court have power to suspend judgment upon payment of costs. (1937, c. 407, s. 142.)

Cross Reference.—As to mandatory revocation of license in event of failure to stop and render aid in case of accident, see § 30-17, paragraph 4.


§ 20-183. Duties and powers of law enforcement officers.—It shall be the duty of the law enforcement officers of the state and of each county, city, or other municipality to see that the provisions of this article are enforced within their respective jurisdictions, and any such officer shall have the power to arrest on sight or upon warrant any person found violating the provisions of this article. Such officers within their respective jurisdictions shall have the power to stop any motor vehicle upon the highways of the state for the purpose of determining, whether the same is being operated in violation of any of the provisions of this article. (1937, c. 407, s. 143.)

Art. 4. State Highway Patrol.

§ 20-184. Patrol under supervision of department of motor vehicles.—The commissioner of motor vehicles, under the direction of the governor, shall have supervision, direction and control of the state highway patrol. The commissioner shall establish in the department of motor vehicles a division of highway safety and patrol, prescribe regulations governing said division, and assign to the division such duties as he may deem proper. (1935, c. 324, s. 2; 1939, c. 387, s. 1; 1941, c. 36.)

§ 20-185. Personnel; appointment; salaries.—The state highway patrol shall consist of one person to be designated as major, and such additional subordinate officers and men as the commissioner of motor vehicles, with the approval of the governor and advisory budget commission, shall direct. Members of the state highway patrol shall be appointed by the commissioner with the approval of the governor, and shall serve at the pleasure of the governor and commissioner. The major, other officers, and members of the state highway patrol shall be paid such salaries as may be established by the division of personnel of the budget bureau. (1929, c. 218, s. 2; 1931, c. 381; 1935, c. 324, s. 1; 1937, c. 313, s. 1; 1941, c. 36.)

§ 20-186. Oath of office; bond.—Each member of the highway patrol shall subscribe and file with the commissioner of motor vehicles an oath of office for the faithful performance of his duties, and shall give a bond with good surety payable to the state of North Carolina in a sum not less than one thousand dollars ($1000.00) and not more than two thousand five hundred dollars ($2500.00) to be fixed by the commissioner of motor vehicles, conditioned as well for the faithful discharge of his duty as patrolman as for his diligently endeavoring to collect faithfully and pay over all sums of money received. The bond shall be duly approved and filed in the office of the insurance commissioner, and copies of the bond certified by the insurance commissioner shall be received and read in evidence in all actions and proceedings where the original might be. (1929, c. 218, s. 2; 1937, c. 339, s. 1; 1941, c. 36.)

See § 128-9.

§ 20-187. Orders and rules for organization and conduct.—The commissioner of motor vehicles is authorized and empowered to make all necessary orders, rules and regulations for the organization, assignment, and conduct of the members of the state highway patrol. Such orders, rules and regulations shall be subject to the approval of the
§ 20-188. Duties of highway patrol.—The state highway patrol shall be subject to such orders, rules and regulations as may be adopted by the commissioner of motor vehicles, with the approval of the governor, and shall regularly patrol the highways of the state and enforce all laws and regulations respecting travel and the use of vehicles upon the highways of the state and all laws for the protection of the highways of the state. To this end, the members of the patrol are given the power and authority of peace officers for the service of any warrant or other process issuing from any of the courts of the state having criminal jurisdiction, and are likewise authorized to arrest without warrant any person who, in the presence of said officers, is engaged in the violation of any of the laws of the state regulating travel and the use of vehicles with respect to the protection of the highways, and they shall have jurisdiction anywhere within the state, irrespective of county lines.

The state highway patrol shall have full power and authority to perform such additional duties as peace officers as may from time to time be directed by the governor, and such officers may at any time and without special authority, either upon their own motion or at the request of any sheriff or local police authority, arrest persons accused of highway robbery, bank robbery, murder, or other crimes of violence.

The state highway patrol shall be required to perform such other and additional duties as may be required of it by the commissioner of motor vehicles in connection with the work of the department of motor vehicles, and such other and additional duties as may be required of it from time to time by the governor. (1929, c. 218, s. 4; 1933, c. 214, ss. 1, 2; 1935, c. 324, s. 3; 1939, c. 837, s. 2; 1941, c. 36.)

§ 20-189. Patrolman assigned to governor's office.—The commissioner of motor vehicles, at the request of the governor, shall assign and attach one member of the state highway patrol to the office of the governor, there to be assigned such services as the governor may direct. The salary of the state highway patrolman so assigned to the office of the governor shall be paid from appropriations made to the office of the governor and shall be fixed in an amount to be determined by the governor and the advisory budget commission. (1941, cc. 23, 36.)

§ 20-190. Uniforms; furnishing motor vehicles.—The department of motor vehicles shall adopt some distinguishing uniform for the members of said state highway patrol, and furnish each member of the patrol with an adequate number of said uniforms and each member of said patrol force when on duty shall be dressed in said uniform. The department of motor vehicles shall likewise furnish each member of the patrol with a suitable motor vehicle, and necessary arms, and provide for all reasonable expense incurred by said patrol while on duty. (1929, c. 218, s. 5; 1941, c. 36.)

§ 20-191. Establishment of district headquarters.—The department of motor vehicles shall supply at its various district offices, or at some other point within the district if it shall be deemed advisable, suitable district headquarters, and the necessary clerical assistance for the major of the force at his headquarters in Raleigh and at the several district headquarters. (1929, c. 218, s. 6; 1937, c. 313, s. 1; 1941, c. 36.)

§ 20-192. Shifting of patrolmen from one district to another.—The major of the state highway patrol under such rules and regulations as the department of motor vehicles may prescribe shall have authority from time to time to shift the forces from one district to another, or to consolidate one or more than one district force at any point for special purposes. (1929, c. 218, s. 7; 1937, c. 313, s. 1; 1941, c. 36.)

§ 20-193. Fees for service of process by patrolmen to revert to county.—All fees for arrests or service of process that may be taxed in the bill of costs for the various courts of the state on account of the official acts of the members of the state highway patrol shall be remitted to the general fund in the county in which the said cost is taxed. (1929, c. 218, s. 8.)

§ 20-194. Expense of administration. — All expenses incurred in carrying out the provisions of this article shall be paid out of the maintenance funds of the state highway and public works commission. (1929, c. 218, s. 9; 1941, c. 36.)

§ 20-195. Co-operation between patrol and local officers.—The commissioner of motor vehicles with the approval of the governor, through the division of highway safety and patrol, shall encourage the co-operation between the highway patrol and the several municipal and county peace officers of the state for the enforcement of all traffic laws and the proper administration of the Uniform Drivers' License Law, and arrangements for compensation of special services rendered by such local officers out of the funds allotted to the division of highway safety and patrol may be made, subject to the approval of the director of the budget. (1935, c. 324, s. 5; 1939, c. 837, s. 3; 1941, c. 36.)

Editor's Note.—The 1939 amendment inserted the words "with the approval of the governor" in the second and third lines.

§ 20-196. State-wide radio system authorized; use of telephone lines in emergencies.—The commissioner of motor vehicles, through the division of highway safety and patrol is hereby authorized and directed to set up and maintain a state-wide radio system, with adequate broadcasting stations so situate as to make the service available to all parts of the state for the purpose of maintaining radio contact with the members of the state highway patrol and other officers of the state, to the end that the traffic laws upon the highways may be more adequately enforced and that the criminal use of the highways may be prevented.

If the director of the budget shall find that the appropriation provided for in the department is not adequate to take care of the entire cost of the radio service herein provided for, after providing for the administration of other provisions of this law, the state highway and public works commission, upon the order of the director of the budget approved by the advisory budget commission, shall make available such additional sum as the said
budget commission may find to be necessary to make the installation and operation of such radio service possible; and the sum so provided by the state highway and public works commission shall constitute a valid charge against the appropriation item of betterments for state and county roads.

The commissioner of motor vehicles is likewise authorized and empowered to arrange with the various telephone companies of the state for the use of their lines for emergency calls by the members of the state highway patrol, if it shall be found practicable to arrange apparatus for temporary contact with said telephone circuits along the highways of the state.

In order to make this service more generally useful, the various boards of county commissioners and the governing boards of the various cities and towns are hereby authorized and empowered to provide radio receiving sets in the offices and vehicles of their various officers, and such expenditures are declared to be a legal expenditure of any funds that may be available for police protection. (1931, c. 324, s. 6; 1941, c. 36.)

Art. 5. Enforcement of Collection of Judgments against Irresponsible Drivers of Motor Vehicles.

§ 20-197. Certain words defined.—The following words, as used in this article, shall have the following meanings:

(a) The singular shall include the plural; the masculine shall include the feminine and neuter, as requisite.

(b) “Person” shall include individuals, partnerships, corporations, receivers, referees, trustees, executors and administrators; and shall also include the owner of any motor vehicle as requisite; but shall not include the State or any political subdivisions thereof.

(c) “Motor Vehicle” shall include trailers, motorcycles and tractors. (1931, c. 116, s. 13.)

§ 20-198. Suspension of driver’s license and registration certificates for failure to pay tort judgment. — In the event of the failure of any person, firm or corporation, to satisfy any judgment which shall have hereafter become final, by expiration, without appeal, of the time within which appeal might have been perfected, or by final affirmance, on appeal, rendered against him, by a court of competent jurisdiction in this State, within thirty days thereafter for damages on account of personal injuries, or deaths, or damage to property in excess of one hundred dollars ($100.00) resulting from the ownership, maintenance, use or operation thereof of a motor vehicle, the said operator’s license and all of the registration certificates of the said person, firm or corporation shall be forthwith suspended by the commissioner of motor vehicles of North Carolina, upon receiving a certified copy or transcript of such final judgment, from the court in which the same was rendered, showing such judgment or judgments to have been still unsatisfied more than thirty days after the same became final, as aforesaid, and shall remain so suspended and shall not be renewed, nor shall any motor vehicle be thereafter registered in the name of the said person, firm or corporation while any such judgment remains unsatisfied, unsatisfied and subsisting and until every such judgment is satisfied or discharged, or until the said person gives proof of his ability to respond in damages, as hereinafter required, for future accidents. It shall be the duty of the Clerk of the Superior Court in any county in which any such judgment is rendered, to forward immediately after the expiration of said thirty days, as aforesaid, to the Commissioner of motor vehicles, a certified copy of such judgment or a transcript thereof as aforesaid. (1931, c. 116, s. 1; 1941, c. 36.)

Editor’s Note.—See 13 N. C. Law Rev. 223.

This article is patterned after the Safety Responsibility Act sponsored by the American Automobile Association. One important point of difference is that under this article the license may be renewed either by paying the judgment or establishing financial responsibility for future accidents, while the American Automobile Association Act uses the conjunctive “and” instead of “or”. See 9 N. C. Law Rev. 384 et seq.

§ 20-199. Proof of ability to respond in damages; surety bond; withdrawal of license to operate automobile.—The proof of the ability of any person, firm or corporation to respond in damages for any liability incurred may be established by the execution of a bond of a surety company, duly authorized to transact business within this State or a bond, with at least two individual sureties, each owning real estate within this State, which real estate shall be scheduled in the bond and which bond shall be approved by a Clerk of the Superior Court. The said bond to be conditioned for any liability thereafter incurred resulting from the ownership, maintenance, use or operation thereof of a motor vehicle for personal injury to and the death of any one person in the amount of at least five thousand dollars ($5,000.00) and, subject to the aforesaid limit for any one person injured or killed, of at least ten thousand dollars ($10,000.00) for personal injury to or the death of two or more persons in any one accident, and for damage to property in the amount of at least one thousand dollars ($1,000.00) resulting from any one accident. Additional evidence of ability to respond in damages, as required by this article, shall be furnished the commissioner of motor vehicles at any time upon his demand.

Provided, however, anything in this article to the contrary notwithstanding, that

(1) When five thousand dollars ($5,000.00) has been credited upon any judgment or judgments rendered in excess of that amount for personal injury to or the death of one person as the result of any one accident; or

(2) When, subject to the limit of five thousand dollars ($5,000.00) for any one person so injured or killed, the sum of ten thousand dollars ($10,000.00) has been credited upon any judgment or judgments rendered in excess of that amount for personal injury to or the death of more than one person as the result of any one accident; or

(3) When one thousand dollars ($1,000.00) has been credited upon any judgment or judgments rendered in excess of that amount for damage to property as the result of any one accident; resulting from the ownership, maintenance, use or operation of a motor vehicle, then and in such event, such payment or payments shall be deemed a satisfaction of such judgment or judgments for the purpose of this article only.
If any such motor vehicle owner or operator shall not be a resident of this State, the privilege of operating any motor vehicle in this State and the privilege of operation within the State of any motor vehicle owned by him shall be withdrawn while any final judgment against him as aforesaid, shall be unstayed, unsatisfied and subsisting for more than thirty (30) days, as aforesaid, and shall not be renewed, nor shall any operator’s or chauffeur’s license be issued to him or any motor vehicle registered in his name until every such judgment shall be stayed, satisfied or discharged as herein provided, and until such person shall have given proof of his ability to respond in damages for future accidents. (1931, c. 116, s. 2; 1941, c. 36.)

Editor’s Note.—The discrimination against non-residents provided for in the last paragraph of this section presents a constitutional problem which will undoubtedly come before the courts, but much authority would sustain it. See La Tourette v. McMaster, 248 U. S. 465, 39 S. Ct. 252, 63 L. Ed. 362, upholding discrimination between residents and non-residents in granting licenses to act as insurance brokers. The practical difficulty is to understand what the non-resident would be doing with a North Carolina automobile license unless he sojourned in the State: Provided, however, that the provisions of this section shall be operative as to such insurance carriers (organized and existing under the laws of such State and not licensed to transact business in this State) only to the extent and under the same terms and conditions that under the laws of such State where such motor vehicle is registered or in which the insured resides, like recognition, if a law of like effect is in force and effect, is granted to certificates of insurance carriers, organized and existing under and by virtue of the laws of this State. If, under the laws of such State, in which a law of like effect is in force and effect, certificates of insurance carriers, organized and existing under or by virtue of the laws of this State are not accepted, the certificates of insurance carriers of such State shall not be accepted under the provisions of this article.

The commissioner of motor vehicles shall be notified by the insurance carrier or sureties of the cancellation or expiration of any motor vehicle liability policy or bond certified under the provisions of the article at least ten (10) days before the effective date of such cancellation or expiration and until such notice is duly given, such policy shall continue in full force and effect.

The commissioner of motor vehicles shall require proof of ability to respond in damages, when required by this article, may be evidenced by the written certificate or certificates of any insurance carrier duly authorized to do business within the State, that it has issued to or for the benefit of the person named therein a motor vehicle liability policy or policies in the form hereinafter prescribed, which, at the date of the certificate or certificates, is or are in full force and effect, and designating therein by explicit description or by other adequate reference, all motor vehicles to which the policy or policies apply. The commissioner of motor vehicles shall not accept any certificate or certificates unless the same shall cover all motor vehicles then registered in this State in the name of the person furnishing such proof. Additional certificates, as aforesaid, shall be required as a condition precedent to the registration of any additional motor vehicle or motor vehicles in the name of such person required to furnish proof as aforesaid. Said certificate or certificates shall certify that the motor vehicle liability policies therein cited shall not be cancelled or expire except as hereinafter provided. If such person be a non-resident, a certificate, as aforesaid, of an insurance carrier authorized to transact business in the State in which the motor vehicle or motor vehicles described in such certificate is registered, or if none be described, then in the State in which the insured resides, shall be accepted if (a) such carrier shall execute a power of attorney authorizing the commissioner of motor vehicles to accept service of notice or process in any action arising out of a motor vehicle accident in this State, and (b) its governing executive authority shall duly adopt a resolution providing that its policies shall be deemed to be varied to comply with the law of this State relating to the terms of motor vehicle liability policies issued therein, and (c) such carrier shall agree to accept as final and binding any final judgment duly rendered in any action arising out of a motor vehicle accident in any court of competent jurisdiction in this State: Provided, however, that the provisions of this section shall be operative as to such insurance carriers (organized and existing under the laws of such State and not licensed to transact business in this State) only to the extent and under the same terms and conditions that under the laws of such State where such motor vehicle is registered or in which the insured resides, like recognition, if a law of like effect is in force and effect, is granted to certificates of insurance carriers, organized and existing under and by virtue of the laws of such State.
his sole expense, bring an action or actions in the name of the State against the company or persons executing such bond. (1931, c. 116, s. 4; 1941, c. 36.)

§ 20-202. Abstracts of operating record furnished on request.—The commissioner of motor vehicles shall upon request furnish any insurance carrier, person, or surety a certified abstract of the operating record of any person subject to the provisions of this article, which abstract shall fully designate the motor vehicles (if any), registered in the name of such person, and if there shall be no record of any conviction of such person of a violation of any provision of any statute relating to the operating of a motor vehicle or of any injury or damage caused by such person as herein provided, the commissioner of motor vehicles shall so certify. The commissioner of motor vehicles shall collect for each such certificate the sum of one dollar. (1931, c. 116, s. 5; 1941, c. 36.)

§ 20-203. Commissioner to furnish other information on request.—The commissioner of motor vehicles shall furnish any person who may have been injured in person or property by any motor vehicle, upon written request, with all information of record in his office pertaining to the evidence of the ability of any operator or owner of any motor vehicle to respond in damages. (1931, c. 116, s. 6; 1941, c. 36.)

§ 20-204. Return by operator of licenses, number plates upon request of commissioner.—Any operator or any owner, whose operator's license or certificate of registration shall have been suspended as herein provided, or whose policy of insurance or surety bond shall have been cancelled or terminated, or who shall neglect to furnish additional evidence of ability to respond in damages upon request of the commissioner of motor vehicles, shall immediately return to the commissioner of motor vehicles his operator's license, certificate of registration and the number plates issued thereunder. If any person shall willfully fail to return to the commissioner of motor vehicles the operator's license, certificate or certificates of registration and the number plates issued thereunder as provided herein, the commissioner of motor vehicles shall forthwith direct any State policeman or other police officer to secure possession thereof and to return the same to the office of the commissioner of motor vehicles. Any person willfully failing to return such operator's license or such certificate or certificates and number plates shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) and such penalty shall be in addition to any penalty imposed for any violation of the Motor Vehicle Laws of North Carolina. (1931, c. 116, s. 7; 1941, c. 36.)

§ 20-205. Cancellation or return of bond by commissioner.—The commissioner of motor vehicles shall cancel such bond or return such proof of insurance to the person furnishing the same at any time after three years shall have elapsed since the filing of such bond or proof or the making of such deposit: Provided, that no suit or judgment against him for damages as aforesaid arising from the ownership, maintenance, use or operation hereafter of a motor vehicle shall then be pending or outstanding and unstayed or unsatisfied, as aforesaid; and the affidavit of such person, showing fulfillment of these requirements shall be sufficient proof thereof in the absence of evidence to the contrary before the commissioner. (1931, c. 116, s. 8; 1941, c. 36.)

§ 20-206. Fraudulent transfer of registration certificate.—If any owner's certificate of registration has been suspended under the provisions of this article, such certificate shall not be transferred nor the motor vehicle in respect of which such certificate was issued, registered in another name, whether the commissioner of motor vehicles has reasonable grounds to believe that such transfer of registration is proposed for the purpose or will have the effect of defeating the purpose of this article. Provided, however, that such transfer of registration shall be permitted upon the furnishing of proof of financial responsibility to the commissioner of motor vehicles by the transferee whenever the commissioner shall deem it necessary in furtherance of the purpose of this section. (1931, c. 116, s. 9; 1941, c. 36.)

§ 20-207. Present policies of automobile insurance unaffected.—Nothing in this article contained shall be held to apply to or affect policies of automobile insurance against liability which may now or hereafter be required by special act, and such policies, if endorsed to conform to the requirements of this article, shall be accepted as proof of financial responsibility when required under this article; nor shall anything in this article be held to apply to or affect policies insuring solely the insured named in the policy against liability resulting from the maintenance, operation or use by other persons in the insured's employ or in his behalf of motor vehicles not owned by the insured. (1931, c. 116, s. 10.)

§ 20-208. Fraudulent proof of ability to respond in damages.—Any person who shall forge, or without authority, sign any evidence of ability to respond in damages as required by the commissioner of motor vehicles in the administration of this article and any nonresident who shall operate a motor vehicle in this State from whom the privilege of operating any motor vehicle has been withdrawn as provided in § 20-199, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) and imprisoned not more than thirty days, or both. (1931, c. 116, s. 11; 1941, c. 36.)

§ 20-209. Motor vehicle liability policy.—"Motor vehicle liability policy," as used in this article, shall be taken to mean a policy of liability insurance issued by an insurance carrier authorized to transact business in this State or issued by an insurance carrier authorized to transact business in the State in which the motor vehicle or motor vehicles therein described is registered, or if none be described, then in the State in which the insured resides, to the person therein named as insured, which policy shall either (1) designate, by explicit description or other adequate reference, all motor vehicles with respect to which coverage is intended to be granted by said policy, and shall insure the insured named therein and any other person using or responsi-
ble for the use of any such motor vehicle with the consent, express or implied, of such insured against loss from the liability imposed by law upon such insured or upon such other person for injury to or death of any person, other than such insured and such person or persons as may be covered, as respects such injury or death, by any workmen's compensation law, and/or for damage to property, except property of others in charge of the insured or of his employees or other agents growing out of the ownership, maintenance, use or operation of any such motor vehicle within the continental limits of the United States of America; or which policy shall, in the alternative, (2) insure the person therein named as insured against loss from the liability imposed by law upon such insured for injury to or death of any person, other than such insured and such person or persons as may be covered as respects such injury or death by any workmen's compensation law, and/or for damage to property, except property of others in charge of the insured or of his employees or other agents, and except a motor vehicle registered in the name of such insured, growing out of the maintenance, operation or use by such insured of any motor vehicle, and occurring while such insured is personally in control, as driver or occupant, of such motor vehicle within the continental limits of the United States of America; and which policy, in either alternative, shall provide insurance to the amount of five thousand dollars ($5,000.00), exclusive of interest and costs, on account of injury to or death of any one person, of ten thousand dollars ($10,000.00), exclusive of interest and costs, on account of any one accident resulting in injury to or death of more than one person; and of one thousand dollars ($1,000.00) for damage to property of others, as herein provided, resulting from any one accident; or a binder pending the issuance of any such policy, or endorsement to an existing policy both as hereinafter provided: Provided, however, that this section shall not be construed as preventing an insurance carrier from granting in a "motor vehicle liability policy" any lawful coverage in excess of or in addition to the coverage herein provided for or from embodying in such policy and agreements, provisions or stipulations not contrary to the provisions of this article and not otherwise contrary to law. And: Provided, further, that separate concurrent policies, whether issued by one or several carriers, covering, respectively, (a) personal injury or death, as aforesaid, and (b) property damage, as aforesaid, shall be termed "a motor vehicle liability policy," within the meaning of this article. Except as in section 20-207 provided, no motor vehicle liability policy shall be issued or delivered in this State until a copy of the form of policy shall have been on file with the Commissioner of Insurance for at least thirty (30) days, unless sooner approved in writing by such Commissioner, nor if within said period of thirty (30) days such Commissioner shall have notified the carrier in writing that in his opinion, specifying the reasons therefor, the form of policy does not comply with the provisions of this article. The Commissioner of Insurance shall approve any form of policy which specifies the name, address and business, if any, of the insured, the coverage afforded by the policy, the premium charged therefor, the policy period, and the limits of liability, and contains an agreement that the insurance thereunder is provided in accordance with the coverage defined in this section, as respects personal injury and death or property damage or both, and is subject to all the provisions of this article. Every such motor vehicle liability policy shall be subject to the following provisions, whether or not contained therein: (a) The liability of the insurance carrier under a motor vehicle liability policy shall become absolute whenever loss or damage covered by such policy occurs, and the satisfaction by the assured of a final judgment for such loss or damage shall not be a condition precedent to the right or obligation of the carrier to make payment on account of such loss or damage. No such policy shall be cancelled or annulled as respects any loss or damage, by any agreement between the carrier and the insured after the said insured has become responsible for such loss or damage, and any such cancellation or annulment shall be void. The policy may provide that the insured, or any other person covered by the policy, shall reimburse the insurance carrier for payments made on account of any loss or damage claim or suit involving a breach of the terms, provisions or conditions of the policy; and further, if the policy shall provide for limits in excess of the limits specified in this section, the insurance carrier may plead against any plaintiff, with respect to the amount of such excess limits of liability, any defenses which it may be entitled to plead against the insured, and any such policy may further provide for the prorating of the insurance thereunder with other applicable valid and collectible insurance. (b) The policy, the written application therefor, if any, and any rider or endorsement which shall not conflict with the provisions of this article shall constitute the entire contract between the parties. (c) The insurance carrier shall, upon the request of the insured, deliver to the insured for filing, or at the request of the insured shall file direct, with the commissioner of motor vehicles an appropriate certificate in conformity with the provisions of § 20-200. (d) Any carrier authorized to issue motor vehicle liability policies may, pending the issue of such a policy, execute an agreement, to be known as a "binder," or may, in lieu of such a policy, issue an endorsement to an existing policy. Every such binder or endorsement shall be subject to the provisions of this section and shall be construed to provide indemnity or insurance in like manner and to the same extent as a motor vehicle liability policy. (1931, c. 116, s. 12; 1941, c. 36.) § 20-210. Rules and regulations.—The commissioner of motor vehicles shall make rules and regulations necessary for the administration of this article. (1931, c. 116, s. 14; 1941, c. 36.) § 20-211. Reliance on other security unaffected. —Nothing herein shall be construed as preventing
§ 20-212 CH. 20. MOTOR VEHICLES

Art. 6. Giving Publicity to Highway Traffic Laws through the Public Schools.

§ 20-212. State highway commission to prepare digest.—The state highway and public works commission shall cause to be prepared a digest of the traffic laws of the State suitable for use in the public schools of the State and have published in pamphlet form and delivered on or before the first day of August, one thousand nine hundred and twenty-seven, to the State Superintendent of Public Instruction, a sufficient number of said pamphlets to supply at least one copy each to all of the public high school teachers of the State. (1927, c. 242, s. 1; 1933, c. 172, s. 17.)

§ 20-213. State superintendent of public instruction to distribute pamphlet. — The State Superintendent of Public Instruction shall cause to be delivered to the superintendents or principals of the various high schools of the State a sufficient number of said pamphlets to supply one to each of the teachers engaged for said schools. (1927, c. 242, s. 2.)

§ 20-214. Pamphlets brought to attention of children.—The superintendents or principals, or other persons in charge of the public high schools of the state, shall cause the contents of said pamphlets to be brought to the attention of all the children in attendance upon the public high schools in the form of lessons of at least one each week until the entire contents of said pamphlet shall have been read and explained. (1927, c. 242, s. 3.)

§ 20-215. Practice to be continued; highway commission to supply additional copies yearly.—This practice shall be continued during each school year and the state highway and public works commission is directed annually on or before the first Monday of August, to supply, as hereinbefore provided, such additional copies of the said pamphlet having the same revised from time to time to meet any amendments of the traffic laws of the State, as the State Superintendent of Public Instruction may ascertain and report to the state highway and public works commission to be necessary. (1927, c. 242, s. 4.)


§ 20-216. Driving regulations; frightened animals; crossings.—A person operating or driving a motor vehicle shall, on signal by raising the hand, from a person riding, leading, or driving a horse or horses or other draft animals, bring such motor vehicle immediately to a stop, and, if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or other animal to pass, and, if traveling in the same direction, use reasonable caution in thereafter passing such horse or other animal: Provided, that in case such horse or other animal appears badly frightened, and the person operating such motor vehicle is so signaled to do, such person shall cause the motor of the motor vehicle to cease running so long as shall be reasonably necessary to prevent accident and ensure the safety of others; and it shall also be the duty of any male chauffeur or driver of any motor vehicle and other male occupants thereof over the age of sixteen years while passing any horse, horses or other draft animals which appear frightened, upon the request of the person in charge thereof and driving such horse or horses or other draft animals, to give such assistance as would be reasonable to insure the safety of all persons concerned and to prevent accident. (1917, c. 140, s. 15; C. S. 2616.)

Passing Animals.—The laws with respect to passing animals, with the exception of establishing a speed limit, are to be construed as an embodiment of principles of law applicable to motor vehicles when operated on the highway and in places where their use is likely to be a source of danger to others. Gaskins v. Hancock, 156 N. C. 56, 72 S. E. 50; Tudor v. Bowen, 152 N. C. 441, 67 S. E. 1015, cited and applied; Curry v. Fleeer, 157 N. C. 16, 72 S. E. 653.

When the law prescribed a maximum speed limit for the running of motor vehicles upon the highways in approaching animals it did not contemplate or intend that the specified limits were always permissible; for one driving a machine of this character was charged with notice of things which he observed or could have observed in the exercise of proper care, having regard to the nature of the vehicle he was operating and its tendency to frighten animals; and not infrequently it might have become his duty to move at a much slower speed, or stop altogether if conditions so required. Curry v. Fleeer, 157 N. C. 16, 72 S. E. 653.


§ 20-217. Motor vehicles to stop for school busses in certain instances.—Every person using, operating, or driving a motor vehicle upon or over the roads or highways of the state of North Carolina, or upon or over any of the streets of any of the incorporated towns and cities of North Carolina, upon approaching from any direction on the same highway any school bus transporting school children to or from school, while such bus is stopped and engaged in receiving or discharging passengers therefrom upon the roads or highways of the state or upon any of the streets of any of the incorporated towns and cities of the state, shall bring such motor vehicle to a full stop and shall remain stopped until the “stop signal” of such bus has been withdrawn or until such bus has moved on.

The provisions of this section are applicable only in the event the school bus bears upon the front and rear thereof a plainly visible sign containing the words “school bus” in letters not less than five inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. (1925, c. 265; 1943, c. 767.)

Editor's Note.—The 1943 amendment rewrote the first paragraph and inserted the second paragraph.

This section applies to passing a school bus from either direction, from the rear or from the front. State v. Webb, 210 N. C. 380, 180 S. E. 241.

§ 20-218. Standard qualifications for school bus drivers; speed limit.—No person shall drive or operate a school bus over the public roads of North Carolina while the same is occupied by children unless said person shall be fully trained in the operation of motor vehicles, and shall furnish to the superintendent of the schools of the county in which said bus shall be operated a certificate from
the highway patrol of North Carolina, or from any representative duly designated by the commissioner of motor vehicles, and the chief mechanic in charge of school busses in said county showing that he has been examined by a member of the said highway patrol and said chief mechanic in charge of school busses, in said county and that he is a fit and competent person to operate or drive a school bus over the public roads of the state.

It shall be unlawful for any person to operate or drive a school bus loaded with children over the public roads of North Carolina at a greater rate of speed than thirty-five miles per hour.

Any person violating paragraph two of this section shall, upon conviction, be fined not more than fifty dollars ($50.00) or imprisoned not more than thirty days. (1937, c. 397, ss. 1-3; 1941, c. 21; 1943, c. 440.)

Cross Reference.—As to selection and employment of school bus drivers, see § 115-378.

Editor's Note.—The 1941 amendment inserted the provision in paragraph one requiring an examination by the chief mechanic.

The 1943 amendment inserted in the first paragraph the words "or from any representative duly designated by the commissioner of motor vehicles."

§ 20-218.1. Jurisdiction over violations by persons over fifteen years of age.—No juvenile court or domestic relations court of this state shall have jurisdiction over any offense involving violation of any of the motor vehicle laws or of any of the laws relating to the operation of motor vehicles on the highways of this state when such offense has been committed by a person over fifteen years of age. Any such offense shall be within the jurisdiction of the court or courts which would have jurisdiction if the offender were over sixteen years of age. (1943, c. 760.)

§ 20-219. Refund to counties of costs of prosecuting theft cases.—Whenever the Motor Vehicle Department of the State has caused to be instituted criminal prosecutions in the Superior Court of any county of the State for violation of the automobile theft laws, and the county wherein such case was tried has incurred court costs incident thereto, upon certificate of the Clerk of the Superior Court of said county showing an itemized statement thereof, and that the same has been paid, upon the approval of the commissioner of motor vehicles and the Attorney General, the sum or sums so paid shall be refunded to said county, the same to be paid from the motor vehicle registration title fees.

This section shall apply to costs incurred in the prosecution of automobile theft cases only. (1929, c. 275; 1941, c. 36.)

Art. 8. Sales of Used Motor Vehicles Brought into State.

§ 20-220. Dealers required to register vehicles with department of revenue and furnish bond.—Every dealer in used, or second-hand, motor vehicles who is a nonresident of the state of North Carolina or who does not have a permanent place of business in this State, and every person, firm or corporation who brings any used, or second-hand, motor vehicles into the state of North Carolina for sale, within ten days from the date of entry of said motor vehicle into the limits of the state of North Carolina, register such motor vehicle with the department of revenue on a form to be provided by said department and under such rules and regulations as may be promulgated by said department from time to time, and shall, before said used or second-hand car is offered for sale, or sold, execute a bond with two good sufficient sureties, or with a surety company duly authorized to do business in the state of North Carolina as a surety or sureties thereon, payable to the state of North Carolina, for the use and benefit of the purchaser and his vendees, conditioned to pay all loss, damages and expenses that may be sustained by the purchaser, and/or vendees, that may be occasioned by reason of the failure of the title of such vendor or by reason of any fraudulent misrepresentations or breaches of warranty as to freedom from liens, quality, condition, use or value of the motor vehicle being sold. Said bond shall be in the full amount of the sale price of each of such motor vehicles, but in no event to exceed the sum of one thousand ($1,000.00) dollars for any one motor vehicle, and shall be filed with the department of revenue of the state of North Carolina by the vendor and be approved by it as to amount, form and as to the solvency of the surety or sureties, and for which service by said department, in registering said vehicle, the vendor shall pay the regular registration fee charged for the registration of motor vehicles and in addition thereto a fee of ten ($10.00) dollars for each bond so filed and approved, which sums shall be paid into the state treasury to the credit of the general fund and expended as provided by law. (1937, c. 62, s. 1.)

Held Unconstitutional by District Court.—As both the bond and the fee required by this section constitute a clear discrimination against used automobiles of foreign origin, the provisions requiring them must be held invalid under the commerce clause of the constitution. McClain v. Hoey, 19 F. Supp. 990, 993.

§ 20-221. Titles to all used cars to be furnished upon delivery.—Every person, firm or corporation, upon the sale and delivery of any used or second-hand motor vehicle, shall, at the time of the delivery of said vehicle, deliver to the vendee a certificate of title issued to the vendor by the North Carolina state department of revenue, duly endorsed in order that the vendee may obtain a title therefor. (1937, c. 62, s. 2.)

§ 20-222. Non-compliance defeats right of action; violates a misdemeanor. — No action, nor right of action to recover any such motor vehicle, nor any part of the selling price thereof shall be maintained in the courts of this state by any such dealer or vendor, his successors or assignees, in any case wherein such vendor or dealer shall have failed to comply with the terms and provisions of this article, and, in addition thereto, such vendor or dealer, upon conviction for the violation of any of the provisions of this article, shall be deemed guilty of a misdemeanor and shall be punished by a fine not less than one hundred ($100.00) dollars and not more than five hundred ($500.00) dollars, or by imprisonment for not less than thirty days, or more than six months, or by both such fine and imprisonment. (1937, c. 62, s. 3.)

—The terms “dealers” and “vendors” herein used shall be construed to include every individual, partnership, corporation or trust whose business, in whole or in part, is that of selling used motor vehicles not taken in exchange for vehicles sold in this state, and likewise shall be construed to include every agent, representative, or consignee of any such dealer as defined above as fully as if same had been herein expressly set out, except that no agent, representative or consignee of such dealer or vendor shall be required to make and file the said bond if such dealer or vendor for whom such agent, representative or consignee acts fully complies in each instance with the provisions of this article. (1937, c. 62, s. 4.)
## Division V. Commercial Law.

<table>
<thead>
<tr>
<th>Chap.</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>21</td>
<td>Bills of Lading</td>
<td>859</td>
</tr>
<tr>
<td>22</td>
<td>Contracts Requiring Writing</td>
<td>864</td>
</tr>
<tr>
<td>23</td>
<td>Debtor and Creditor</td>
<td>869</td>
</tr>
<tr>
<td>24</td>
<td>Interest</td>
<td>879</td>
</tr>
<tr>
<td>25</td>
<td>Negotiable Instruments</td>
<td>888</td>
</tr>
<tr>
<td>26</td>
<td>Suretyship</td>
<td>920</td>
</tr>
<tr>
<td>27</td>
<td>Warehouse Receipts</td>
<td>927</td>
</tr>
</tbody>
</table>

Sec. 21-1. General definitions.
21-2. Definition of straight bill.
21-3. Definition of order bill.

Art. 1. Definitions.

§ 21-1. General definitions.—In this chapter, unless the context of subject-matter otherwise requires—

“Action” includes counterclaim, set-off, and suit in equity.

“Bill” means bill of lading governed by this chapter.

“Consignee” means the person named in the bill as the person to whom delivery of the goods is to be made.

“Consignor” means the person named in the bill as the person from whom the goods have been received for shipment.

“Goods” means merchandise or chattels in course of transportation or which have been or are about to be transported.

“Holder” of a bill means a person who has both actual possession of such bill and a right of property therein.

“Order” means an order by indorsement on the bill.

“Person” includes a corporation or partnership, or two or more persons having a joint or common interest.

“To purchase” includes to take as mortgagee and to take as pledgee. (1919, c. 65, s. 42; C. S. 284.)

Editor’s Note.—This chapter is based upon and closely follows the Federal Bills of Lading Act. However, the North Carolina statutes depart in phraseology from the federal act wherever such a change is necessary to adopt the statutes to intrastate commerce. See § 21-4 providing that bills of lading issued in intrastate commerce shall be governed by this chapter.

§ 21-2. Definition of straight bill.—A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill. (1919, c. 65, s. 2; C. S. 284.)

Cross Reference.—As to bills of lading in evidence, see § 8-41.

§ 21-3. Definition of order bill.—A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that it is nonnegotiable shall be null and void, and shall not affect its negotiability within the meaning of this chapter unless upon its face and in writing agreed to by the shipper. (1919, c. 65, s. 3; C. S. 285.)

Cross Reference.—As to bills of lading in evidence, see § 8-41.

Art. 2. Issue of Bills of Lading.

§ 21-4. Bills governed by this chapter.—Bills of lading issued by any common carrier for the transportation of goods from one point in North Carolina to another shall be governed by this chapter. (1919, c. 65, s. 4; C. S. 286.)

§ 21-5. Order bills must not be issued in sets.—

Sec. 21-22. Liability for nonreceipt or misdescription of goods loaded by shipper.
21-23. Liability for nonreceipt or misdescription of goods.
21-24. Attachment or levy upon goods for which an order bill has been issued.
21-25. Creditor’s remedy to reach order bills.
21-26. Lien for charges under order bill.
21-27. Effect of sale.

Art. 4. Negotiation and Transfer of Bills.

21-29. Negotiation of order bills by indorsement.
21-30. Transfer of bills.
21-31. Who may negotiate an order bill.
21-32. Rights of person to whom an order bill has been negotiated.
21-33. Rights of person to whom a bill has been transferred.
21-34. Right to compel indorsement of negotiable bill.
21-35. Warranties on sale of bill.
21-36. Indorser not a guarantor.
21-37. No warranty implied from accepting payment of a debt.
21-38. When negotiation not impaired by fraud, accident, mistake, duress, conversion, etc.
21-40. Negotiation defeats vendor’s lien.
21-41. When rights and remedies under mortgages and liens are not limited.

Art. 5. Criminal Offenses.

§ 21-42. Issuing false bills or violating chapter made felony.
Order bills issued in North Carolina for transportation of goods from one point to another in North Carolina shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts. (1919, c. 65, s. 4; C. S. 286.)

§ 21-6. Duplicate order bills must be so marked.—When more than one order bill is issued in North Carolina for the same goods to be transported to any place in North Carolina, the word “duplicate” or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill. (1919, c. 65, s. 5; C. S. 287.)

Cross Reference.—As to duplicate bills of lading in evidence, see § 8-41.

§ 21-7. Straight bill shall be marked “nonnegotiable.”—A straight bill shall have placed plainly upon its face by the carrier issuing it “nonnegotiable” or “not negotiable.” This section shall not apply, however, to memoranda or acknowledgments of an informal character. (1919, c. 65, s. 6; C. S. 288.)

§ 21-8. Insertion of name of person to be notified.—The insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods. (1919, c. 65, s. 7; C. S. 289.)

Editor’s Note.—Formerly it was the rule in this state that when goods were shipped under a bill of lading made out to the order of the vendor, the mere insertion of the name of the consignee to be notified, would not bring such consignee into contract relations with the carrier so as to enable him to bring suit against the carrier for delay, damage, etc. Mfg. Co. v. R. R., 149 N. C. 261, 62 S. E. 1091, and likewise in such case the rule was that title did not pass until the draft was paid, id.; Bank v. R. R., 153 N. C. 346, 69 S. E. 261; Killingsworth v. R. R., 171 N. C. 47, 87 S. E. 947. But the law has been changed by legislative enactment. See also sections 21-9 and 21-12 and annotations thereunder.

As to shipment made “Order, notify” see Watts v. R. R., 183 N. C. 12, 119 S. E. 382.

Art. 3. Obligations and Rights of Carriers upon Bills of Lading.

§ 21-9. Obligation of carrier to deliver.—A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

1. An offer in good faith to satisfy the carrier’s lawful lien upon the goods;

2. Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods if the bill is an order bill; and

3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure. (1919, c. 65, s. 8; C. S. 290.)

Possession of Properly Endorsed Bill is Sufficient.—An order bill of lading indorsed by the shipper, in the possession of the shipper, is sufficient evidence of the plaintiff’s ownership of the bill and of the goods for which the bill was issued. Temple v. R. R., 190 N. C. 439, 440, 129 S. E. 815.

Consignee Must Produce Bill.—The failure or refusal of consignee to produce, upon the carrier’s demand, a bill of lading for a prepaid shipment of goods in the carrier’s possession is ordinarily a valid defense to an action to recover of the carrier the value of a shipment, which has never been delivered, but the burden is upon the carrier to prove that such demand has been made and not complied with. Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 342.

Bill Must Be Properly Endorsed.—Where shipper paid the draft and obtained the bill of lading but failed to have it endorsed by a certain bank as required by the terms of the bill, the carrier was not liable for failure to deliver the goods. Killingsworth v. R. R., 171 N. C. 47, 87 S. E. 947.

§ 21-10. Justification of carrier in delivery.—A carrier is justified, subject to the provisions of §§ 21-11, 21-12 and 21-13, in delivering goods to one who is—

1. A person lawfully entitled to the possession of the goods, or

2. The consignee named in a straight bill for the goods; or

3. A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee. (1919, c. 65, s. 9; C. S. 291.)

§ 21-11. Carrier’s liability for misdelivery.—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions 2 and 3 of § 21-10; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

1. Had been requested by or on behalf of a person having a right of property or possession in the goods, not to make such delivery; or

2. Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. (1919, c. 65, s. 10; C. S. 292.)

§ 21-12. Carrier’s liability on order bill not cancelled on delivery.—Except as provided in § 21-27, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier...
shall be liable for failure to deliver the goods to any one who for value and in good faith pur-

chases such bill, whether such purchaser ac-

quired title to the bill before or after the delivery

of the goods by the carrier and notwithstanding
delivery was made to the person entitled thereto.
(1919, c. 65, s. 11; C. S. 293.)

§ 21-13. Carrier's liability on order bill un-

marked to show partial delivery.—Except as pro-

vided in § 21-27, and except when compelled

by legal process, if a carrier delivers part of the

goods for which an order bill had been issued and
fails, either—

1. To take up and cancel the bill, or

2. To place plainly upon it a statement that a

portion of the goods has been delivered with a

description, which may be in general terms,
either of the goods or packages that have been so
delivered or of the goods or packages which still
remain in the carrier's possession, he shall be lia-

ble for failure to deliver all the goods specified
in the bill to any one who for value and in good
faith purchases it, whether such purchaser ac-
quired title to it before or after the delivery of
any portion of the goods by the carrier, and not-
withstanding such delivery was made to the per-
son entitled thereto. (1919, c. 65, s. 12; C. S. 294.)

§ 21-14. Altered bills.—Any alteration, addition,
or erasure in a bill after its issue without author-

ity from the carrier issuing the same, whether
in writing or noted on the bill, shall be void,
whatever be the nature and purpose of the
change, and the bill shall be enforceable accord-

ing to its original tenor. (1919, c. 65, s. 13; C.
S. 295.)

§ 21-15. Lost or destroyed bills.—Where an or-

der bill has been lost, stolen, or destroyed, a court
of competent jurisdiction may order the delivery
of the goods upon satisfactory proof of such loss,
thief, or destruction, and upon the giving of a
bond, with sufficient surety, to be approved by
the court, to protect the carrier or any person
injured by such delivery from any liability or
loss incurred by reason of the original bill re-

maining outstanding. The court may also, in
its discretion, order the payment of the carrier's
reasonable costs and counsel fees: Provided, a
voluntary indemnifying bond without an order
of court shall be binding on the parties thereto.
The delivery of the goods under an order of
the court, as provided in this section, shall not
relieve the carrier from liability to a person to
whom the order bill has been, or shall be, nego-
tiated for value without notice of the proceedings
or of the delivery of the goods. (1919, c. 65, s.
14; C. S. 296.)

§ 21-16. Effect of duplicate bills.—A bill, upon
the face of which the word “duplicate,” or some
other word or words indicating that the docu-
ment is not an original bill, is placed plainly,
shall impose upon the carrier issuing the same
the liability of one who represents and warrants
that such bill is an accurate copy of an original
bill properly issued, but no other liability. (1919,
c. 65, s. 15; C. S. 297.)

§ 21-17. When title or right of carrier excuses
liability for non-delivery.—No title to the goods or
right to their possession asserted by a carrier for
his own benefit shall excuse him from liability for
refusing to deliver the goods according to the
terms of the bill issued for them, unless such title
or right is derived directly or indirectly from a
transfer made by the consignor or consignee after
the shipment, or from the carrier's lien. (1919,
c. 65, s. 16; C. S. 298.)

§ 21-18. Interpleader of adverse claimants.—If
more than one person claim the title or posses-
sion of goods, the carrier may require all known
claimants to interplead, either as a defense to an
action brought against him for nondelivery of
the goods or as an original suit, whichever is ap-
propriate. (1919, c. 65, s. 17; C. S. 299.)

Cross Reference.—As to interpleader, new parties by order
of court, see § 1-73.

§ 21-19. Carrier has reasonable time to deter-
mine validity of claims.—If some one other than
the consignee or the person in possession of the
bill has claim to the title or possession of the
goods, and the carrier has information of such
claim, the carrier shall be excused from liability
for refusing to deliver the goods, either to the
consignee or person in possession of the bill or to
the adverse claimant, until the carrier has had a
reasonable time to ascertain the validity of the
adverse claim or to bring legal proceedings to
compel all claimants to interplead. (1919, c. 65,
s. 18; C. S. 300.)

§ 21-20. Adverse title is no defense except as
above provided.—Except as provided in the pre-
ceding sections of this article, no right or title of
of a third person, unless enforced by legal process,
shall be a defense to an action brought by the con-
signee of a straight bill or by the holder of an
order bill against the carrier for failure to deliver
the goods on demand. (1919, c. 65, s. 19; C.
S. 301.)

§ 21-21. Carriers not to insert “shipper’s weight,
load and count” when goods loaded by carrier.—
When goods are loaded by a carrier, such carrier
shall count the packages of goods, if package
freight, and ascertain the kind and quantity, if
bulk freight, and such carrier shall not, in such
cases, insert in the bill of lading or in any notice,
receipt, contract, rule, regulation or tariff, "ship-
er’s weight, load and count," or other words of
like purport, indicating that the goods were loaded
by the shipper and the description of them made
by him or, in case of bulk freight and freight not
concealed by packages, the description made by
him. If so inserted, contrary to the provisions of
this section, said words shall be treated as null
and void and as if not inserted therein. (1919,
c. 65, s. 20; C. S. 303.)

§ 21-22. Liability for nonreceipt or misedescrip-
tion of goods loaded by shipper.—When package
freight or bulk freight is loaded by a shipper and
the goods are described in a bill of lading merely
by a statement of marks or labels upon them or
upon packages containing them, or by a state-
ment that the goods are said to be goods of a cer-
tain kind or quantity, or in a certain condition, or
it is stated in the bill of lading that packages are
said to contain goods of a certain kind or quan-
tity or in a certain condition, or that the contents
or condition of the contents of packages are un-
known, or words of like purport are contained in
the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also, by inserting in the bill of lading the words "shipper's weight, load, and count," or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and, if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading. Provided, however, where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reason-
§ 21-31. Who may negotiate an order bill.—An order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery. (1919, c. 65, s. 30; C. S. 312.)

§ 21-32. Rights of person to whom an order bill has been negotiated.—A person to whom an order bill has been duly negotiated acquires thereby:
1. Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and
2. The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him. (1919, c. 65, s. 31; C. S. 313.)

Editor's Note.—See Editor's Note under section 21-8.

In General.—The person to be notified on shipment to order of consignor has, by this section, title for the purpose of a suit to recover damages and the statutory penalty, as fully as if the carrier had contracted with him directly, upon the presentation of the bill of lading properly endorsed and his tender thereof in good faith to the carrier, the statute being remedial of the common law that there was no contractual relation between him and the carrier that would permit recovery for causes accruing before he had paid the draft, and had the bill of lading assigned to him. Watts v. Norfolk Southern R. Co., 183 N. C. 12, 110 S. E. 582.

§ 21-33. Rights of person to whom a bill has been transferred.—A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a straight bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by an indorser of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods. (1919, c. 65, s. 32; 1910, c. 290; C. S. 314.)

§ 21-34. Right to compel indorsement of negotiable bill.—Where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. (1919, c. 65, s. 33; C. S. 315.)

§ 21-35. Warranties on sale of bill.—A person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—
1. That the bill is genuine;
2. That he has a legal right to transfer it;
3. That he has knowledge of no fact which would impair the validity or worth of the bill;
4. That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby. (1919, c. 65, s. 34; C. S. 316.)

§ 21-36. Indorser not a guarantor.—The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorser of the bill to fulfill their respective obligations. (1919, c. 65, s. 35; C. S. 317.)

§ 21-37. No warranty implied from accepting payment of a debt.—A mortgagee or pledger or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt, or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described. (1919, c. 65, s. 36; C. S. 318.)

Editor's Note.—The rule which this section lays down is stated by the court in Mason v. Cotton Co., 148 N. C. 492, 497, 498, 62 S. E. 625 and the earlier case of Finch v. Gregg, 126 N. C. 176, 35 S. E. 251 was discussed and overruled.

§ 21-38. When negotiation not impaired by fraud, accident, mistake, duress, conversion, etc.—The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion. (1919, c. 65, s. 37; C. S. 319.)

§ 21-39. Subsequent negotiation.—Where a person, having sold, mortgaged or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that
Chapter 22. Contracts Requiring Writing.

Sec.

22-1. Contracts charging representative personally; promise to answer for debt of another.

22-2. Contract for sale of land; leases.

Cross References.—As to draft attached to bill of lading for intoxicating liquors, etc., see § 18-33.

Sec.

22-3. Contracts with Cherokee Indians.

22-4. Promise to revive debt of bankrupt.

Art. 5. Criminal Offenses.

§ 21-41. When rights and remedies under mortgages and liens are not limited.—Except as provided in § 21-40, nothing in this chapter shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this chapter, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien, and obtained possession of them. (1919, c. 65, s. 40; C. S. 322.)
the promisor or if the contract is made for the benefit of the third person or if the contract is made with the third person and the promise constitutes a separate and independent contract under which the promisor agrees to pay upon default of the primary debtor, the promise is a collateral agreement within the statute.  


Contracts Not within the Statute.—One financially interested in a crop induced the landlord to part with his lien, in order that the tenant might sign an appeal bond of the tenant, and promised to save from harm, and the transaction was not within this section.  

Jennings v. Keel, 196 N. C. 763, 146 S. E. 716.

Plaintiff held assignments covering all funds to become due under a building contract, and was entitled to apply such funds to the extinguishment of claims it held for advancements made to carry on the work. Defendant, surety on the contractor’s bond, orally agreed that if allowed to use part of the money received by plaintiff, on a payment under the contract, to pay claims for labor and materials so the construction could be carried on without going outside of the funds derived from the work, it would pay the balance due plaintiff from the contractors. It was held that such agreement was not within this section. S.urety Co. v. Jackson County Bank, 20 Fed. (2d) 644.

Where a business run in the name of J. W. J. was in charge of W. P. J., J. W. J.’s son, and J. W. J. being dead, the son, J. W. J., Jr., promised to ship goods to them to be shipped in the name of J. W. J. & Son., saying to plaintiff, “you won’t lose anything by it,” and a payment on account was made by “J. W. J. & Son.” this section was held inapplicable. Noland Co. v. Jones, 211 N. C. 462, 190 S. E. 720.

What Determines Nature of Promise.—Whether a promise is an original one not coming within the provisions of this section, or a superseded one barred by the statute, does not depend altogether on the form of expression, but the situation of the parties, and whether they understood the promise to be direct or collateral, is also a determining consideration, Gennett v. Lyerly, 207 N. C. 201, 176 S. E. 458.

Oral Agreement of Stockholders to Be Responsible for Merchandise Held to Be an Original Promise.—Defendants agreed orally to be personally responsible for merchandise shipped to a corporation of which they were the majority stockholders, and which they later took over. It was held that the agreement was an original promise not coming within the statute of frauds. Brown v. Benton, 209 N. C. 523, 175 S. E. 792.

The Same Being True of Agreement to Furnish Merchandise for Use on Farm.—Evidence of defendant’s statement to plaintiff that if the plaintiff delivered the goods, the goods were to be shipped in the name of the defendant, and if they were not delivered, they were to be paid for, is evidence of an oral agreement to be responsible on the promise of another, Daniels v. Duck Island, Inc., 212 N. C. 90, 193 S. E. 741.

Oral Promise by Administrator.—A promise by the administrator that he would see that a debt of his intestate is paid, or that he would pay it, is void under this section, unless made in writing. Smithwick v. Shepherd, 49 N. C. 118, 6 S. E. 451.

Out of Representative’s Estate.—The agreement, in order not to be enforceable unless in writing, must be to pay out of the representative’s own estate. N. C. 523, 34 S. E. 686.

Original Undertakings—New Consideration.—The general rule is that a promise to answer for the debt, default or miscarriage of another for which that other remains liable, is a subsequent promise and not coming within the statute, and the question of interpretation should have been submitted to the jury. Dozier v. Wood, 208 N. C. 414, 181 S. E. 336.


Intent of Promisor—How Determined.—The intent of the promisor to become bound may be shown by the surrounding circumstances and other transactions or writings communications between the creditor and the promisor. Hickory Novelty Co. v. Andrews, 188 N. C. 59, 123 S. E. 314.

Where a writing or notation is not a continuing guaranty, each order upon which his guaranty is limited to the order upon which his guaranty appears. Gennett v. Lyerly, 207 N. C. 201, 176 S. E. 727.

Goods Furnished to Son on Father’s Credit.—If goods are furnished to a son upon the promise of the credit of the father, the promise need not be in writing; but if the son was the principal debtor, and the promise was not enforceable unless by a writing, the promise must be in writing. White v. Tripp, 123 N. C. 523, 34 S. E. 696.

Definiteness of Subject Matter of Contract.—The principle that some executory agreements must be in writing unless the subject matter upon which it is intended by the parties to operate can first be definitely ascertained from its terms, either through an explicit description or through some definite identification applies to verbal agreements as well as to those required by this section to be in writing. Hemphill v. Annis, 119 N. C. 314, 26 S. E. 152.

Evidences of Guarantor’s Obligation.—The obligation of
one as guarantor of payment must be evidenced and established by a written agreement, or some written note or memorandum signed by him or some person authorized to sign him. Supply Co. v. Finch, 147 N. C. 106, 60 S. E. 904; Hickory Novelty Co. v. Andrews, 188 N. C. 29, 187 S. E. 718.

What Amounts to Contract of Guaranty.—A telegram that the debtor is a reliable person and that any justifiable claims will be taken care of is insufficient to establish a contract of guaranty or a promise to answer for the debt of another, in the absence of a promise to pay the debt if the debtor does not pay. Fain Grocery Co. v. Early, etc., Co., 181 N. C. 459, 107 S. E. 497.

Parol Assumption of Mortgage Debt Not within the Statute of Frauds.—A promise by a grantee of mortgaged land to assume and pay the amount of the mortgage is not a promise to pay the debt of another related by blood, or arising out of the business relation of the parties, made by the holder of the mortgage for the benefit made in his behalf by the secretary for the corporation as his alleged agent. Gennett v. Lyerly, 207 N. C. 501, 119 S. E. 898.

Agreement to Prevent Sale of Land.—An agreement in consideration of a lease, whereby the lessee agrees to do something, will not be deemed a contract to pay the price of the property, unless the lessee promises to buy it. Hoes v. Ruffin, 207 N. C. 501, 119 S. E. 898.

Promise to Guarantee Safety of Money.—An oral promise to guarantee the safety of money placed in the promisor's hands for investment is not an agreement to answer for the debt of another; the promisor is not liable to the depositor the plea of the statute of frauds is not a valid defense. Garren v. Youngblood, 207 N. C. 86, 176 S. E. 252.

A promise by the president of a bank to become personally liable for a deposit when supported by a new and independent consideration is not a promise to answer for the debt of another, since the original promise was not one to pay the debt, and the consideration by which the promisor is bound is not the business relation of the parties. Parlier v. Miller, 186 N. C. 501, 119 S. E. 898.

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A parol lease for three years is not within the statute. It must be for a term exceeding three years. Smithdeal v. McAdoo, 172 N. C. 700, 704, 90 S. E. 907.

In order to discharge the consideration, it must be proved by parol evidence. Wilson v. Williams, 215 N. C. 407, 2 S. E. (2d) 19.

II. WHAT CONSTITUTES AN INTEREST IN OR CONCERNING LAND.


A contract to devise real property comes within the provisions of this section, and performance of services by the promisee for the consideration of an interest in land, and is valid even though not in writing. Newby v. Atlantic, etc., Realty Co., 182 N. C. 34, 108 S. E. 323; Broden v. Gibson, 165 N. C. 16, 18 S. E. 956.


Assignment of Lease.—A personal assignment of an unexpired lease to continue more than three years is void under this section. Alexander v. Morris, 145 N. C. 22, 58 S. E. 600.

Negative Easement.—A restriction on the use of land being in effect a negative easement is an interest in land required to be in writing. Davis v. Robinson, 189 N. C. 589, 127 S. E. 697.

Where land in a development is sold by deeds containing certain restrictive covenants, the covenants are in the nature of an easement, and it would seem that ordinarily such easement may not be released by parol agreement. Moore v. Shore, 206 N. C. 699, 175 S. E. 117.

Judicial Sales.—Judicial sales were not within the contemplation of the legislature at the time of making this enactment. Tate v. Greenlee, 15 N. C. 149, 150.

Judgment.—The Statute of Frauds does not require that a judgment constituting a lien on land should be assigned by a written instrument. Winbrey v. Koons, 83 N. C. 351.

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

No special form or instrument is required. A letter, note, bill or draft is sufficient. Neaves v. North State Milling Co., 90 N. C. 312.

But Memorandum Must Show Essential Elements of Valid Contract.—In order to constitute an enforceable contract within the provisions of this section, the written memorandum must be sufficient to show the essential elements of a valid contract. It must embody the terms of the contract, names of vendor and vendee, and a description of the land to be conveyed, at least sufficiently definite to be aided by parol. Smith v. Joyce, 214 N. C. 602, 604, 200 S. E. 431.

A promissory note for the purchase price signed and given by the purchaser is not such a contract or memorandum thereof. Burrias v. Starr, 155 N. C. 657, 51 S. E. 929.

The memorandum need not be contained in a single document, but may be in several paragraphs, and be finally connected together. Smith v. Joyce, 214 N. C. 602, 604, 200 S. E. 431.

Letters addressed to third party may be used against the writer as a memorandum of it. Such letters are sufficient evidence of the contract to warrant the court in giving effect to it. Mizell v. Burnett, 49 N. C. 249, 254; Nicholson v. Dover, 145 N. C. 18, 58 S. E. 444, cited in note in 24 L. R. A. 2d 979.

B. A Promissory Note.—A written instrument by which the parties agree to pay a sum of money to the order of a third party is an interest in land, if the promisee is the owner of the land at the time of severing the contract of sale. Moore v. Bostic, 15 N. C. 63.

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C. Letter to Seal.—The Statute of Frauds does not require a contract for the sale of land to be under the seal of the party to be charged. Simmons v. Spruill, 56 N. C. 9; Stephens v. Midyette, 161 N. C. 323, 77 S. E. 243.
The admissions of the parties in their pleadings may stand for the writing. Sandlin v. Kearney, 154 N. C. 407, 163 S. E. 291.

§ 22-2

CH. 22. CONTRACTS REQUIRING WRITING

Time of Making Memorandum.—The writing upon which a contract is partly verbal and partly in writing, unless the writing purports to embrace all the contract. Thus where the vendor upon a conveyance by deed, verbally agreed that he would make good any deficiency in the agreed purchase price had been increased, and after the defendant which was filled in by the latter payable to his own name, it was held that the note was not signed by the defendant, since filling in the note with his own name must have put his name with the intention of signing it. Thus where the plaintiff, the purchaser, and the vendee could recover damages sustained by defendant's breach of contract to convey. Oxendine v. Strickler, 154 N. C. 257, 163 S. E. 291.

When all the circumstances of possession, ownership, and situation of the parties, and of their relation to each other and the property, as when they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement. Gilbert v. Wright, 195 N. C. 165, 168, 141 S. E. 577; Norton v. Smith, 179 N. C. 553, 103 S. E. 14.

"The party to be charged" under this section is the one against whom the relief is sought; and if the contract is not in writing and cannot be enforced against the purchaser. Mizell v. Burnett, 49 N. C. 239, 242, 156 S. E. 577.

B. The Signature.

What constitutes Signing.—The signing of a paper-writing or instrument is the affixing of one's name thereto with the purpose or intent to identify the paper or instrument, or to give it effect as one's act. McCall v. Textile, Co., 189 N. C. 775, 128 S. E. 349, 353.

Actual Signature—Position Immaterial.—Although the place of the signature upon the writing of the party to be charged is immaterial, and such party need not necessarily "subscribe" the writing, yet there must be a writing in which such party must have put his name with the intention of signing it. Thus where the plaintiff, the party to be charged, marked a, a mark of an illiterate person is a sufficient signature to fulfill the requirement of the Statute. Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902.

The phrase "the party to be charged" does not necessarily refer to the vendor, it may refer to the vendee. In a suit for the specific performance of a contract to convey land the "party to be charged" is the vendor, and not the vendee. If the contract was made by the vendor and the vendee does not fulfill the condition imposed on him to show that the Statute has been complied with, by writing by which he alone is bound. Clegg v. Bishop, 188 N. C. 554, 122 S. E. 441. The "party to be charged" under this section is the one against whom the relief is sought; and if the contract is sufficient to bind him, he can be proceeded against, though the name of the other party need not be given because, as to them, the Statute is not fully complied with. Lewis v. Murray, 177 N. C. 17, 97 S. E. 750.

Thus a contract in writing to sell land, signed by the vendor, is not against anyone other than the obligee to pay the price is not in writing and cannot be enforced against the purchaser. Mizell v. Burnett, 49 N. C. 239, 242

The Statute requires that the writing be signed by the party to be charged. So, if a contract in writing to sell land to B, the former's promise being in writing and signed, but the latter's not, A would be bound to perform, whereas, if the contract is in writing and signed by the vendee, it does not fulfill the condition imposed on him to show that the Statute has been complied with, by writing by which he alone is bound. Clegg v. Bishop, 188 N. C. 554, 122 S. E. 441.

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Member of Corporation or Partner May Sign.—Under the clause "or by some other person by him thereto lawfully authorized" a member of a corporation or a partner is the competent agent to sign a contract in writing under partnership. Neaves v. Mining Co., 90 N. C. 412, 415.

Signature of Agent.—If signed by one who is proved or admitted by the principal to have been authorized as agent, it is a sufficient compliance with the Statute. If the agent sign his own name instead of that of his principal by him. Hargrove v. Adcock, 111 N. C. 166, 171, 16 S. E. 16.
Where the agent is the one by whom the contract or the memorandum is signed, the authority of the agent to sign it for his principal need not have been given in writing. And even a subsequent ratification of an unauthorized signing will suffice. Johnston v. Sikes, 49 N. C. 70.

It is not necessary that the name of the principal or his ratification to the transaction shall appear upon the writing itself or in the form of the signature. Neaves v. Mining Co., 90 N. C. 412, 415.

Ordinance, Resolution or Vote.—An ordinance, resolution or vote of a municipal corporation, accepted as a lease or contract tendered, does not constitute a signing within the meaning of the Statute. Wade v. New Bern, 77 N. C. 460.

C. Statement of Consideration.


But see Hall v. Misenheimer, 127 N. C. 183, 49 S. E. 104, where it is said that a memorandum of a contract for the sale of land is not good as against the vendee unless it shows the price to be paid.

The sale of land is not good as against the vendee unless the price to be paid is stated, Spaulding v. Lindsley, 122 N. C. 293-1, Sec. 293-2. Debts mature on execution of assignment; substitute appointed. Sec. 293-3. Trustee to file schedule of property. Sec. 293-4. Substitute for incompetent trustee appointed. Sec. 293-5. Insolvent trustee removed unless bond given; substitute appointed. Sec. 293-6. Trustee removed on petition of creditors; substitute appointed. Sec. 293-7. Substituted trustee to give bond.

Chapter 23. Debtor and Creditor.

Art. 1. Assignments for Benefit of Creditors.

Sec. 23-1. Debts mature on execution of assignment; no preferences.

23-2. Trustee to file schedule of property.

23-3. Trustee to recover property conveyed fraudulently or in preference.

23-4. Substitute for incompetent trustee appointed in special proceeding.

23-5. Insolvent trustee removed unless bond given; substitute appointed.

23-6. Trustee removed on petition of creditors; substitute appointed.

23-7. Substituted trustee to give bond.

Sec. 23-8. Only perishable property sold within ten days of registration.

23-9. Creditors to file verified claims with clerk; false swearing misdemeanor.


23-11. Trustee to account quarterly; final account in twelve months.

23-12. Trustee violating duties guilty of misdemeanor.

Art. 2. Petition of Insolvency for Assignment for Creditors.

23-13. Petition; schedule; inventory; affidavit.

23-14. Clerk to give notice of petition.
Art. 1. Assignments for Benefit of Creditors.

§ 23-1. Debts mature on execution of assignment; no preferences.—Upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once, and no such deed of trust or deed of assignment shall contain any preferences of one creditor over another, except as hereinafter stated. (Rev., s. 967; 1893, c. 453; 1909, c. 918, s. 1; C. S. 1609.)

Cross References.—As to homestead and exemptions, see § 1-369 and notes. As to preferences in the absence of assignment, see also notes to § 39-15—analysis line, "Rights and Remedies of Creditors."

Definition.—An assignment for the benefit of creditors has been defined by the U. S. Supreme Court as "an assignment whereby a debtor, generally an insolvent, transfers to another his property, in trust to pay his debts or assign to another his property, in trust to pay his debts or apply the property upon their payment." Black Law Dict.

What Constitutes an Assignment.—The Supreme Court has held that where a person, who is insolvent, makes an assignment of practically all his property to secure a pre-existing debt, there being also other creditors, such instrument will be treated as an assignment for the benefit of creditors under the statutes relating thereto, and neither the omission of a small part of the debtor's property nor a defeasance clause in the instrument will change the result. Bank v. Tobacco Co., 188 N. C. 177, 178, 124 S. E. 158; Powell Brothers v. Lumber Company, 153 N. C. 52, 57, 68 S. E. 926; Nat'l Bank v. Gilmer, 116 N. C. 684, 22 S. E. 2; Nat'l Bank v. Gilmer, 117 N. C. 416, 23 S. E. 333; Glanton v. Jacobs, 117 N. C. 427, 23 S. E. 333; Cooper v. McKinnon, 127 N. C. 417, 32 S. E. 417; Perre v. Fols, 122 N. C. 239, 31 S. E. 475; Brown v. Nimocks, 124 N. C. 417, 32 S. E. 743; Taylor v. Lauer, 127 N. C. 157, 37 S. E. 197; Odum v. Clark, 146 N. C. 544, 60 S. E. 512.

Same—Deed to Secure Advancements.—Where the purpose of a deed is to secure payment not only of pre-existing debts but also of debts to be contracted for advancements to said grantees in carrying on their business then said deed is not a voluntary deed of assignment for the benefit of creditors, within the meaning of this and the following section. Commissioner of Banks v. Turnage, 202 N. C. 485, 486, 163 S. E. 451.

§ 23-2. Creditor liable for jail fees.


§ 23-4. False swearing; penalty.


§ 23-6. False oath; penalty.

§ 23-7. False oath; penalty.


§ 23-10. False oath; penalty.

§ 23-11. False oath; penalty.

§ 23-12. False oath; penalty.


§ 23-14. False oath; penalty.


§ 23-17. Suggestion of fraud by opposing creditor.

Art. 2. Trustee for Estate of Debtor Imprisoned for Crime.

§ 23-18. Persons who may apply for trustee for imprisoned debtor.

§ 23-19. Superior court appoints; copy of sentence to be produced.

§ 23-20. Duties of trustee; accounting; oath.

§ 23-21. Court may appoint several trustees.

§ 23-22. Court may remove trustee and appoint successor.

Art. 3. Trustee for Estate of Debtor Imprisoned for Crime.

§ 23-23. Insolvent debtor's oath.


§ 23-25. Petition; before whom; notice; service.


§ 23-29. Persons taken in arrest and bail proceedings, or in execution.

§ 23-30. When petition may be filed.

§ 23-31. Petition; contents; verification.

§ 23-32. Notice; length of notice and to whom given.

§ 23-33. Who may suggest fraud.

Art. 4. Discharge of Insolvent Debtors.

§ 23-34. Where no suggestion of fraud, discharge granted.

§ 23-35. Continuance granted for cause.

§ 23-36. Where fraud in issue, discharge only after trial.

§ 23-37. If fraud found, debtor imprisoned.


Art. 5. General Provisions under Articles 2, 3, and 4.


§ 23-40. Insolvent released on giving bond.

§ 23-41. Surety in bond may surrender principal.

§ 23-42. Creditor liable for jail fees.

§ 23-43. False swearing; penalty.

§ 23-44. Powers of trustees hereunder.


Art. 6. Practice in Insolvency and Certain Other Proceedings.

§ 23-46. Unlawful to solicit claims of creditors in proceedings.

§ 23-47. Violation of preceding section a misdemeanor.

Art. 7. Bankruptcy of Taxing, etc., Districts, Counties, Cities, Towns and Villages.

§ 23-48. Local units authorized to avail themselves of provisions of bankruptcy law.

Same—Mortgage.—Where a mortgage is made of the entirety of a large estate for pre-existing debts (omitting only an insignificant remnant of property) the mortgage is in effect an assignment for the benefit of creditors secured therein. National Bank v. Gilmer, 117 N. C. 416, 23 S. E. 333; Nat'l Bank v. Gilmer, 116 N. C. 684, 22 S. E. 2.

Same—Chattel Mortgages.—A chattel mortgage, attempted to be executed by an insolvent corporation owing other creditors, to secure a pre-existing debt on practically all of its property, will be treated as an assignment and void, unless the requirements of the statute have been complied with, and no lien otherwise on the property described therein can be thereby created. Banking, etc., Co. v. Tobacco Co., 188 N. C. 177, 124 S. E. 158.

But a chattel mortgage on a stock of goods, securing the purchase price, cannot be deemed an assignment for the benefit of creditors where the secured debt is contemporaneous with the contract of purchase, as a part of one continuous transaction. Cowan v. Dale, 189 N. C. 684, 128 S. E. 155.

A chattel mortgage of an insolvent corporation, executed and registered before the appointment of a receiver for it, will not be construed under the provisions of this section as in effect an assignment for the benefit of creditors in the absence of the fact that the property covered by the mortgage constitutes practically all of the property of the insolvent. Vanderwall v. Vance Dairy Co., 200 N. C. 314, 315, 156 S. E. 512.

By Whom Made—Corporations.—The U. S. Supreme Court has held that a corporation, through its proper officers, may make an assignment for the benefit of creditors. Potts v. Wallace, 146 U. S. 689, 13 S. Ct. 196, 36 L. Ed. 1135.

Same—Partnership.—In Tracy v. Tuffly, 134 U. S. 206, 10 S. Ct. 527, 33 L. Ed. 879, it is held that a partnership, whether general or limited, may, through its proper officers, make an assignment for the benefit of creditors.

Same—Trustees.—In accordance with the rule that trustees must unite to pass any title to property jointly held by them, where there are two or more trustees of the property of insolvents, all should join therein. Wilber v. Almy, 12 How. 180, 13 L. Ed. 944.

Applies to Sureties.—The provision that all debts of the maker become due at once applies to the sureties upon a note of the assignor. Pritchard v. Mitchell, 139 N. C. 54, 51 S. E. 783.

Effect of Void Assignment.—If a deed of assignment for the benefit of creditors becomes void as to creditors its...
§ 23-2. Trustee to file schedule of property.—Upon the execution of such deed of trust, the trustee, whether named therein or appointed as hereafter provided for, shall file with the clerk of the superior court of the county in which said deed of trust is registered, within ten days after the registration thereof, and inventory under oath, giving a complete, full and perfect account of all property that has come into his hands or knowledge of any person for him, by virtue of such deed of trust, and when further property of any kind not included in any prior return comes to the knowledge or knowledge of such trustee he shall return the same as hereinbefore prescribed within ten days after the possession or discovery thereof. (Rev., s. 968; 1893, c. 453, s. 2; C. § 1610.)

§ 23-3. Trustee to recover property conveyed fraudulently or in preference.—It is the duty of the trustee to recover, for the benefit of the estate, property which was conveyed by the grantor or assignor in fraud of his creditors, or which was conveyed or transferred by the grantor or assignor for the purpose of giving a preference. A preference, under this section, shall be deemed to have been given when property has been transferred or conveyed or the right of any person for him to have control of property has been conveyed or transferred in consideration of the payment of a pre-existing debt, when the grantee or transferee of such property knows or has reasonable ground to believe that the grantor or assignor was insolvent at the time of making such conveyance or transfer. (1909, C. 918, s. 2; C. § 1611.)

Editor's Note.—For a discussion of preference under the Bankruptcy Act, see Wilson v. Taylor, 154 N. C. 211, 70 S. E. 492; John W. Evans, Fraudulent Conveyances, 12 Ohio L. J. 433. (1910, C. 918, s. 2; C. § 1611.)

General Effect of Section.—On proper consideration of this section, its terms and purpose, it is clear that the legislature intended to prohibit and avoid, as a wrongful preference, any assignment of property by a debtor, absolute or conditional, by which a creditor, in consideration of an existent or antecedent debt and within four months of a general assignment by his debtor, acquires title which the debtor or his property conveyance in lieu thereof, when he knew or had reasonable ground to believe that his grantor or assignor was insolvent at the time the transfer or conveyance was made. Wooten v. Taylor, 159 N. C. 604, 76 S. E. 11; Teague v. Howard Grocer Co., 175 N. C. 195, 198, 95 S. E. 173.

Preferences Valid at Common Law.—A debtor unable to pay his indebtedness in full, has an undoubted right, in the absence of a statute, to make preferences in the distribution of his property among the creditors, when the appropriation is absolute and with no reservation for his own benefit or benefit of his creditors, and that that he may make such preferences is not a transfer or conveyance within this section. Cowan v. Dale, 189 N. C. 684, 128 S. E. 155.

Real and Personal Property Included.—This section requiring the trustee in a general assignment for creditors to recover property "conveyed or transferred by the grantor or assignor" in consideration of preference, includes within its meaning real and personal property, and the general methods by which the title is passed or interest therein created and extends to an executed contract of sale. Teague v. Howard Grocer Co., 175 N. C. 195, 95 S. E. 173.

The Four Months' Period.—The four months' period mentioned in this section is to be counted from the time the transfer or conveyance was made, and not from the time of its registration. Wooten v. Taylor, 159 N. C. 604, 76 S. E. 11.

Effect of Preference in Deed.—A deed of general assignment for the benefit of creditors, by expressly making a prior mortgage of the grantor's property, wherein an unlawful preference is given, subject thereto, will not, of itself, grant a right of sale to a creditor of property conveyed in preference by the trustee in the deed in trust for the general creditors. Wooten v. Taylor, 159 N. C. 604, 76 S. E. 11.

A chattel mortgage on a stock of goods to secure the purchase price, was not a conveyance in preference within this section. Cowan v. Dale, 189 N. C. 684, 128 S. E. 155.

Judgment Not a Preference Prohibited by This Section.—A judgment not a preference rendered by a court of competent jurisdiction against a debtor assigning his property to a trustee for the benefit of creditors is not a transfer or conveyance of property by the assignment otherwise than within four months prior to the assignment to the trustee, and the judgment is not a preference prohibited by this section, and will not be declared void upon suit of the trustee. Pritchett v. Tolbert, 210 N. C. 644, 188 S. E. 12.

Execution on Priority Personal to Registration of Deed of Assignment Creates Prior Lien.—Where a valid judgment
is rendered within four months prior to an assignment for benefit of creditors by the judgment debtor, and execution is issued thereon and personal property of the debtor levied upon prior to the registration of the deed of assignment, and the judgment is a lien upon the personal property levied upon prior to the title of the trustee in the deed of assignment. Pritchett v. Tolbert, 210 N. C. 644, 188 S. E. 71. 4

Meaning of Insolvent.—Insolvent means unable to pay his debts; or to sell any part of the property or assets belonging to the person or estate into money, at market prices, and applying the proceeds, with the cash previously on hand, to the payment of them. Silver Valley Mining Company v. North Carolina Smelting Company, 119 N. C. 417, 25 S. E. 954. 4

Debtors Whose Assets Exceed His Indebtedness.—Where a solvent debtor conveys practically all of his property to secure a pre-existing debt, having other creditors at the time, it does not create a preference within the intent and meaning of this section. Flowers v. American, etc., Chemical Co., 199 N. C. 456, 154 S. E. 736.

Right and Duty to Defend Suits.—It is the duty of assignees for the benefit of creditors, who have once accepted the trust, not only to appear, but so far as the nature of the transaction and the facts and circumstances of the case will admit or warrant, to defend suits to set aside the assignments. Chittenden v. Brewer, 2 Wall. 191. 17 L. Ed. 567.

§ 23-4. Substitute for incompetent trustee appointed in special proceeding.—When a trustee named in a deed of assignment for the benefit of creditors has died or resigned or has in any way become incompetent to execute the trust, the clerk of the superior court of the county wherein said deed of assignment has been registered is authorized and empowered, in a special proceeding in which all persons interested have been made parties, to appoint some discreet and competent person to act as such trustee and to execute all the trusts created in the original deed of assignment, according to its true intent and as fully as if originally appointed trustee therein. (1915, c. 176, s. 1; C. S. 1612.)

Cross Reference.—As to appointment of successor to incompetent trustee, generally, see § 45-9.

§ 23-5. Insolvent trustee removed unless bond given; substitute appointed.—Upon the complaint of any creditor of the assignor or trustee in such deed of trust, alleging that the trustor named therein is insolvent, and asking that he be removed, it is the duty of the clerk of the superior court of the county in which such deed of trust is registered, upon a notice of not more than ten days to such trustee, to hear the complaint. If upon such hearing the clerk is satisfied that such trustee is insolvent, he shall remove such trustee and appoint some competent person to execute all the trusts created in the original deed of trust, according to its true intent and as fully as if originally appointed trustee therein. (1915, c. 176, s. 1; C. S. 1612.)

Cross Reference.—As to appointment of successor to incompetent trustee, generally, see § 45-9.

§ 23-6. Trustee removed on petition of creditors; substitute appointed.—Upon the written petition of one-fourth of the number of the creditors of the grantor or assignor whose claims aggregate more than fifty per cent of the total indebtedness of said grantor or assignor, the clerk of the superior court of the county in which said deed of trust or deed of assignment is registered, upon a notice of not more than ten days to said trustee of said petition, shall remove said trustee and appoint some competent person to execute the provisions of such deed of trust or deed of assignment. (1909, c. 918, s. 3; C. S. 1614.)

§ 23-7. Substituted trustee to give bond.—Upon the removal or resignation of any trustee it is the duty of the clerk to require the person appointed to execute the provisions of such deed of trust, before entering upon his duties, to file with the clerk a good and sufficient bond, to be approved by him in a sum double the value of the property in said deed of trust, payable to the state of North Carolina, and conditioned that such person shall faithfully execute and carry into effect the provisions of said deed of trust. (Rev., s. 970; 1893, c. 453, s. 3; 1909, c. 918, s. 4; 1915, c. 176, s. 2; C. S. 1615.)

§ 23-8. Only perishable property sold within ten days of registration.—It is unlawful for any trustee, whether named in such deed of trust or appointed by a clerk of the superior court, to sell any part of the property described in such deed of trust within ten days from the registration thereof, unless such property or some part thereof be perishable, in which case he may sell such property as is perishable, according to the powers conferred upon him in said deed of trust. (Rev., s. 971; 1893, c. 453, s. 4; C. S. 1616.)

§ 23-9. Creditors to file verified claims with clerk; false swearing misdemeanor.—All creditors of the maker of such deed of trust shall, before receiving payment of any amount from the said trustee, file with the clerk of the superior court a statement under oath that the amount claimed by him is justly due, after allowing all credits and offsets, to the best of his knowledge and belief. Any creditor who shall knowingly swear falsely in such statement shall be guilty of a misdemeanor. (Rev., ss. 972; 3617; 1893, c. 453, ss. 6, 7; C. S. 1617.)

Creditors Claiming Estoppel.—Creditors, who claim under a deed of trust and file their claims to share in the proceeds of sale, cannot be heard to impeach its provisions. Chard v. Warren, 122 N. C. 75, 29 S. E. 373.

§ 23-10. Priority of payments by trustee.—The trustee, after paying the necessary costs of the administration of the trust, shall pay as speedily as possible (1) all debts which are a lien upon any of the trust property in his hands, to the extent of the net proceeds of the property upon which such debt is a lien; (2) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before registration of said deed of trust or deed of assignment, and (3) all other debts equally ratable. (1909, c. 918, s. 5; C. S. 1618.)

No Discrimination Except as Provided.—Except for the
two classes mentioned in this section all discrimination among creditors is forbidden. Wooten v. Taylor, 159 N. C. 604, 608, 76 S. E. 11.

§ 23-11. Trustee to account quarterly; final account in twelve months.—The trustee, whether named in the deed of trust or appointed by a clerk of a superior court, shall within three months from the registration of such deed of trust, and at each succeeding period of three months, file with the clerk of the superior court of the county in which the same is registered an account under oath, stating in detail his receipts and disbursements and his action as trustee, and within twelve months he shall file his final account of his administration of his trust. The clerk may upon good cause shown extend the time within which the quarterly and final accounts herein provided for are to be filed. (Rev., s. 973; 1893, c. 453, s. 8; C. S. 1619.)

§ 23-12. Trustee violating duties guilty of misdeemeanor.—If any trustee in a deed of trust for the benefit of creditors shall fail to file his inventory as required by law, or shall knowingly make any false statement in such inventory, or shall knowingly fail to include any property therein, or shall sell any part of the property described in the deed of trust within ten days unless such property so sold be perishable, or shall fail to file either of the quarterly accounts or the final accounts as required by law, or shall knowingly make any false statement in such quarterly or final account, or shall knowingly fail to include any property, money or disbursement in such quarterly or final account, he shall, in either case, be guilty of a misdemeanor. (Rev., s. 3689; 1893, c. 453, s. 8; C. S. 1620.)

Art. 2. Petition of Insolvent for Assignment for Creditors.

§ 23-13. Petition; schedule; inventory; affidavit. —Every insolvent debtor may present a petition in the superior court, praying that his estate may be assigned for the benefit of all his creditors, and that his person may thereafter be exempt from arrest or imprisonment on account of any judgment previously rendered or of any debts previously contracted. On presenting such petition, every insolvent shall deliver therewith a schedule containing an account of his creditors and an inventory of his estate, which inventory shall contain—

1. A full and true account of his creditors, with the place of residence of each, if known, and the sum owing to each creditor, whether on written security, on account, or otherwise.

2. A full and true inventory of his estate, real and personal, with the encumbrances existing thereon, and all books, vouchers and securities relating thereto.

3. A full and true inventory of all property, real and personal, claimed by him as exempt from sale by execution.

He shall annex to his petition and schedule the following affidavit, which must be taken and subscribed by him before the clerk of the superior court, and must be certified by such officer:

I. ............. do swear (or affirm) that the account of my creditors, with the places of their residence, and the inventory of my estate, which are herewith delivered, are in all respects just and true; that I have not at any time or in any manner disposed of or made over any part of my estate for the future benefit of myself or my family, or in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with any of my creditors, with a view that they, or any of them, should abstain or desist from opposing my discharge: so help me, God. (Rev., s. 1930; Code, ss. 2942, 2943, 2944; 1868-9, c. 162, ss. 1, 2, 3; C. S. 1621.)

Cross References.—As to prohibiting imprisonment for debt, see Const., Art. I, §§ 16, 17. As to provisional remedies by arrest and bail, see § 1-409 et seq. See also, § 1-311 as to execution against the person.

Constitutional Provisions.—The Constitution gives, in express terms, to the Legislature the power to regulate the manner in which a debtor shall surrender his property for the use of his creditors, and he must pursue the regulations which may be thus prescribed, in order to secure his person from arrest for his debt. Crain v. Long, 14 N. C. 371.

When Debtor Not under Arrest.—A petitioner not under arrest must show that he has complied with the provisions of this section and obtain an order of discharge under sections 23-14, 23-15. Howie v. Spittle, 156 N. C. 180, 72 S. E. 207.

Facts Set Out.—Defendant having filed the schedule of his property, it was not only proper, but necessary, that he should set out the facts, which are required, is one entitling the defendant to the benefit of this section for the relief of insolvent debtors. Edwards v. Sorrell, 150 N. C. 712, 716, 64 S. E. 898.

Defendant in Alienation of Affections.—A suit by one charging the defendant to alienating the affections of his wife, and arresting and holding him for bail under the affidavits required, is one entitling the defendant to the benefit of this section for the relief of insolvent debtors. Edwards v. Sorrell, 150 N. C. 712, 64 S. E. 898.

§ 23-14. Clerk to give notice of petition.—On receiving the petition, schedule and affidavit, the clerk of the superior court shall make an order requiring all the creditors of such insolvent to show cause before said officer, within thirty days after publication of the order, why the prayer of the petition should not be granted, and shall post a notice of the contents of the order at the courthouse door and three other public places in the county where the application is made for four successive weeks; or, in lieu thereof, shall publish the same for three successive weeks in any newspaper published in said county, or in an adjoining county. (Rev., s. 1931; Code, ss. 2945, 2946; 1868-9, c. 162, ss. 4, 5; C. S. 1622.)

§ 23-15. Order of discharge and appointment of trustee.—If no creditor oppose the discharge of the insolvent, the clerk of the superior court shall determine an order of discharge and appoint a trustee of all the estate of such insolvent. (Rev., s. 1932; Code, ss. 2947, 2948; 1868-9, c. 162, ss. 4, 5; C. S. 1623.)

§ 23-16. Terms and effect of order of discharge. —The order of discharge shall declare that the petition of such insolvent shall forever thereafter be exempted from arrest or imprisonment on account of any judgment, or by reason of any debt due at the time of such order, or contracted for before that time, though payable afterwards. But no debt, demand, judgment or decree against any insolvent, discharged under this chapter, shall be affected or impaired by such discharge, but the same shall remain valid and effectual against all the property of such insolvent acquired after his discharge and the appointment of a trustee; and the lien of any judgment or decree upon the property of such insolvent shall not be in any manner...
§ 23-17. CH. 23. DEBTOR AND CREDITOR

Suggestion of fraud by opposing creditor.—Every creditor opposing the discharge of the insolvent may suggest fraud and set forth the particulars thereof in writing, verified by his oath: but the insolvent shall not be compelled to answer the suggestions of fraud in more than one case, though as many creditors as choose may make themselves parties to the issues in such cases. (Rev. s. 1934; Code, s. 2948; 1868-9, c. 162, s. 7; C. S. 1625.)

In Bastardy Proceeding.—A mother of a bastard child, to whom an allowance has been made in bastardy proceedings, is such a creditor of the father of such child as to permit him to oppose the insolvent’s discharge by suggesting fraud in answer to his petition. State v. Parsons, 115 N. C. 730, 20 S. E. 511.

Sale or Assignment to Fine and Costs.—When defendant in bastardy proceedings has been ordered to pay a fine and costs and allowed to the mother, only the State can suggest fraud as to the fine and costs. State v. Parsons, 115 N. C. 730, 20 S. E. 511.

Answer Does Not Suggest Fraud.—One who has another arrested and held to bail for alienating the affections of the mother does not raise an issue or suggestion of fraud under this section by answering the petition for discharge, and denying a statement therein made by petitioner that he is advised by counsel that, owing to the condition of the title to certain land scheduled, an execution could not issue against it, as such statement is surplusage. Edwards v. Sorrell, 150 N. C. 712, 64 S. E. 598.

All Creditors Notified May Be Joined.—Where a debtor is arrested under different causes, sa’s. at the instance of several creditors, if he applies for his discharge as an insolvent debtor, and fraud is suggested in answer to his application, he has a right to require that all the creditors he may notify shall join in the trial of one issue, and the court will so direct. Williams v. Floyd, 27 N. C. 649.

Suggestion of Fraud Waived.—But this is for the case of the debtor, and he may waive the privilege by joining issue with each creditor, and then a verdict in his favor in one case will not discharge him from the responsibility in the case of another creditor. Williams v. Floyd, 27 N. C. 649.

Art. 3. Trustee for Estate of Debtor Imprisoned for Crime.

§ 23-18. Persons who may apply for trustee for imprisoned debtor.—When any debtor is imprisoned in the penitentiary for any term, or in a county jail for any term more than twelve months, application by petition may be made by any creditor, the debtor, or by his wife, or any of his relatives, for the appointment of a trustee to take charge of the estate of such debtor. (Rev. s. 1943; Code, s. 2974; 1868-9, c. 162, s. 40; C. S. 1636.)

§ 23-19. Superior court appoints; copy of sentence to be produced.—The application must be made to the superior court of the county where the debtor was convicted; and upon producing a copy of the sentence of such debtor, duly certified by the clerk of the court, together with an affidavit of the applicant that such debtor is actually imprisoned, the court shall appoint such trustee, and instruct him in any sum, the clerk or the judge may immediately appoint a trustee of the estate of such debtor. (Rev. s. 1944; Code, s. 2975; 1868-9, c. 162, ss. 41, 42; C. S. 1627.)

§ 23-20. Duties of trustee; accounting; oath.—The trustee of the imprisoned debtor shall pay his debts pro rata. After paying such debts, the trustee shall apply the surplus, from time to time, to the support of the wife and children of the debtor, under the direction of the superior court. When the imprisoned debtor is lawfully discharged from his imprisonment, the trustee shall deliver to him all the estate, real and personal, of such debtor, after retaining a sufficient sum to satisfy the expenses incurred in the execution of the trust and lawful commissions therefor. The trustee shall make his returns and have his account audited and settled by the clerk of the superior court of the county in which the proceedings was had, in like manner as provided for personal representatives. Before proceeding to the discharge of his duty, the trustee shall take and subscribe an oath, well and truly to execute his trust according to his best skill and understanding. The oath must be filed with the clerk of the superior court. (Rev. ss. 1914, 1945, 1946, 1947; Code. ss. 2976, 2978, 2979; 1868-9, c. 162, ss. 43, 45, 46; C. S. 1628.)

§ 23-21. Court may appoint several trustees.—The court has power, when deemed necessary, to appoint more than one person trustee under this chapter; but in reference to the rights, authorities and duties conferred herein, all such trustees shall be deemed one person in law. (Rev., s. 1948; Code, s. 2980; 1868-9, c. 162, s. 47; C. S. 1639.)

§ 23-22. Court may remove trustee and appoint successor.—In case of the death, removal, resignation or other disability of a trustee, the court making the appointment may from time to time supply the vacancy; and all proceedings may be continued by the successor in office in like manner as in the first instance. (Rev., s. 1949; Code, s. 2981; 1868-9, c. 162, s. 48; C. S. 1630.)

Art. 4. Discharge of Insolvent Debtors.

§ 23-23. Insolvent debtor’s oath.—Prisoners in order to be entitled to discharge from imprisonment under the provisions of this article shall take the following oath:

I, ........, do solemnly swear (or affirm) that I have not the worth of fifty dollars in any worldly substance, in debts, money or otherwise whatsoever, and that I have not at any time since my imprisonment or before, directly or indirectly, sold or assigned, or otherwise disposed of, or made over in trust for myself or my family, any part of my real or personal estate, whereby to have or expect any benefit or to defraud any of my creditors: so help me God. (Rev., s. 1918a; Code, s. 2972; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, s. 803; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 31; 1881, c. 76; C. S. 1631.)

Constitutional.—This section does not contravene the constitutional provision in regard to homestead and personal property exemptions as the prisoner can discharge himself from custody by paying the fine and costs or by complying with the provisions of this article and taking the oath prescribed. State v. Williams, 97 N. C. 414, 416, 2 S. E. 370.

Liberal Construction.—In Wood v. Wood, 61 N. C. 358, it is stated that ch. 59 of the Rev. Code (the provisions of which are contained in this and the following sections) has always received a liberal interpretation.

Debtor Must Follow Provisions.—The Constitution gives, in express terms, to the Legislature, the power to regulate the manner in which a debtor shall surrender his property
§ 23-24. Persons imprisoned for nonpayment of costs in criminal cases.—The following persons may be discharged from imprisonment upon complying with this article and § 153-191, 153-193 and 153-194: Every person committed for the fine and costs of any criminal prosecution. (Rev., s. 1915; Code, ss. 2967; R. C., s. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1835, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 26; 1933, c. 228, s. 9; C. S. 1632.)

Editor's Note.—Prior to Public Laws 1933, c. 228, sec. 9, this section contained a provision which read as follows: "Every putative father of a bastard committed for failure to pay for its maintenance." This provision was omitted by the amendment.

Purpose.—This section was manifestly intended to be construed as permitting a defendant committed in a proceeding, or found to be the father of a bastard child, to file a petition before the court designating the time when he wished to apply for a discharge. State v. Parsons, 115 N. C. 583, s. 111.

Construed with Sections 153-191 and 153-194.—This section does not repeal those enacted much later, (sections 153-191, 153-194,) but the latter modify it. State v. Manuel, 20 N. C. 571.

Where Workhouse Established.—One committed for the fine and costs of any criminal prosecution, who is imprisoned for twenty days, may be discharged upon complying with provisions of the next section. State v. Davis, 82 N. C. 610; State v. Williams, 97 N. C. 414, 2 S. E. 370, and this is so, although a workhouse has been established by the county court, at the time and place named for the hearing of the case, which warrant every such sheriff or keeper shall obey. (Rev., s. 1917; Code, ss. 2970; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 29; C. S. 1634.)

Where Clerk Refuses to Give Oath.—If the clerk should refuse to allow the prisoner to take the oath, the remedy is an appeal to the judge holding the courts of that district, and it is intimated that it is irregular for the judge of an adjoining district to release the prisoner on a writ of habeas corpus. State v. Miller, 97 N. C. 451, 1 S. E. 776.

Twenty Day Provision Mandatory.—Whether a defendant had property or not, he must remain in jail the twenty days, or pay the fine and costs, since the officers could not waive the imprisonment, nor had the judge the power to dispense with it. State v. Davis, 82 N. C. 610, 613.

Improperly Discharged.—Where a defendant arrested and imprisoned for fraud did not tender the oath required by section 23-23, nor surrender his homestead and personal property exemptions, nor file the petition, nor give the notice required by section 23-25, he was improperly discharged upon an affidavit that he had thereby made an assignment of all his property for the benefit of creditors, that he was insolvent at the date of the affidavit insolvent and not worth more than the exemptions allowed him by law as set apart to him. Raisin Fertilizer Co. v. Grubbs, 114 N. C. 470, 19 S. E. 597.

Cross Reference.—See generally the annotations under § 24-26.

§ 23-25. Petition; before whom; notice; service. —Every such person, having remained in prison for twenty days, may apply by petition to the court where the judgment against him was entered, praying to be brought before such court at a time and place to be named in the petition, and to be discharged upon taking the oath hereinbefore prescribed. The applicant shall cause ten days notice of the time and place of filing the petition to be served on the sheriff or other officer by whom he was committed. In cases of conviction before a justice of the peace the clerk of the superior court of the county where the convicted person confined for costs is, may administer the oath and discharge the prisoner. (Rev., s. 1916; Code, ss. 2968, 2969; 1891, c. 195; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 26; 1874-5, c. 11; 1868-9, c. 162, s. 27; 1874-4, c. 90; C. S. 1633.)

A Proceeding in the Cause.—The application of an insolvent for the nonpayment of costs is a proceeding in the cause in which he was convicted, and should be made by petition, in the county where the conviction was entered. State v. Miller, 97 N. C. 451, 1 S. E. 776.

Where Clerk Refuses to Give Oath.—If the clerk should refuse to allow the prisoner to take the oath, the remedy is an appeal to the judge holding the courts of that district, and it is intimated that it is irregular for the judge of an adjoining district to release the prisoner on a writ of habeas corpus. State v. Miller, 97 N. C. 451, 1 S. E. 776.

Where Discharge Ineligible.—If the applicant is again committed for the same cause, he shall not be discharge for the time reserved for the taking of the oath. State v. Bryan, 80 N. C. 16.

Effect of Discharge.—The discharge of a debtor from prison, under this section, does not protect the debtor from arrest at the instance of any other creditor than the one at whose suit he was in prison, though such other creditor had notice of the debtor's application to be discharged. Griffin v. Simmons, 50 N. C. 145.

§ 23-26. Warrant issued for prisoner.—The clerk of the superior court, or justice of the peace, before whom such petition is presented shall forthwith issue a warrant to the sheriff, or keeper of the prison, requiring him to bring the prisoner before the court, at the time and place named for the hearing of the case, which warrant every such sheriff or keeper shall obey. (Rev., s. 1917; Code, ss. 2970; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 29; C. S. 1634.)

§ 23-27. Proceeding on application. — At the hearing of the petition, if the prisoner has no visible estate, and takes and subscribes the oath or affirmation prescribed in this article, the clerk of the superior court, or justice of the peace, before whom he is brought, shall administer the oath or affirmation to him, and discharge him from imprisonment; of which an entry shall be made in the docket of the court, and, where the proceeding is before a justice of the peace, the justice shall return the petition and orders thereon into the office of the clerk of the superior court to be filed. (Rev., s. 1918; Code, ss. 2971; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 30; C. S. 1635.)

Cross Reference.—See generally the annotated sections under § 24-26.

Improperly Discharged. —Where a debtor arrested and imprisoned for fraud did not tender the oath required by section 23-23, nor surrender his homestead and personal property exemptions, nor file the petition, nor give the notice required by section 23-25, he was improperly discharged upon an affidavit that he had thereby made an assignment of all his property for the benefit of creditors, that he was insolvent at the date of the affidavit insolvent and not worth more than the exemptions allowed him by law as set apart to him. Raisin Fertilizer Co. v. Grubbs, 114 N. C. 470, 19 S. E. 597.

§ 23-28. Suggestion of fraud.—The chairman of the board of commissioners, and every officer interested in the fee bill taxed against such prisoner, may oppose his taking the insolvent debtor's oath above prescribed, and file particulars in the suggestion in writing, in the court where the same shall stand for trial as provided by law, for the punishment of this chapter in other cases of fraud or concealment. (Rev., s. 1919; Code, ss. 2973; 1868-9, c. 162, s. 32; C. S. 1636.)
§ 23-32. Persons taken in arrest and bail proceedings, or in execution.—The following persons also are entitled to the benefit of this article as hereinafter provided:

1. Every person taken or charged on any order of arrest for default or bail, or on surrender of bail in any action.

2. Every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever. (Rev., s. 1920; Code, s. 2951; 1868-9, c. 162, s. 10; C. S. 1637.)

Cross Reference.—As to arrest and bail, see §§ 1-409 to 1-49.

Construed with Sections 1-417 and 1-419. — This section should be construed with sections 1-417 and 1-419, and, so construed, the remedies given by this section are in addition to those given by the other sections mentioned. Edwards v. Sorrell, 150 N. C. 712, 64 S. E. 899.

Broad Terms.—The terms of this section are as broad and sweeping as they well can be. They do not, in any view of them as to the purpose intended, imply limitation or discrimination. They plainly embrace "every person," taken or charged to be arrested by virtue of "any order of arrest," not specially for a tort, or for fraud, or other particular cause of action as to which a person may be arrested, but for any cause of action, no matter what may be its nature, if the person is arrested in a case wherein he may lawfully be so arrested. They, in plain, strong terms, embrace any such arrest made or ordered to be made, for any cause whatsoever—that is, an action in which a person—a party—may be so arrested. Burgwyn v. Hall, 108 N. C. 489, 492, 13 S. E. 222.

Same.—Tort Actions Included. — The benefits of the statute extend as well to those arrested for torts as for debt, and the debt growing out of one is no more a debt and no more entitled to an extraordinary process for its collection than the other. Burgwyn v. Hall, 108 N. C. 489, 13 S. E. 222.

Any Cause Specified in Section 1-410. — The provisions of this section extend to and embrace every person arrested or to be arrested in a civil action on account of any cause of action specified in sec. 1-410. Burgwyn v. Hall, 108 N. C. 489, 496, 13 S. E. 222.

Nonresidents Included. — The benefits of the section are not confined to residents of this State. There is no provision in it, or any other statute, within our knowledge, that in terms or by reasonable implication declares that a nonresident shall not be discharged from arrest in a civil action, if he makes the complete surrender of his estate as prescribed. Burgwyn v. Hall, 108 N. C. 489, 496, 13 S. E. 222.

Where Motion to Vacate Denied. — Where a party is under arrest in a civil action and his motion to vacate the arrest has been overruled, he may seek his discharge under the provisions of this section. Wing v. Hooper, 98 N. C. 482, 4 S. E. 463.

Effect on Exemptions.—A judgment debtor against whose person execution has been issued cannot be discharged except by payment, or giving notice and surrender of all property in excess of $30, and the effect of the execution against the person is to deprive him of his homestead and his personal property exemption over and above $30. Oakley v. Lasater, 172 N. C. 96, 89 S. E. 1063.

Meaning of "Debtor and Creditor."—The term "debtor and creditor," employed generally and without precision in the definition of arrest in civil actions, is here taken as meaning and applying to the plaintiff and defendant in the action in which the defendant shall be so arrested. They imply the plaintiff's claiming and suing for damages for a tort, or for fraud, or for some other particular cause of action as to which a person may be arrested. Bur- gwyn v. Hall, 108 N. C. 489, 496, 13 S. E. 222.

Effect of Notice.—The party arrested and so seeking relief must notify the creditors or plaintiff at whose suit he is arrested, but he may or may not notify other creditors of his application to surrender his property and be discharged from arrest, and only such creditors as may be notified will be affected by the discharge. Burgwyn v. Hall, 108 N. C. 489, 492, 13 S. E. 222.

§ 23-30. When petition may be filed.—Every person taken or charged as in the preceding section specified may, at any time after his arrest or imprisonment, petition the court from which the process issued on which he is arrested or imprisoned, for his discharge therefrom, on his compliance with this chapter. (Rev., s. 1921; Code, s. 2962; R. C. c. 59, s. 3; 1868-9, c. 162, s. 11; C. S. 1635.)

Persons Included.—This section in broadest terms embraces "every person taken or charged as in the preceding section specified." Burgwyn v. Hall, 108 N. C. 489, 493, 13 S. E. 222.

Cause of Action Immaterial. — The debtor is entitled to be discharged upon the honest surrender of his property in the way prescribed, whether the cause of action on account of which he was arrested was a fraudulent debt, or a tort, or of other nature as to which he might be arrested. Burgwyn v. Hall, 108 N. C. 489, 493, 13 S. E. 222.

§ 23-31. Petition; contents; verification. — The petition shall set forth the cause of the imprisonment, with the writ or process and complaint on which the same is founded, and shall have annexed to it a just and true account of all his estate, real and personal, and of all charges affecting such estate, as they exist at the time of filing his petition, together with all deeds, securities, books or writings whatever relating to the estate and the charges thereon; and also what property, real and personal, the petitioner claims as exempt from sale under execution, and shall have annexed to it an oath or affirmation, subscribed by the petitioner and taken before any person authorized by law to administer oaths, to the effect following:

I, ..........., the within named petitioner, do swear (or affirm) that the within petition and the account annexed thereto, shall be personally served by such debtor on the creditor or creditors at whose suit he is arrested or imprisoned, and such other creditors as the debtor may choose, or their personal representatives or attorneys. If the person to be notified reside out of the state, and has no agent or attorney in the state, the notice may be served on the officer having the claim to collect, or by two weekly publications in any newspaper in the state. (Rev., s. 1923; Code, s. 2955; R. C. c. 59, ss. 3; 1868-9, c. 162, ss. 12; C. S. 1640.)

§ 23-32. Notice; length of notice and to whom given.—Twenty days notice of the time and place at which the petition will be filed, together with a copy of such petition and the account annexed thereto, shall be personally served by such debtor on the creditor or creditors at whose suit he is arrested or imprisoned, and such other creditors as the debtor may choose, or their personal representatives or attorneys. If the person to be notified reside out of the state, and has no agent or attorney in the state, the notice may be served on the officer having the claim to collect, or by two weekly publications in any newspaper in the state. (Rev., s. 1923; Code, s. 2955; R. C. c. 59, ss. 3; 1868-9, c. 162, ss. 14; C. S. 1640.)

Effect of Notice.—The party arrested and so seeking relief must notify the creditors or plaintiff at whose suit he is arrested, but he may or may not notify other creditors of his application to surrender his property and be discharged from arrest, and only such creditors as may be notified will be affected by the discharge. Burgwyn v. Hall, 108 N. C. 489, 492, 13 S. E. 222.

§ 23-33. Who may suggest fraud.—Every creditor upon whom the notice directed in § 23-32 is served may suggest fraud upon the hearing of the petition, and the issues made up respecting the fraud shall stand for trial as in other cases. (Rev., s. 1924; Code, s. 2956; R. C. c. 59, s. 13; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 15; C. S. 1641.)

Petitioner May Demand Oath and Jury Trial. — A petitioner is entitled to insist that suggestions of fraud, made by a creditor, shall be verified by the oath of the creditor and tried by a jury; and it is error in a judge to decide upon such suggestions, without submitting them in an issue to a jury. Purvis v. Robinson & Co., 49 N. C. 96. See also, State v. Carroll, 51 N. C. 488, 499. [876]
§ 23-34. Where no suggestion of fraud, discharge granted.—If no creditor suggests fraud or opposes the discharge of the debtor, the justice of the peace or the clerk of the superior court before whom the petition is heard shall forthwith discharge the debtor, and, if he surrenders any estate for the benefit of his creditors, shall appoint a trustee of such estate. The order of discharge and appointment shall be entered in the docket of the court, and if granted by a justice of the peace a copy thereof shall be certified by him to the clerk of the superior court, where the same shall be recorded, and filed. (Rev., s. 1925; Code, s. 2857; R. C., c. 59, s. 1; 1773, c. 100; 1808, c. 746, s. 2; 1810, c. 797; 1830, c. 33; 1838, c. 25; 1840, c. 33; 1852, c. 49; 1868-9, c. 162, s. 16; C. S. 1642.)

Proper Remedy to Secure Damages.—The proper remedy of the party seeking to establish and secure his damages for tort is to have a trustee appointed, under this section, to hold and distribute among creditors when and as soon as all debts are ascertained. Burgwyn v. Hall, 108 N. C. 498, 13 S. 2d. 222.

§ 23-35. Continuance granted for cause.—When it appears to the court that any debtor, who may have given bond for his appearance under this chapter, is prevented from attending court by sickness, or other sufficient cause, the case shall be continued to another day, or to the next term, when the same proceedings shall be had as if the debtor had appeared according to the condition of his bond, and in the event of his death in the meantime, his bond shall be discharged. (Rev., s. 1926; Code, s. 2959; R. C., c. 59, s. 10; 1822, c. 1131, s. 1; 1868-9, c. 162, s. 18; C. S. 1643.)

Cross Reference.—As to the insolvent's bond, see § 23-40 and annotations.

When Sickness Excuses.—The extreme sickness of the principal would excuse his nonappearance, and entitle him and his surety to a continuance if that appeared to the court. But where it was not made to appear, the court could not properly continue it. Buis v. Arnold, 51 N. C. 233, 234.

Sickness of Surety No Excuse.—Under this section the sickness of the surety is no excuse for the default of the principal. Speight v. Wooten, 14 N. C. 327.

§ 23-36. Where fraud in issue, discharge only after trial.—After an issue of fraud or concealment is made up, the debtor shall not discharge himself as to the creditors in that issue, except by trial and verdict in the same, or by a discharge by consent. (Rev., s. 1927; Code, s. 2962; R. C., c. 59, s. 17; 1868-9, c. 162, s. 21; C. S. 1644.)

When Applicable.—The provisions of this section only apply to cases where the defendant is in lawful custody and by virtue of an authority competent to order it. Houston & Co. v. Walsh, 79 N. C. 35, 36.

§ 23-37. If fraud found, debtor imprisoned.—If, on the trial, the jury finds that there is any fraud or concealment, the judgment shall be that the debtor be imprisoned until he surrenders any estate, property or effects be made by the debtor. (Rev., s. 1928; Code, s. 2961; R. C., c. 59, s. 14; 1823, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 20; C. S. 1645.)

Must Surrender Whole Property.—An insolvent debtor included in his schedule "all his interest in certain property assigned to S. C." On an issue found, the jury found the deed assigning such property fraudulent. It was held, that the debtor should be imprisoned until he makes a surrender of the whole of such property. Hutton v. Sell, 20 N. C. 285.

Not in Execution as to Others.—A debtor convicted of fraudulent concealment of his effects, upon an issue be-tween him and A, and ordered into custody thereupon, according to this section, is not in execution at the suit of B, another creditor, in whose case no such concealment was found or suggested. Folsom v. Gregory, 12 N. C. 231.

§ 23-38. Effect of order of discharge.—The order of discharge under the last four articles of this chapter, whether granted upon a nonsuggestion of fraud, upon the finding of a jury in favor of the debtor, or otherwise, shall be in like terms and have like effect as prescribed in § 23-16; except that the body of such debtor shall be free from arrest or imprisonment at the suit of every creditor as to him only, to whom the notice required may have been given; and the notices, or copies thereof, shall in all cases be filed in the office of the superior court clerk. (Rev., s. 1929; Code, s. 2960; R. C., c. 59, s. 11; 1822, c. 1131, s. 1; 1853, c. 12; 1868-9, c. 162, s. 10; C. S. 1646.)

Debt Not Discharged.—The discharge of the principal, under the insolvent debtor's law, is not a discharge of the debt. Norment v. Alexander, 32 N. C. 71.

Protects against Those Notified.—The discharge of an insolvent protects him from arrest by those creditors only who had notice of his intention to apply for a discharge. Crain v. Long, 14 N. C. 371; Norment v. Alexander, 32 N. C. 71; Rountree v. Waddill, 52 N. C. 309, 312.

Art. 5. General Provisions under Articles 2, 3, and 4.

§ 23-39. Superior court tries issue of fraud.—In every case where an issue of fraud is made up as provided in this chapter, the case shall be entered in the trial docket of the superior court, and stand for trial as other causes; and upon a finding by the jury in favor of the petitioner the judge shall discharge the debtor; if the finding is against the petitioner he shall be committed to jail until he makes full disclosure. (Rev., s. 1935; Code, s. 2949; 1868-9, c. 162, s. 8; C. S. 1647.)

In General.—Upon the suggestion of fraud an issue is raised which should be entered upon the trial docket of the superior court and stand for trial as other causes. State v. Parsons, 115 N. C. 739, 20 S. E. 511.

When Issue Can Be Made Up.—When one who applies to take the insolvent debtor's oath, upon rendering a schedule, sets forth in his schedule that he has made a deed in trust of certain property to satisfy certain creditors, and surrenders all his interest in such deed, it is still competent for the opposing creditor to have an issue made up whether the said deed is not fraudulent, and if found fraudulent by a jury, to cause the debtor to be imprisoned until he makes a surrender of the whole property so conveyed. Adams v. Alexander, 23 N. C. 501.

When Jury Finds Deed Fraudulent.—Where an insolvent debtor, in filing his schedule, only surrenders his interest in certain property, conveyed by a deed in trust, and the jury, upon an issue, find the deed fraudulent, he must be imprisoned until he makes a surrender of the whole property so conveyed. Hutton v. Sel, 28 N. C. 285.

§ 23-40. Insolvent released on giving bond.—Every debtor entitled under the provisions of this chapter to discharge as an insolvent may, at the time of filing his application for a discharge or at any time afterwards, tender to the sheriff or other officer having his body in charge, a bond, with sufficient surety, in double the amount of the sum due any creditor or creditors at whose suit he was taken or charged, conditioned for the appearance of such debtor before the court where his petition is filed, at the hearing thereof, and to stand to and abide by the final order or decree of the court in the case. If such bond be satisfactory to the sheriff, he shall forthwith release such debtor from custody. (Rev., s. 1936; Code, s. [877]
When Bond May Be Given.—The insolvent may give bond during the pendency of and until the final determination of the proceedings. Howie v. Spittle, 156 N. C. 183, 72 S. E. 207.

Sufficient Compliance.—A condition "to appear and claim, etc., and not depart without leave," is substantially the same as that prescribed by the defendant's appearance. Quere? Winslow v. Anderson, 20 N. C. 2.

Return Day Must Be Certain.—The bond for the defendant's appearance, under this section connected with the execution, is in the nature of process to compel an appearance, and the return day thereof must be certain. Winslow v. Anderson, 20 N. C. 2.

Where State in Bond Erroneous.—Where a bond was conditioned for the defendant's appearance at the next term of court to be held upon a stated day, and, at the next term which sat at a date earlier than that mentioned in the bond, the defendant did not appear, it was error to take a judgment against him and his surety for default since there was no default of appearance according to the bond. Winslow v. Anderson, 20 N. C. 2.

Invalid Surrender.—Where a prisoner was brought into the jail as a debtor, while under the process of arrest, and was thereupon ordered to prepare a bond to be given for the appearance of the imprisoned debtor within a stated time, was it error to refuse to receive the bond for the appearance of the defendant, which was not signed by the plaintiff or his agent? Bunting v. Mcllhenny, 61 N. C. 10.

Where Ca. Sa. Voidable.—When a defendant gave bond under this section for the appearance of an insolvent to court, is good if it is for double the original debt, exclusive of interest and costs, and judgment, on motion, may be rendered on it. Williams v. Cross, 13 N. C. 3.

Defendant Cannot Object to Bond.—A defendant who has given bond under this section cannot object to the in forma- lity of the bond, and pray a discharge on account thereof. Hager v. Smedes, 1 N. C. 113.

Where Ca. Sa. Voidable.—Where a defendant gave bond under the insolvent act, and while he is at large by virtue thereof, he is not entitled to his discharge on account of the fact that the condition of the bond was broken, nor can he move, under such circumstances, to quash the proceedings on that account. Bryan v. Brooks, 51 N. C. 580.

Defendant Bound to Attend.—The defendant in a ca. sa. bond, given under this section is bound to attend at every term until the cause is finally disposed of. Arrington v. Bass, 14 N. C. 95.

Sufficient Compliance.—A condition "to appear and claim, etc., and not depart without leave," is substantially the same as that prescribed by the defendant's appearance. Quere? Winslow v. Anderson, 20 N. C. 2.

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Defendant Bound to Attend.—The defendant in a ca. sa. bond, given under this section is bound to attend at every term until the cause is finally disposed of. Arrington v. Bass, 14 N. C. 95.
in relation to personal representatives over the estates of deceased persons; but all debts shall be paid by the trustees pro rata. (Rev., s. 1941; Code, s. 2977; R. C., c. 59, ss. 21, 22; 1773, c. 100; ss 5, 6; 1827, c. 44; 1830, c. 26, s. 2; 1868-9, c. 162, s. 44; C. S. 1652.)

§ 23-45. Jail bounds.—Any imprisoned debtor may take the benefit of the prison bounds by giving security, as required by law, except as follows:

1. A debtor against whom an issue of fraud is found.
2. Any debtor who, for other cause, is adjudged to be imprisoned until he makes a full and fair disclosure or account of his property. (Rev., s. 1942; Code, s. 2966; R. C., c. 59, ss. 27; 1818, c. 964; 1868-9, c. 162, s. 25; C. S. 1653.)

Cross Reference.—As to regulations regarding prison bounds, see § 153-54.

Art. 6. Practice in Insolvency and Certain Other Proceedings.

§ 23-46. Unlawful to solicit claims of creditors in proceedings. — It shall be unlawful for any individual, corporation, or firm or other association of persons, to solicit of any creditor any claim of such creditor in order that such individual, corporation, firm or association may represent such creditor or present or vote such claim, in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in any matter involving an assignment for the benefit of creditors. (1931, c. 298, s. 1.)

Cross Reference.—As to restrictions on appearance for creditor in insolvency proceedings, etc., see § 24-9.

Editor's Note.—See 9 N. C. Law Rev. 348.

§ 23-47. Violation of preceding section a misdemeanor.—Any individual, corporation, or firm or other association of persons violating any provision of § 23-46 shall be guilty of a misdemeanor. (1931, c. 298, s. 3.)

Art. 7. Bankruptcy of Taxing, etc., Districts, Counties, Cities, Towns and Villages.

§ 23-48. Local units authorized to avail themselves of provisions of bankruptcy law. — With the approval of the local government commission of North Carolina and with the consent of the holders of such percentage or percentages of its indebtedness as may be required by Public Act Number three hundred two of the Seventy-fifth Congress, First Session, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July first, one thousand eight hundred ninety-eight and Acts amendatory thereof and supplementary thereto," approved August sixteenth, one thousand nine hundred thirty-seven, as amended, any taxing district, local improvement district, school district, county, city, town or village in the state of North Carolina is authorized to avail itself of the provisions of said act of congress as said act now exists or may be hereafter amended. (1939, c. 203.)

Editor's Note.—For comment on this enactment, see 17 N. C. L. Rev. 343.

Chapter 24. Interest.

Sec. 24-1. Legal rate is six per cent.

Sec. 24-2. Penalty for usury; corporate bonds may be sold below par.

Sec. 24-3. Time from which interest runs.

Sec. 24-4. Obligations due guardians to bear compound interest; rate of interest.

§ 24-1. Legal rate is six per cent.—The legal rate of interest shall be six per cent per annum for such time as interest may accrue, and no more. (Rev., s. 1950; Code, s. 3835; 1895, c. 69; 1876-7, c. 91; S. 2305.)

Editor's Note.—The distinction between the "legal rate" of interest, and the "lawful rate" of interest, which is maintained in some states, and which appears in some of the older cases of this State, Burwell v. Burgwyn, 100 N. C. 399, 392, 6 S. E. 409, has not been preserved. Legal rate of interest implied the maximum rate at which interest could be charged upon an obligation in the absence of stipulation as to the rate; and a lawful rate of interest implied that rate of interest which could be lawfully stipulated without incurring the penalty of law. The former was six per cent, the latter eight. See Burwell v. Burgwyn, 100 N. C. 399, 392, 6 S. E. 409. This distinction is now abolished; as the maximum rate at which interest may be charged, with or without stipulation of the rate, cannot exceed six per centum per annum, under the provisions of this and the succeeding section.

This section declares the policy of the state with regard to usury. Pinnix v. Maryland Cas. Co., 214 N. C. 760, 767, 200 S. E. 874.

Definition.—Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, as damages for its detention. Brown v. Halts, 15 Wall. 177, 185, 21 L. Ed. 128.

Interest is not costs in any sense, and, when allowed, it should be decreed as damages, and be added to the damages awarded. The "Wantart," etc. v. Avery et al., 95 U. S. 600, 615, 24 L. Ed. 461.

Within the Province of Legislature.—It is within the exclusive province of the lawmaking power to prescribe upon what conditions and at what rate interest can be allowed or contracted for, and what shall be a forfeiture of the right to collect it. Moore v. Beamam, 112 N. C. 558, 564, 17 S. E. 676.

Where Interest Rate Not Specified.—Where the statute providing for recovery of taxes does not specify the rate of interest to be employed, it is likely that the "legal rate," six per cent per annum, applies. See 12 N. C. Law Rev. 39.

A contract will be declared usurious when it appears that it was the purpose and intent of the lender to charge and receive a greater rate of interest than that allowed by law under this section. Polikoff v. Finance Service Co., 201 N. C. 631, 172 S. E. 356.

Insurance Companies Not Authorized to Charge Interest in Excess of Legal Rate.—Section 58-52 dealing with loans by insurance companies secured by insurance policies does not authorize insurance companies to charge interest in

[879]
excess of the legal rate prescribed in this section. Cowan v Security Life, etc., Co., 211 N. C. 18, 188 S. E. 812.

§ 24-2. Penalty for usury; corporate bonds may be sold below par.—The taking, receiving, reserving or charging a greater rate of interest than six per cent per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person, or his legal representatives or corporation by whom it has been paid, may recover twice the amount of interest paid in an action in the nature of action for debt. In any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, or otherwise agreed to be paid thereon, is, under the use of money, then the party against whom the action is brought to plead as a counter-evidence of debt, it is lawful for the party against whom the action is brought to plead as a counter-claim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest. Nothing contained in this section or in § 24-1, however, shall be held or construed to prohibit private corporations from paying a commission on the sale of their coupon bonds, nor from selling such bonds for less than the par value thereof. (Rev., s. 1951; Code, s. 3836; 1895, c. 69; 1903, c. 154; 1876-7, c. 91; C. S. 2306.)

I. General Considerations.
II. Substance Controls Nature of Transaction.
A. General Doctrine.
B. Specific Instances.
III. Equitable Doctrines as Affecting Rights of Parties.
A. Summary of Law and Conclusions.
B. Exposition of Authorities.
IV. Rights of Subsequent Purchasers.
A. Summary of Law.
B. Exposition of Authorities.
C. Pleading and Practice.

Cross References.
As to party seeking to recover on any usurious contract not allowed costs, see § 5-25. As to usurious loans on houses held by sale or mortgage, see § 5-19. As to usury and misdesmeiran, see § 14-391. As to applicability of usury provisions to pawnbrokers, see § 91-7. As to limitation of actions to recover penalty and forfeiture of interest for usury, see § 1-51.

I. GENERAL CONSIDERATION.

Editor's Note.—The former statute (Rev. Code, ch. 114; Rev. Stat. 1901, c. 117) denounced a usurious contract as void and charged, the contract is not invalidated as to the principal, but the entire interest carried by the note or other evidence of debt or the interest otherwise agreed to be paid thereon, is, under the use of money, then the party against whom the action is brought to plead as a counter-evidence, or the corporation by whom the same has been paid, may recover twice the amount paid in an action in the nature of action for debt. Sloan v. Ins. Co., 189 N. C. 690, 188 S. E. 374; Pate v. Morgan, etc., Corp., 193 N. C. 422, 147 S. E. 529; Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 147 S. E. 529; also McRae v. Osborne, 179 N. C. 667, 103 S. E. 388, 13 A. L. R. 1207.

Our statute is copied from the national banking act, and has gone into the laws of many states in exactly the same form. Pinnix v. Maryland Cas. Co., 214 N. C. 760, 765, 200 S. E. 874.

The usury laws are strictly construed, and usury must be pleaded. Dixon v. Smith, 204 N. C. 480, 168 S. E. 683.

Purpose of Statute—Distinction between the New and the Old Statute.—Both the former and present statutes were enacted in restraint of excessive interest for the same general policy, and especially on the idea of protecting the borrower against the oppression of the lender, the chief difference being that a violation under the old statute in- tended to induce an observance of the statute, whereas this law leaves the contract valid as to the principal, but makes the interest forfeitable. Moore v. Woodward, 83 N. C. 531, 533. As to the Beneficent Result of These Laws—Avoiding Charging Usury or an Illegal Rate of Interest are enacted for the benefit of the borrower. Ector v. Osborne, 179 N. C. 667, 103 S. E. 388.

Effect of Contract to Carry out Legislative Intent.—The forfeiture of the entire unpaid interest and recovery back of twice the interest paid is in the nature of a penalty intended to induce an observance of the statute, and it is the duty of the courts so to expound and apply the law as to carry out the legislative intent. Moore v. Woodward, 83 N. C. 531, 533.

Enforceability in the Absence of Penalty.—Even in the absence of a penalty on charging usurious interest, such as is prescribed in this section, the contract must be held, as prescribed by law would not be enforceable. Hughes v. Rosenberg, 102 N. C. 137, 7 S. E. 286.

Four Requisites of Usurious Transaction.—In order to constitute a usurious transaction, four requisites must appear: (1) there must be a loan, express or implied; (2) that for such loan an interest above the one prescribed by law would not be enforceable. Hughes v. Boones, 116 N. C. 137, 17 S. E. 286.

§ 24-2.
Forfeiture of Indebtedness or Loan of Money Essential.—It is universally held that in order that a transac-
tion may be held usurious under the statutes against usury it is essential that there should be a contract for 
the forbearance of an existing indebtedness or a loan of money. Struthers v. Drexel, 122 U. S. 487, 7 S. Ct. 1293, 
30 I. Ed. 1216. See 29 Am. and Eng. Enc., p. 464, sec. 4, 
and note 5, where a large number of cases are cited in sup-
port of the text. There is no exception to this universal 
rule, that there must be an extension of credit and an ille-
gal compensation for it, knowingly taken, in order to con-
stitute usury. This is the essential, constant element in the 

Charge Usurious Interest.—Where the lender of 
money intentionally charges the borrower a greater rate 
of interest than the law allows, and his purpose stands 
clearly revealed on the face of the instrument, a corrupt 
intent to violate the usury law on the part of the lender 
is shown. Riley v. Sears, 154 N. C. 599, 70 S. E. 997.

Effect of Charging and Collecting Usury.—Where a usuri-
ous rate of interest on money has been paid by the bor-
rower of money, the mortgagee is entitled to the entire 
amount of the debt, plus six per cent interest 
thereon, in accordance with the general rule of law.
Riley v. Sears, 154 N. C. 599, 70 S. E. 997.

Where Person Is Not Entitled to Statutory Penalty.—Where 
a debtor seeks the aid of a court on the ground that his 
debt is tainted with usury, he may have the 
statutory penalty imposed upon him, in the event 
that there are legal proceedings to enforce it, 
the defendant, and may not thereafter maintain the 
defense that a note or instrument was tainted with the usury 

Usurious Interest Accused upon Bonds Other Than the 
Same—Consent Judgment.—By consent judgment en-
forced in an action upon a note, wherein usury was set 
up by the defendant, and the parties have agreed upon 
a compromise in a certain sum, signed and entered by the 
court, the defendant waives his right under our usury law, 
and may not thereafter maintain the defense that a note 
he had given the plaintiff, in the amount of the judgment, 
was tainted with the usury of the first transaction. Ector 
v. Osborne, 179 N. C. 667, 103 S. E. 388.

Users of Money Without Contract.—Where Person Is Not Entitled to Statutory Penalty.—

Where a transaction is in reality a loan of money, what-
ever may be its form, and the lender charges for the use 
of his money a sum in excess of interest at the legal rate, 
he has given the plaintiff, in the amount of the judgment, 
was tainted with the usury of the first transaction. Ector 
v. Osborne, 179 N. C. 667, 103 S. E. 388.

Revenue Interest Declared a Forfeiture.—The statute makes 
the "taking, receiving, reserving or charging usury," when 
knowningly done, i.e., intentionally done, and not by 
a mere error of calculation, a forfeiture (not mere forfeita-
ble) of the entire interest which the note carries with it, 
where the money was lent for usurious interest so paid, notwithstanding that he was in pari 
delicto in the transaction. Hollowell v. Building, etc., As-
sociation, 120 N. C. 266, 26 S. E. 781.

Overpayment by Mistake.—In an action to recover for 
overpayment of interest, when interest was not charged, 
the defendant may set up the defense of usury upon the 
agreement that the sole consideration of the bond secured by the 
mortgage was usurious interest, which had accrued upon 
the other claims executed by the defendant to the plain-

Promise of Interest Void—Note Valid.—A note executed 
and delivered as evidence of the promise of the maker to 
pay to the payee or his order a sum of money which has 
been advanced by the payee for the use of the maker, 
for the use of the payee, is void, although the payee has, knowingly, taken, received, reserved, 
or charged interest on the note at a greater rate than six 
per cent per annum, which is the legal rate in this State;
and no penalty can be had for the forfeiture of double the interest as a 
punishment for usury, since, upon the allegation of such over-
payment by mistake, no legal implications arise that the 
credit is in pari delicto in the transaction. Federal Reserve Bank v. Jones, 205 N. C. 648, 650, 172 S. E. 185.

Identity with Provisions of National Bank Act.—Our 
statutes for usury are identical with those provisions of the 
Building and Loan Association, 119 N. C. 249, 255, 26 S. E. 41.

Effect of Repeal of Old Law.—A contract absolutely void 
under the old law for being usurious, is not validated by 
the repeal of that law and the enactment of this section 
which does not invalidate the principal of a usurious con-


II. SUBSTANCE CONTROLS NATURE OF TRANSACTION.

A. The General Doctrine.

Form of Transaction Cannot Conceal Its Usurious Nature.—An express or implied loan, upon the understanding 
that the money shall be returned at a greater interest rate 
than the statute allows, whether the transaction is 
called a loan, a discount, a discount note, a bank loan, 
a mortgage, a mortgage note, or whatever other name 
may be given it, such loan or transaction is usurious 
under our usury law, and the contract is therefore 
void, although the parties have agreed in 
writing that the money shall be returned at a greater 
interest rate than that allowed by law. Loan & Trust Co. v. Yokley, 174 N. C. 573, 94 S. E. 102.

Where a transaction is in reality a loan of money, what-
ever may be its form, and the lender charges for the 
use of his money a sum in excess of interest at the legal rate,
by whatever name the charge may be called, the transaction will be held to be usurious. The law considers the substance and not the mere form or outward appearance of the transaction. If this were not so, the usury laws of the State would be evaded by lenders of money who would exact from borrowers with impunity compensation in the form of a loan, whereas the legal rate is exceeded. Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 424, 137 S. E. 156.

The courts do not hesitate to look beneath the forms of transactions alleged to be usurious in order to determine what is the reality. If this were not so, the usury laws of the State would be evaded by lenders of money who would exact from borrowers with impunity compensation in the form of a loan, whereas the legal rate is exceeded. Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 424, 137 S. E. 156.

The nature and terms of the contract determine its character as a loan and payment of a rate of interest in excess of that allowed by law, the interest thus received is usurious and comes within the intent and meaning of the statute forbidding usury. English Lumber Co. v. Wachovia Bank & Trust Co., 102 S. E. 205, 206. Between Bank and Its Customer.—Where the bank has followed an arrangement made by its depositors that the latter keep a certain per cent. of the money borrowed payable in another state, the court will not be concerned with whether or not such transactions are in truth and in reality usurious. In Bank v. Wysong, 177 N. C. 380, 99 S. E. 199, Justice Walker, speaking of a transaction alleged to be usurious, says: "This kind of usurious usury must be conceived as a bare form. But the courts have invariably stripped it of its flimsy disguises, and decided according to its substance, and its tendency and effect, when the purpose and intent of the lender is unmistakable." Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 424, 137 S. E. 156.

Where there is negotiation for a loan of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending; and however the transaction may be shaped or disguised, if a profit or return beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, whether in the form of a contract or otherwise, the courts will look to its substance and not to its mere form or outward appearance. The nature and terms of the contract determine its character as a loan and payment of a rate of interest in excess of that allowed by law, the interest thus received is usurious and comes within the intent and meaning of the statute forbidding usury. English Lumber Co. v. Wachovia Bank & Trust Co., 102 S. E. 205, 206. Between Bank and Its Customer.—Where the bank has followed an arrangement made by its depositors that the latter keep a certain per cent. of the money borrowed payable in another state, the court will not be concerned with whether or not such transactions are in truth and in reality usurious. In Bank v. Wysong, 177 N. C. 380, 99 S. E. 199, Justice Walker, speaking of a transaction alleged to be usurious, says: "This kind of usurious usury must be conceived as a bare form. But the courts have invariably stripped it of its flimsy disguises, and decided according to its substance, and its tendency and effect, when the purpose and intent of the lender is unmistakable." Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 424, 137 S. E. 156.

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Section Paid to Trust Company Held to Be a Reasonable Brokerage Fee.—$2,600 paid to a trust company for its services in handling ninety $1,000 bonds bearing interest at the legal rate was held not to constitute usury, but a reasonable brokerage fee. McCubbins v. Virginia Trust Co., 80 F. (2d) 984.

III. EQUITABLE DOCTRINES AS AFFECTING RIGHTS OF PARTIES.

A. Summary of Law and Conclusions.

Editor's Note.—The operation of the equitable doctrines whose primary purpose is to attenuate the hardships of technical rules of law, among which doctrines the relief granted by third-party equity courts against the enforcement of forerences occupies a foremost ground, and the effect upon the prevailing usury laws of the changes made in the essence of this section, have created no little diversity of opinion as to the determination of the rights of parties in a usurious transaction in proceedings of equitable nature. The legal situation may be presented from two different angles: (a) where the lender seeks to enforce the usurious contract in an equitable proceeding as a violation of the statute, allowing the court to foreclose a mortgage, (1) under the former law which made both the principal and the interest of a usurious transaction absolutely void, (2) under the present law, which deems only the principal interest void, and the covenant of the purchaser of the usurious mortgage, (1) under the former law, (2) under the present law.

Under situation (a), (1) the cases are uniform that the lender can enforce neither the principal nor the interest of his usurious claim. McBrayer v. Roberts, 17 N. C. 75. This it is believed, on the ground that the law invalidates the principal and the interest of a usurious transaction is a positive statutory law which takes precedence over the equitable doctrine of relief against forfeitures, and also on the ground that a court of equity will not give aid to a person who has exacted an unconscionable usurious bargain.

Situation (a), (2), also presents no difficulty. Here, as in the preceding situation, the court in equitable proceedings follows the exact terms of the statute, and allows the lender the recovery of his principal and disallows that of his interest.

Situation (b) is the one which presents the most difficulty. Under situation (b), (1), the court affected by the established equitable maxim that "he who seeks equity must do equity" declared that a borrower as a condition precedent to the enforcement of his mortgage must do equity, and that defendant charged and received payment of usurious interest, the findings are sufficient to support a judgment in plaintiff's favor that he recover of defendant the amount of usurious interest of this section. Polkoff v. Finance Service Co., 205 N. C. 631, 172 S. E. 356.

Usury in Fact Made Payable in This State.—Where in fact a contract for the payment of usurious interest, in violation of section, the courts will look to its substance and not to its mere form or outward appearance. The nature and terms of the contract determine its character as a loan and payment of a rate of interest in excess of that allowed by law, the interest thus received is usurious and comes within the intent and meaning of the statute forbidding usury. English Lumber Co. v. Wachovia Bank & Trust Co., 102 S. E. 205, 206.
§ 24-2

CH. 24. INTEREST

§ 24-2

124 S. E. 746, being the latest judicial utterance upon the subject. The justification of the holding seems to lie in the fact that the remedy to recover under this section is an independent action, and the submission of the facts to a court for decision, in order to prevent unnecessary delays, and a circuity of action to which the doctrine of the case would lead would frustrate that spirit; (2) that an action under this section would be the only recourse which, in unequivocal terms, declares that the debtor shall not be compelled to pay any interest when usury has been exacted. These conclusions are supported by adjudicated cases, see McIlvaine v. Roberts, 112 N. C. 558, 559, 17 S. E. 676; Ward v. Sugg, 113 N. C. 489, 18 S. E. 717; and seem sound upon principle and policy.

Under the following headline will appear the state of authority upon the subject which will exemplify the classification of situations presented above, and will indicate the diversity of opinions which the court has entertained upon the point at different times.

B. Exposition of Authorities.

Lender Precluded Even in Equity.—A court of equity is bound by the statute of usury, and, although upon a bill of the borrower, aid will be extended only upon the terms of his repaying the sum lent with interest, yet the lender can have no relief whatever, and his bill to foreclose a usurious mortgage will be dismissed. McIlvaine v. Roberts, 17 N. C. 75.

Same—Borrower in Equity.—When the borrower comes into equity, he will be made to do equity, by paying the sum lent with interest, and no fictitious equitable relief. But when the lender asks aid of equity, he must ask it on a contract not tainted by an unlawful and corrupt ingredient. McIlvain v. Roberts, 17 N. C. 75, 76, 77.

It is well settled that the penalty for usury, provided for in this section, is not applicable in injunction proceedings—equitable in nature, the principle being that he who seeks equity must do equity. Jonas v. Home Mtg. Co., 205 N. C. 493, 170 S. E. 127, citing Waters v. Garris, 188 N. C. 305, 306, 124 S. E. 334.

Where in a legal action, the defendant, a borrower of money, seeks an equitable relief and alleges usury, it is required that he make a title into a court of equity of his right to relief from a usurious contract, will be required to pay legal interest. Cook v. Patterson, 103 N. C. 127, 9 S. E. 402.

Equitable Principle Not Applicable in Legal Proceedings.—The principle that a court of equity will eliminate an usurious mortgage from the debt, which is brought by the debtor for the penalty, upon his paying the principal sum and the legal rate of interest, does not apply to an action at law involving no equitable principle. Cuthbertson v. Bank, 170 N. C. 531, 87 S. E. 333; Cheek v. Iron Belt Building, etc., Association, 127 N. C. 121, 37 S. E. 333.

The principle of equity that a debtor, seeking the aid of equity, must have the usurious element eliminated from his debt only upon his paying the principal and legal rate of interest, the only forfeiture which he can enforce being the interest in excess of the legal interest rate. North Carolina Mtg. Corp. v. Wilson, 205 N. C. 491, 171 S. E. 783.

The principle of equity that a debtor seeking, the aid of an equitable court, to have the usurious element eliminated from his debt must pay the principal sum and the legal rate of interest, the only forfeiture enforced against the creditor being the excess of the legal rate, (Ehringhaus v. Turanga, 122 N. C. 426, 30 S. E. 122; Owens v. Wright, 161 N. C. 127, 76 S. E. 735; Simonton v. Lanier, 71 N. C. 498,) such as in a case to enjoin the foreclosure of a mortgage or to grant other equitable relief, does not apply when the plaintiff seeks relief in equity. Cuthbertson v. Peoples Bank, 170 N. C. 331, 332, 87 S. E. 333.

Tender and Payment of Correct Interest.—Upon the principle that in usurious transactions, a court must see to the foreclosure of a mortgage upon the ground of usury, usury must tender the correct amount of the mortgage debt with the legal rate of interest thereon, the remedy to recover under the usury statute being an independent action at law. Miller v. Dunn, 188 N. C. 397, 124 S. E. 746.

Where the plaintiff seeks equitable relief from the foreclosure of a mortgage on his lands on the ground of usury, his remedy being by an action at law under this section, he must, under the rules of equity, offer to repay the principal sum due and the legal rate of interest thereon, in order to recover under the usury statute being an independent action at law. Miller v. Dunn, 188 N. C. 397, 124 S. E. 746.

A junior mortgagee seeking equitable relief against foreclosure of a senior mortgage because of usury should be required to tender, or at least, offer to pay the principal sum due, with legal interest thereon at six per cent. Pinch v. Maryland Cas. Co., 214 N. C. 760, 779, 200 S. E. 874.

Equitable Maxim Cannot Change the Statutory Rule.—It is entirely immaterial whether the plaintiff creditor has sought his relief by a proceeding which formerly would have been termed a suit in equity or an action at law. The distinction between a suit in equity and an action at law under a mortgage, the court will only grant relief upon payment of the principal with legal interest. This is put upon the principle that "who asks equity must do equity," but the principle that under this statute for the court to rule that the debtor is entitled to relief, with no application to a case where the right is conferred by statute, that the debtor shall be compelled to pay no interest when usury has been contracted for. Moore v. Beaman, 112 N. C. 558, 560, 17 S. E. 676.

There are some authorities to the effect that when the debtor brings the action and invokes the equitable jurisdiction of the court, as under a usurious contract, the court under a mortgage, the court will only grant relief upon payment of the principal with legal interest. This is put upon the principle "who asks equity must do equity," but the principle that under this statute for the court to rule that the debtor is entitled to relief with no application to a case where the right is conferred by statute, that the debtor shall be compelled to pay no interest when usury has been contracted for. Moore v. Beaman, 112 N. C. 558, 560, 17 S. E. 676.

Under the usury act in force up to 1886 whenever usury was reserved the entire contract was void, and neither principal nor interest, could be recovered, but this act excluded the usury, the borrower is entitled in equity to evade the usury laws, the borrower is entitled in equity to an equitable relief which would have been denied him under a usurious contract. Ballinger v. Edwards, 39 N. C. 499, this was construed to apply only on the law side of the docket, and when the debtor had to seek the aid of a court of equity, as was the case in this action, the court would be an action at law involving no equitable principle. This section, while reducing the penalty to the loss of interest, seems to have expressly intended to change the doctrine laid down in Ballinger v. Edwards, Moore v. Beaman, 112 N. C. 558, 565, 17 S. E. 676.

An usurious contract is regarded by the settled law of every court as an oppression, practiced or attempted by the lender upon the borrower. A court of equity can not therefore be invoked to aid such a contract in whole or in part, or to redress the oppressor, because the mediated injustice has, by the artifice of the intended victim, been made to recoil upon himself. Oppression can not deceive him against his interest. It would be an anomaly to array its imagined wisdom against the legislative will, or to defeat public policy by a recourse to the code of honor or morality. Moore v. Beaman, 112 N. C. 558, 565, 17 S. E. 676.

That this section may work a hardship in any case gives the courts no authority to disregard the statute or exemp tion from its provisions. What the Legislature has constitutional authority to make the statute and its meaning is plain, with no limitation making it apply only when the action is brought by the creditor, the courts have not the power to restrict it. Moore v. Beaman, 112 N. C. 558, 565, 17 S. E. 676.

There is no exception in the statute, and, equity as a separate jurisdiction being abolished, there is no ground from which the court can derive authority to grant relief. Indeed, it will be a virtual repeal of the usury law if a creditor, by dexterously securing himself by a mortgage with power of sale, can secure himself against the "forfeiture of all interest" which the statute law visits, with out exception, upon every "note or other evidence of debt" which is in any way tainted with usury. Ward v. Sugg, 113 N. C. 489, 18 S. E. 717; Smith v. Bldgs., etc., Assoc., 119 N. C. 249, 255, 26 S. E. 41. It would be an anomaly under this statute for the court to rule that the debtor must pay the principal debt, "with interest," when the statute provides that, if the debtor is made to pay the sum due to "recover back double the interest so paid." Roberts v. Ins. Co., 118 N. C. 429, 24 S. E. 780. Churchill v. Turnage, 122 N. C. 436, 437, 37 S. E. 333.

Where the payee withdraws from the borrower a part of the face amount of the note, the same being a device to evade the usury laws, the borrower is entitled in equity to recover only the sum paid, leaving the borrower in possession of the maturity of the note as against the payee under this section. Federal Reserve Bank v. Jones, 205 N. C. 648, 172 S. E. 185.

IV. RIGHTS OF SUBSEQUENT PURCHASERS.

A. Summary of Law.

Editor's Note.—In this connection two important principles of law clash in the determination of the rights of the subsequent purchaser. The first, the constitutional rule of a negotiable instrument. The criterion of negotiability of an instrument presupposes that it shall be transferable free from all defenses which may exist between the origin-
nal parties to the instrument, and is adhered to upon the consideration of promoting mediums of credit, commerce and industry. On the other hand public policy demands that debtors should enjoy full immunity from the imposition of usurious transactions. Should usury be the doctrine of negligence, it is widely held that the statute by which it is given expression would be frustrated by a transfer of the obligation to a holder in due course. To this end the impragmability of the incidents of usury and usurious transactions have been given expression to the effect that where the evidence of obligation is void in itself or is made so by statute, the defenses which are available against the payee are also available against the maker. And since the interest of a usurious obligation were rendered void in this State by the express terms of the statute, the case presented no difficulty, and the judicial decisions inevitably declared that the holder in due course of a usurious contract, which is deemed exacted under duress, to come under the general rule in favor of innocent holders for value. The case rec-ognizes the general rule, but takes mortgages out of it.

Since the establishment of the rule that usury does not render void the principal of the obligation but merely avoids the interest, there has been some question as to the applicability of the old rule to the new situation. See the dissenting opinion of Mr. Justice Burwell, in Ward v. Sugg, 113 N. C. 489, 496, 18 S. E. 717. But the holding of the Court in the latter case indicates that when the operative words, "any rate of interest that may be agreed upon," confers the right to exact the rate of interest, the party who has endorsed the note to him (Daniel on Negotiable Instruments, 289, 290, 36 S. E. 276; Ward v. Sugg, 113 N. C. 489, 492, 18 S. E. 717.)


B. Exposition of Authorities.

Banker.—The doctrine of this case is abrogated by the latter part of the second section, which follows in the language, "Shall be a Forfeiture" Construed.—The Supreme Court has expressly held that the words, "shall be a forfeiture," in this section makes void the agreement as to interest. Ward v. Sugg, 113 N. C. 489, 491, 18 S. E. 717. But see the subsequent decisions of the Court, in Ward v. Sugg, 113 N. C. 489, 496, 18 S. E. 717, to the effect that the statute does not render the usurious interest void so as to prevent an innocent purchaser of the obligation from recovering the same; and that the usurer is the person who makes the loan at an interest rate higher than the legal rate.

V. USURY LAWS AS AFFECTING CORPORATIONS.

Corporation Embraced within Usury Laws.—In the absence of special legislation, corporations are embraced in the usury laws just as natural persons are, and there is no special legislation affecting this point. Commissioners v. Atlantic, etc., R. Co., 77 N. C. 289.

Same.—Conflict of Laws.—The statute of the State of New York, forbidding corporations to plead usury as a defense, can not govern a corporation of this State sued in this State, although the bond (New York and made payable there. Commissioners v. At- lantic, etc., R. Co., 77 N. C. 289.)

Borrower May Use Lender as Witness.—To the end that the defense of usury may be answered, if the borrower in his discretion should resort to his remedy under this section he is authorized to examine the lender as a witness. Merchants Bank v. Fayetteville & Lutterloh, 81 N. C. 148.

VI. PLEADING AND PRACTICE.

Definiteness of Allegations.—In an action brought to re- cover money alleged to be due on a contract entered into between the parties, wherein the plea of usury is set up; the answer and a recovery is sought under this section for double the amount of the interest paid, the recovery sought is in the nature of a penalty; and when the facts are shown to have exceeded the usurious rate, the statute's application to the pleading as to the time and amount, before al-legations in such action are held to be sufficient, and when statements is not made no amendment to the pleadings should be allowed. Riley v. Sears, 134 N. C. 599, 70 S. E. 997.

Borrower May Use Lender as Witness.—To the end that the defense of usury may be answered, if the borrower in his discretion should resort to his remedy under this section he is authorized to examine the lender as a witness. Merchants Bank v. Fayetteville & Lutterloh, 81 N. C. 148.

Statute of Limitations.—An action to recover the penalty for usury, under this section, is barred after the lapse of two years from the accrual of the cause of action in the ab-sence of discharge or nonresidence affecting the running of the statute. Smith v. Finance Co., 207 N. C. 367, 177 S. E. 183.

Same.—Nonresident Creditor.—An action against a non-resident creditor for the statutory penalty for charging usury, who has no agent here upon whom process may be served, is not barred by the statute of limitations, nor does the fact in this case that one of the plaintiffs is a
nonresident and the other has changed his residence affect the matter. Cuthberton v. Peoples Bank, 170 N. C. 559, 185 S. E. 383.

Statute of Limitations a Part of Plaintiff's Case.—Under sec. 1-53, a period of two years is allowed for the exercise of the right of the plaintiff to recover usurious interest paid under any provision it was held that it was a part of the plaintiff's right to allege and prove that the usury was paid within two years, and that the defendant need not specially plead the limitations as in the case of the ordinary statute of limitation. See Roberts v. English Insurance Co., 118 N. C. 429, 24 S. E. 780; Rogers v. Bank, 108 N. C. 574, 13 S. E. 249.

Counterclaim Available.—While a counterclaim for usury may be set up in an action on a note under this section, such counterclaim may not be set up in an action in ejectment based on title to the property under foreclosure of a mortgage. Clayton v. Virginia Mtg. Corp. v. Wilson, 205 N. C. 493, 171 S. E. 783.

Usury Question of Law When Facts Not in Dispute.—What constitutes usury is a question of law to be determined by the court when the facts are not in dispute. Grant v. Morris & Sons, 81 N. C. 150.

When Question for Jury.—Where, in an action upon a note, the defendant pleads the usury statute, and the evidence is conflicting it was properly submitted to the jury, and in order for an agreement as to the total debt to be in the nature of a compromise and settlement and be a confession by the debtor set aside as fraudulent as to creditors, the fact that plaintiff's debt is tainted with usury entitles defendant debtor to invoke the forfeiture of interest, but does not defeat plaintiff's action, or estop plaintiff from asserting the usury statute. Virginia Trust Co. v. Lambeth Realty Corp., 215 N. C. 526, 2 S. E. (2d) 544.

Restraining Foreclosure.—The holder of a second mortgage, able and willing to pay the amount of the debt secured by the first mortgage, but alleging usury, under this section, is entitled to have a restraining order against foreclosure continued until determination of the issues. Wilson v. Union Trust Co., 200 N. C. 788, 138 S. E. 479.

Effect of Consent Judgment.—Where a controversy between the parties as to the amount of the debt has been settled by a consent judgment such judgment is conclusive and final as to any matter determined and cannot be impeached collaterally in another proceeding under this section. Torrance v. Suncorl Corp., 22 F. (2d) 946.

Failure to Instruct as to Double Recovery Is Prejudicial.—The plaintiff in his action to recover for usurious rate of interest paid and received by the defendant debtor to invoke the forfeiture of interest, not from the date thereof, but from the conclusion of law that the debtor waived the right to claim interest, is prejudicial to him and is reversible error. Bundy v. Commercial Credit Co., 200 N. C. 511, 512, 157 S. E. 860.

§ 24-3. Time from which interest runs.—Interest is due and payable on instruments, as follows:

1. All bonds, bills, notes, bills of exchange, liquidated and settled accounts shall bear interest from the time they become due, provided such liquidated and settled accounts be signed by the debtor, unless it is specially expressed that interest is not to accrue until a time mentioned in the said writings or securities.

2. All bills, bonds, or notes payable on demand shall be held and deemed to be due when demand is made, provided such demand is made, and the debtor is not prejudiced thereby. Virginia Trust Co. v. Lambeth Realty Corp., 215 N. C. 526, 2 S. E. (2d) 544.

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1. All bonds, bills, notes, bills of exchange, liquidated and settled accounts shall bear interest from the time they become due, provided such liquidated and settled accounts be signed by the debtor, unless it is specially expressed that interest is not to accrue until a time mentioned in the said writings or securities.

2. All bills, bonds, or notes payable on demand shall be held and deemed to be due when demand is made, provided such demand is made, and the debtor is not prejudiced thereby. Virginia Trust Co. v. Lambeth Realty Corp., 215 N. C. 526, 2 S. E. (2d) 544.

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§ 24-4


Same—Necessity of Demand.—A person holding money belonging to another, and demanding thereon, except from the date of demand, is not liable for interest thereon, except from the date of demand of payment made after their maturity. Burroughs v. Commissioners, 65 N. C. 234.

Same—Commencement of Action.—Where interest runs from the date when it is due and payable, no demand has been made, interest will be allowed from the date of commencement of suit. Porter v. Grimes, 98 N. C. 550, 4 S. E. 529.

Bond Payable without Interest.—Where a note or bond is made out of the estate of their wards, they may lend at any rate of interest not less than four per cent per annum and not more than the maximum legal rate. This section is not exclusive in prescribing instances in which interest is recoverable, and in proper instances interest may be recovered upon transactions not coming within the statute. Anderson Cotton Mills v. Royal Mfg. Co., 221 N. C. 479, 23 S. E. (2d) 818.

§ 24-5. Obligations due guardians to bear compound interest; rate of interest;—Guardians shall have power to lend any portion of the estate of their wards upon bond with sufficient security, to be repaid with interest annually, and all the bonds, notes or other obligations which he shall take as guardian shall bear compound interest, for which he may lend at any rate of interest not less than four per cent per annum and not more than the maximum legal rate. This section shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section. (Rev., s. 1954; Code, s. 530; R. C., c. 31, s. 90; 1786, c. 253; 1789, c. 314, s. 4; 1807, c. 721; C. S. 2308.)

Editor's Note.—The caption of this section was incorrectly punctuated prior to the Consolidated Statutes, and gave rise to at least one litigation. The comma which now appears after the word "bonds" did not then exist, consequently, the excepting clause embraced "judgments" as well as penal bonds. But it was pointed out in Chisholm's Wil. 126, N. C. 211, 96 S. E. 1031, disregarded the error and held that, though the caption of a statute may be called in aid of construction, it can not control the text when it is clear, and gave express permission to the courts of the state of North Carolina to subsequently correct in the Consolidated Statutes.

§ 24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.—All sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied. In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section. (Rev., s. 1954; Code, s. 530; R. C., c. 31, s. 90; 1786, c. 253; 1789, c. 314, s. 4; 1807, c. 721; C. S. 2309.)

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At common law a judgment did not carry interest when an execution of s.i. was issued upon it. In an action upon the judgment the plaintiff could recover interest in the way of damages for the detention of the money. The statute was passed for the purpose of amending the law in this respect. Collins v. McLeod, 30 N. C. 221. The intent was that the principal should bear interest because it was just and right that it should, and that the technical rule of the common law should not longer stand in the way. McNell v. Railroad, 38 N. C. 4, 507, 17 S. E. 295.

The section is not exclusive in prescribing instances in which interest is recoverable, and in proper instances interest may be recovered upon transactions not coming within the statute. Anderson Cotton Mills v. Royal Mfg. Co., 221 N. C. 500, 23 S. E. (2d) 818.

Application to Liquidated Demands Only.—The rule that all moneys due by contract, except those due on penal bonds, shall bear interest applies whenever a recovery is secured by the bond or note of some person in addition to the borrower. Watson v. Holton, 115 N. C. 36, 20 S. E. 183.

This in Boyett v. Hurst, 54 N. C. 167, where the guardian lends the money of his ward to a trading firm composed of two partners, who both became insolvent at the same time, and from the same causes, no security having been taken besides the names of the two partners, it was held that the guardian was entitled to interest on the money advanced. The court held that the time of this loan the partners were considered as entirely solvent and their failure was sudden and unexpected.

A guardian will be held liable for any loss resulting from the absence of any security, however solvent the debtor may have been when the loan was made. Bake v. Nicholson, 20 N. C. 104, 106, 164 S. E. 790.

A guardian's primary duty is to invest the trust fund, and he will be chargeable with interest in the absence of proof that it remained in his hands unemployed without his fault. Wilson v. Lineberger, 88 N. C. 416.

§ 24-5. Compound Interest Defined.—Compound interest is interest upon interest, where accrued interest is added to the principal sum, and that whole treated as a new principal, for the calculation of the interest for the next period. Black Law Dict., p. 636.

Calculation of Compound Interest.—The rule for compound interest on notes due guardians is "to make annual rests," making the aggregate of principal and interest due at the end of a year a part of the principal, bearing interest thenceforward for another year. Little v. Anderson, 71 N. C. 190; Ford v. Vandyke, 33 N. C. 227.

Bonds in Settlement with the Ward.—The bonds, upon which the guardian has lent the ward's money, may be transferred by him to the ward in settlement with him, and the guardian does not have to pay the ward in money. Cobb v. Fountain, 187 N. C. 315, 337, 121 S. E. 614.

As to interest on amount awarded for the taking of lands under eminent domain, see Yancey v. North Carolina State Highway, etc., Comm., 222 N. C. 106, 22 S. E. (2d) 256. Interest from the Time Money Should Have Been Paid.—The theory upon which the plaintiff recovers is that the defendant has received the money wrongfully and the law implies a promise to repay it. The action was originally entitled to recovery in a record and is such that in good conscience the defendant should repay the money wrongfully received, and from this duty the law implied a promise so to do. We see no reason why the amount should not bear interest from the day of its receipt. 42 Am. Jur. § 24-5; Case of Barlow v. Norfleet, 72 N. C. 535; Farmer v. Willard, 75 N. C. 403. The cases cited by defendant were actions in tort, wherein the jury may or may not allow interest, as in the case of conversion or seizure, and it has been usual for them to allow interest on the amount of the damages from the time of the conversion. Lance v. Butler, 135 N. C. 419, 47 S. E. 488. The rule in this State is that interest, as interest, is allowable only when expressly given by statute, or by express or implied agreement of the parties. Devereux v. Burgwin, 33 N. C. 490; Lewis v. Rountree, 79 N. C. 122. The only statute upon the subject is that contained in this section, which provides that when there is a consent judgment for a recovery of a certain sum, interest amounting to the rate of six per centum per annum shall bear interest from the time of the conversion or seizure, and it has been usual for them to allow interest in cases in which the whole amount is assessed in damages, so as to enable the clerk or the sheriff to compute the interest on the principal sum. But where the principal and interest are discriminated on the judgment, or it can be collected from an interest fund, it is best always that the court in its judgment should state that it shall bear interest from its date. Loach v. Worke, 10 N. C. 36, 40.

Judgment by Restitution from First Day of Term.—Where an assessment judgment for a recovery of a certain sum is made a lien on lands, and by its terms payable ninety days from the date of its rendition, it bears interest from the first day of the term, then the interest given being merely for the purpose of charging the money for its payment; and where the only question submitted to the court is whether interest is chargeable from the date it was payable to a further period beyond, interest for such extended period at the rate of six per cent should be allowed. In re Chisholm's Will, 176 N. C. 211, 96 S. E. 1031.

Verdict or Contract—Judgment Should Include Interest.—Where a controversy is made to depend upon whether a written agreement of a certain sum was a binding upon the defendant corporation, the court should add interest on it as from the date it was due, as a matter of law, and judgment should be rendered accordingly, and not from the date of its rendition as in Chisholm v. Mecklenburg Realty Co., 174 N. C. 671, 94 S. E. 447.

Interest on Value of Permanent Improvements on Land.—Where it has been ascertained by the verdict of the jury, upon a trial free from error, that the plaintiff is entitled to recover the defendant the value of permanent improvements which he has placed upon the land, interest on the amount of the principal sum recovered in a judgment for the same should be rendered accordingly, and not from the date of the verdict, which is to allow interest on judgments. McNeill v. Railroad, 138 N. C. 1, 30 S. E. 458.

Compromise Judgment in a Will Contest Case.—Where, in a will contest, a compromise judgment was entered whereby legacies were named in the will, but the court did not allow interest to the failure to do this, when enough appears on the face of the judgment to enable the officer to compute the amount justly due. All he is required to know is the amount of the principal, and then the statute makes a provision that amount bear interest to the time of payment. McNeill v. Railroad, 138 N. C. 1, 3, 30 S. E. 458.

Interest on Damages in Condemnation Proceedings.—Interest on damages for conversion of property, is discretionary with the court for taking his lands in condemnation; for while the jury may award interest in their verdict, the owner may not recover of the defendant the value of permanent improvements which was ordered as, under this section would draw interest from its date. Moore v. Pullen, 116 N. C. 324, 21 S. E. 195.

Interest on Damages in Condemnation Proceedings.—Interest is not allowed on a judgment rendered in the superior court for damages awarded by the jury to the owner for taking his lands in condemnation; for while the jury may award interest in their verdict, the owner may not complain when such has been ordered. The measure of a statutory remedy is not constructions with respect to it, and the absence of evidence tending to show he is entitled to it. Raleigh, etc., R. Co. v. Mecklenburg Mfg. Co., 166 N. C. 168, 22 S. E. 835.

Declared Dividend.—Where a receiver declares a dividend which he wrongfully withholds, interest should run from the time the dividend is declared. Armstrong v. American Exchange Nat. Bank, 131 U. S. 433, 470, 10 S. Ct. 540, 34 L. Ed. 747.

Interest on Surety Bond.—The surety bond of a clerk of the Superior Court is fixed as to amount in the sum of five thousand dollars, and it is an interest on the declaration of his principal, including 6 per cent interest from the time of notice given it, except from judgment thereon, when a different principle applies and the surety is liable for the amount of the judgment, until it is paid. Lee v. Martin, 188 N. C. 119, 123 S. E. 631.

The measure of the surety's liability is that of the principal, provided such liability does not exceed the penal sum.
Chapter 25. Negotiable Instruments


25-1. Definitions.

25-2. Person primarily liable on instrument.


25-4. When law merchant governs.

25-5. Acts to be done on Sunday or holiday.

25-6. Application of chapter.

Art. 2. Form and Interpretation.

25-7. Form of negotiable instrument.

25-8. What constitutes certainty as to sum.

25-9. When promise is unconditional.


25-12. Effect of omissions; seal; designation of particular money.


25-14. When payable to order.

25-15. When payable to bearer.

25-16. No formal language required.

25-17. Presumption as to date.


25-19. When date may be inserted.

25-20. When blanks may be filled.


25-22. Delivery necessary; when effectual; when presumed.

25-23. Construction, where instrument is ambiguous.

25-24. Signature must appear; trade or assumed name.

§ 24-6. Judgment by default final, clerk ascertains.—When a suit is instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, and the defendant does not plead to issue thereon, upon judgment, the clerk of the court shall ascertain the interest due by law, without a writ of inquiry, and the amount shall be included in the final judgment of the court as damages, which judgment shall be rendered therein in the manner prescribed by § 24-5. (Rev. s. 1955; Code, s. 351; R. C., c. 31, s. 91; 1707, c. 475; C. S. 2310.)

This section dispenses with a jury and directs the clerk to compute the interest preparatory to a final judgment by default in suits "instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account," contemplating the rendition of such judgment upon written instruments which themselves specify the precise sum to be paid, and need only an estimate of accrued interest. Rogers v. Moore, 86 N. C. 86, 87.

Courts' Power to Correct Mistake in Calculation.—A judgment by default upon a speciality, for the want of a plea, entered by the clerk in court, upon his calculation of interest, was held to be an office judgment, and that the court possessed the power to correct a mistake in the clerk's calculation of interest at any time upon motion. Griffin v. Hinson, 51 N. C. 154.

§ 24-7. Interest from verdict to judgment added as costs.—When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto. (Rev., s. 1955; Code, s. 529; C. S. 2311.)
CHAPTER 25. NEGOTIABLE INSTRUMENTS

Art. 5. Rights of Holder.
25-57. Right of holder to sue; payment.
25-59. When person not deemed holder in due course.
25-60. Notice before full amount paid.
25-61. When title defective.
25-63. Rights of holder in due course.
25-64. When subject to original defenses.
25-65. Who deemed holder in due course.

25-68. Liability of acceptor.
25-69. When person deemed indorser.
25-70. Liability of irregular indorser.
25-71. Warranty, where negotiation by delivery.
25-72. Liability of general indorser.
25-73. Liability of indorser, where paper negotiable by delivery.
25-74. Order in which indorsers are liable.
25-75. Liability of agent or broker.

Art. 7. Presentment for Payment.
25-76. Effect of want of demand on principal debtor.
25-77. Presentment.
25-78. What constitutes a sufficient presentment.
25-79. Place of presentment.
25-80. Instrument must be exhibited.
25-81. Presentment where instrument payable at bank.
25-82. Presentment where principal debtor is dead.
25-83. Presentment to persons liable as partners.
25-84. Presentment to joint debtors.
25-85. When presentment not required to charge the drawer.
25-86. When presentment not required to charge the indorser.
25-87. When delay in presentment is excused.
25-88. When presentment may be dispensed with.
25-89. When instrument dishonored by nonpayment.
25-90. Liability of persons secondarily liable when instrument dishonored.
25-91. Time of maturity.
25-92. When days of grace allowed.
25-93. How time is computed.
25-94. Rule where instrument is payable at bank.
25-95. What constitutes payment in due course.

25-96. To whom notice of dishonor must be given.
25-97. By whom notice given.
25-99. Effect of notice given on behalf of holder.
25-100. Effect, where notice is given by party entitled thereto.
25-101. When agent may give notice.
25-102. When notice sufficient.
25-103. Form of notice.
25-104. To whom notice may be given.
25-105. Notice when party is dead.
25-106. Notice to partners.
25-109. Time within which notice must be given.
25-110. Notice where parties reside in the same place.
25-111. Notice where parties reside in different places.
25-112. When sender deemed to have given due notice.
25-114. Time of notice to antecedent parties.
25-115. Where notice must be sent.
25-117. Who affected by waiver.
25-118. Waiver of protest.
25-119. When notice is dispensed with.
25-120. Delay in giving notice.
25-121. When notice need not be given to drawer.
25-122. When notice need not be given to indorser.
25-123. Notice of nonpayment where acceptance refused.
25-124. Effect of omission to give notice of nonacceptance.
25-125. When protest need not be made; when it must be made.

Art. 9. Discharge.
25-128. Right of party paying instrument.
25-129. Renunciation by holder.
25-130. Unintentional cancellation; burden of proof.
25-132. What constitutes a material alteration.

25-133. Bill of exchange defined.
25-134. Bill not an assignment of funds in hands of drawee.
25-135. Bill addressed to more than one drawee.
25-137. When bill may be treated as promissory note.

Art. 11. Acceptance.
25-139. Acceptance defined; how made.
25-140. Holder entitled to acceptance on face of bill.
25-141. Acceptance by separate instrument.
25-142. When promise to accept equivalent to acceptance.
25-143. Time allowed drawee to accept.
§ 25-1. Definitions.—In this chapter, unless the context otherwise requires—

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counterclaim and setoff.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

“Instrument” means negotiable instrument.


25-150. When presentment for acceptance must be made.

25-151. Failure to present in reasonable time discharges drawer and indorsers.

25-152. How presentment may be made.

25-153. On what days presentment may be made.

25-154. Presentment where time is insufficient.

25-155. Where presentment is excused.

25-156. When dishonored by nonacceptance.

25-157. Duty of holder, where bill not accepted.

25-158. Rights of holder, where bill not accepted.

Art. 13. Protest.

25-159. In what cases protest necessary.


25-161. By whom protest made.

25-162. When protest to be made.


25-164. Protest both for nonacceptance and non-payment.

25-165. Protest before maturity, where acceptor is solvent.

25-166. When protest dispensed with.

25-167. Protest where bill is lost.


25-168. When a bill may be accepted for honor.


25-170. When deemed an acceptance for honor of drawer.


25-172. Agreement of acceptor for honor.

25-173. Maturity of bill payable after sight accepted for honor.


Art. 15. Payment for Honor.

25-175. How presentment for payment to acceptor for honor made.

25-176. When delay in making presentment excused.

25-177. Dishonor of bill by acceptor for honor.

Art. 16. Bills in a Set.

25-185. Bills in a set constitute one bill.

25-186. Rights of holders, where different parts are negotiated.

25-187. Liability of holder who indorses two or more parts of a set to different persons.

25-188. Acceptance of bills drawn in sets.

25-189. Payment by acceptor of bills drawn in sets.

25-190. Effect of discharging one of a set.

Art. 17. Promissory Notes and Checks.


25-192. Check defined.

25-193. Within what time a check must be presented.

25-194. Bank may refuse to honor check more than six months old in the absence of contrary instructions.


25-196. Effect, where holder of check procures it to be certified.

25-197. Check not assignment of funds.

25-198. When stop-payment order given to bank expires.

25-199. Application to present orders.

“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print. (Rev., s. 2340; 1899, c. 733, s. 191; C. S. 2976.)

Cross Reference.—As to terms “bearer” and “holder,” see note to § 25-15.

Editor’s Note.—Especially attention is called to the fact that the purpose in enacting this statute was to bring about, insofar as possible, a uniformity of the law of the various states upon the subject. This being true, if the purpose is to be realized to the fullest extent, uniformity of interpretation is as essential as uniformity in the statutory provisions. Hence, an investigation of the decisions of the other states which interpret the N. I. L. is not only proper but almost indispensable, and such decisions are more persuasive as authority than is usually the case with the decisions of other states. While it would be impossible in a work of this nature to incorporate all the holdings of the courts of other states upon the subject, some of these decli
sions have been inserted in this chapter where it is thought they may be of great value in construing the law, or where no decision exists. The Supreme Court of North Carolina covers the special point. Some of the North Carolina cases herein annotated were decided under the Law Merchant before the N. I. I. was adopted, but should be of aid in construing this law.

Section quoted in defining bearer and holder in Stein

Cited in Fickett v. Fulford, 211 N. C. 160, 189 S. E. 488.

§ 25-2. Person primarily liable on instrument.
The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable. (Rev., s. 25-2, 1929, c. 733, s. 192; C. S. 2977.)

Cross Reference.—As to liability of parties, see §§ 25-66 to 25-75.

A surety on an instrument comes squarely within the definition of a person whose liability is primary, for he is, by the terms of the instrument, absolutely required to pay the same. Rouse v. Wooten, 140 N. C. 557, 559, 53 S. E. 430. See also Taft v. Covington, 199 N. C. 51, 153 S. E. 597; Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351.

Joint makers upon the face of a negotiable instrument are deemed to be primarily liable thereon, and in an action upon the note the burden is upon the defendants to prove any matter in release, if brought within three years. Robertson v. C. R. Co., 199 N. C. 513, 161. See also Taft v. Covington, 199 N. C. 51, 153 S. E. 597.

When a promissory note sued on has the signatures of two of the defendants on its face as joint makers and the other defendant on the back as endorser, the statute makes them each liable to the payee and, nothing else appearing, those signing as makers are primarily liable, with the right of contribution among themselves, while the one signing as endorser is secondarily liable. Raleigh Trust Co. v. York, 199 N. C. 624, 153 S. E. 263.

Indorser.—If a note, whether negotiable or not, is indorsed at the same time that it is itself made, the indorser is made, in effect, as original promisor or maker of the note. But where the note is indorsed after its delivery to the payee, the indorser is to be held as an indorser or guarantor depending upon whether the note is negotiable or not. Lily v. Baker, 88 N. C. 151, 154.

A married woman may now make executory contracts as binding as if she were a feme sole, § 52-2, with certain restrictions, § 52-12, and when she has executed a note as co-maker with her husband, a holder in due course for value, may accordingly enforce collection thereof against her as a person primarily liable on the note, and absolutely required to pay it. Taft v. Covington, 199 N. C. 51, 153 S. E. 597.

Parol Evidence as to Character of Signing.—As between the payee of a negotiable note and the signers thereof, a person shall be deemed to have signed the note in the capacity of a guarantor or endorser by parol evidence that to the knowledge of the payee he signed the same as surety and not maker. Davis v. Alexander, 207 N. C. 417, 154 S. E. 176. See also Davis v. Davis, 215 N. C. 196, 199 S. E. 542, 153 S. E. 628.


§ 25-3. What constitutes reasonable time.—In determining what is reasonable time or an unreasonable time regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case. (Rev., s. 25-3, 1899, c. 733, s. 103; C. S. 2978.)

Cross Reference.—As to failure to present bill for acceptance within a reasonable time, see § 25-10; as to payment to order, see § 25-14; and as to failure to present for acceptance a draft, see § 25-19.

As Dependent upon Circumstances. What constitutes reasonable time will vary under the facts and circumstances of different cases, and this statute expresses as definite a rule as could well be established or considered desirable. Manufacturing Co. v. Summers, 143 N. C. 102, 108, 58 S. E. 417.

Though it be inconvenient to have several rules, applicable to different classes of persons, it is more so to have one applied to a crop to be negotiated when needed, a bill of lading, and experience of the greater number. It is impossible to lay down a rule in the abstract which is equally just in its bearing on all persons, and to be applicable to the circumstances of the case, and must be determined by the jury, under the directions of the court. Raines v. Grantham, 205 N. C. 340, 343, 171 S. E. 360, citing Brittain v. Johnson, 12 N. C. 290.

Same.—Demand and Notice of Default upon Notes.—Four months, when the parties all resided in the same village, is an unreasonable time in making a demand of the maker of a note and giving notice of non-payment to the indorser. Yancey v. Littlejohn, 9 N. C. 525.

But where a demand note was given to raise money for marketing a crop to be negotiated when needed, a negotiation forty-four days after the date of making was not an unreasonable time. Colona v. Parksley Nat. Bank, 120 Va. 812, 92 S. E. 979.

Same.—Prescription of Check.—The holder of a check upon a bank located in the town of his residence may present it for payment on the day after the same is drawn, and his omission to present it sooner is no defense to the drawee bank, unless he had information of its precarious condition. First National Bank v. Alexander, 84 N. C. 30.

Cited in State, etc., Trust Co. v. Hedrick, 198 N. C. 574, 151 S. E. 723.

§ 25-4. When law merchant governs.—In any case not provided for in this chapter the rules of the law merchant shall govern. (Rev., s. 2344; 1899, c. 733, s. 196; C. S. 2979.)

Cross Reference.—As to common law declared to be in force in North Carolina, see § 4-1.

§ 25-5. Acts to be done on Sunday or holiday.—Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday, or on a holiday, the act may be done on the next succeeding secular or business day. (Rev., s. 2839; 1899, c. 733, s. 194; C. S. 2980.)

§ 25-6. Application of chapter.—The provisions of this chapter do not apply to negotiable instruments made and delivered prior to the eighth day of March, one thousand eight hundred and ninety-nine, (Rev., s. 2344; 1899, c. 733, s. 195; C. S. 2981.)


Art. 2. Form and Interpretation.

§ 25-7. Form of negotiable instrument.—An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or determinable future time; (4) must be payable to the order of a specified person or to bearer; and (5) where the instrument is addressed to a drawee, he must be named, or otherwise indicated therein with reasonable certainty. (Rev., s. 2151; 1899, c. 733, s. 1; C. S. 2982.)

Cross References.—As to certainty of sum, see § 25-8: as to unconditional promise, see § 25-9; as to fixed determinable time, see § 25-10; as to payment to order, see § 25-14; as to payment to bearer, see § 25-15.

Editor's Note.—It is apparent that this section is declaratory of the prior law upon the subject. As to certainty of amount to be paid and time of payment, see First Nat. Bank v. Bynum, 84 N. C. 25; necessity of payment in money, Johnson v. Hendeson, 76 N. C. 227.

Effect of Conditions.—A contingent condition has always defeated the negotiability of an instrument. Goodloe v. Taylor, 10 N. C. 458.

Since the passage of this law the court has held that a note, the payment of which was made dependent upon a condition expressed in a separate instrument, a deed, was not negotiable. Pope v. Righter Parey Lumber Co., 162 N. C. 206, 78 S. E. 65.

Necessity for Payment to Order or Bearer.—Subsection four was applied in Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 25.

Where an instrument is expressly made payable to a named person, such a provision clearly imports a lack of negotiability under this section. Bank of United States v. Cuthbertson, 67 F. (2d) 182, 186.

The absence of the words "to bearer" or "to order"
does not render the bonds nonassignable, but nonnegotiable.

1d. Form of Instrument.—So long as the requirements of this section are complied with, the instrument is negotiable. It has been held that the fact that the instrument is written in pencil (Gudger v. Fletcher, 29 N. C. 372, although decided prior to section this holding would seem to be applicable), or that it is under seal (First Nat. Bank v. Michael, 96 N. C. 53, 1 S. E. 855, which case was also decided prior to N. I. L., but is apparently applicable, see section 23-12) does not affect the negotiability.

To illustrate further, the provision containing words of negotiability (Johnson v. Henderson, 76 N. C. 227, though decided prior to N. I. L., this case is applicable under it), or a due bond (Purtel v. Morehead, 19 N. C. 258, a negotiable note for a specified sum, payable at a certain future date, though it provided that the whole principal sum should become payable at the option of the mortgagee upon a default in an installment, (Thorpe v. Minderman, 123 N. C. 149, 101 S. E. 412, decided under the N. I. L. of Wisconsin, which is identical with this section) is negotiable.

Although county warrants are transferable by indorsement and the indorsee or holder may sue upon them in his own name, they are not negotiable in the sense that the holder in due course is protected by the N. I. L. Wright v. Kinney, 123 N. C. 618, 619, 31 S. E. 874.

The provisions therein for their payment should be payable to bearer only, or to the registered holder only, and provisions for an extension of time, upon application of the maker, in the discretion of trustee in the deed of trust securing it, are not negotiable character. Thomas v. Moss, 202 N. C. 666, 163 S. E. 759.

A municipal bond payable to bearer, and otherwise complying as to form with the provisions of this section, is a negotiable instrument, and as such when in the hands of a holder in due course as defined by § 25-58 is not subject to defenses which would otherwise ordinarily be available to the municipal corporation by which the bond was issued. Flakers' Trust Co. v. Statesville, 203 N. C. 399, 405, 166 S. E. 169.

A bond indemnifying a bank from any loss which it might sustain by reason of its taking over the assets and discharging the liabilities of another bank, the bond being payable to the liquidating bank and not to its order, is not a negotiable instrument within the meaning of this section. North Carolina Exchange Bank v. Land Co., 128 N. C. 193, 38 S. E. 813. Since the provision in an instrument is invalid it does not affect the amount in suit in determining the jurisdiction of a proper court, e.g., v. Appalachian Land, etc., Co., 128 N. C. 193, 38 S. E. 813.

Since attorney fees are not collectible under this section an agent with special authority to pay a note due out of funds held by him is limited to a payment of the principal sum, interests and costs that have accrued at the time of payment. Hooper v. Trust Co., 190 N. C. 423, 130 S. E. 49.

Same—Foreign Contract for Attorney’s Fees.—The validity of a provision in a note for attorneys’ fees executed and payable in Georgia, must be determined by the laws of North Carolina Exchange Bank v. Land Co., 128 N. C. 193, 38 S. E. 813. And because of this section, the courts of North Carolina will not enforce such a provision. Security Finance Co. v. Hendry, 189 N. C. 549, 177 S. E. 629.

§ 25-9. When promise is unconditional.—An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with (1) an indication of a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional. (Rev., s. 2153; 1899, c. 733, s. 3; C. S. 2994.)

Cross Reference.—As to draft with bill of lading attached, see § 21-37 and notes.

Editor’s Note.—This section is declaratory of the prior law upon the subject except that very early it was held that a statement of the consideration made the instrument conditional. See Mason v. Nelson Cotton Co., 148 N. C. 492, 62 S. E. 625; and Bank v. Hatcher, 151 N. C. 359, 66 S. E. 1, which overruled the early case, Howard v. Kimball, 65 N. C. 175, and held in conformity with this section.

Retention of Title in Seller.—A written unconditional promise to pay a specified sum of money at a designated time is a negotiable instrument, and as such when in the hands of a holder in due course is not affected because the title to goods sold for which the note was given is retained in the seller until payment shall have been made; or stipulations are made in the instrument for the application of the proceeds to the obligor’s unqualified promise to pay. See Branch Banking, etc., Co. v. Leggett, 185 N. C. 65, 116 S. E. 1.

Particular Fund Provided.—Bonds issued for road building are negotiable notwithstanding that a fund is provided for their payment. While the specification of a particular fund out of which payment is to be made destroys the negotiability, a fund may be provided for payment, as in the case, without affecting H. Commissioners v. Bank, 157 N. C. 191, 72 S. E. 996.

§ 25-10. What constitutes determinable future time.—An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. An instrument is payable at a determinable future time, within the meaning of this chapter, notwithstanding the fact that it contains a provision waiving notice of protest, notice ofdishonor, and
an agreement to be bound notwithstanding any extension of time which may be granted. Or, if collaterals have been deposited as security for the payment thereof and the instrument contains a provision that if the value of the securities so deposited has so decreased or declined as to render the holder insecure, the holder may require the maker to deposit other and further collaterals to secure the same, and, upon failure to comply with such demand, to declare the instrument due at once. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, but an instrument payable at a determinable future time is negotiable, even though it may mature or be declared due upon a contingency happening before such future time. (Rev., s. 2156; 1899, c. 733, s. 4; 1923, c. 725.)

Editor's Note.—By the amendment, Public Laws 1923, there was added all that part of the section including and following the third sentence.

In 1 N. C. Law Rev., 299, in an article discussing the judicial construction of the Public Laws of 1923, Mr. Strickland's article was cited: "C. 72 of the Public Laws of 1923 amends the Negotiable Instruments Law (N. I. L.) s. 4, C. S. s. 2985 [this section] in one important respect in order to conform with banking practice. It increases the power and extends the authority of the former Reserve Bank of Richmond. (The Tar Heel Banker, April 1923, p. 14.) There are in common usage today many kinds of provisions in negotiable paper for the purpose of accelerating maturity. Thus, for example, provision may be made for the payment of any installment or of interest, the whole shall become due, [sec. 25-8, cl. 31. Or notes may be issued in a series to fall due on successive dates, and each note payable in installments with the provision that if one is dishonored the whole series is payable at once. [Chicago Ry. Equipment Co. v. Merchants Bank, 136 U. S. 268, 10 S. Ct. 999, 34 L. Ed. 349, is an example.] Other exceptions are found in chattel notes, and metal tokens, and coins, and provision for the protection of the holder of the notes, or for the protection of the obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal, nor authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions. (Rev., ss. 2154, 2346; 1899, c. 733, ss. 5, 197; 1905, c. 327; C. S. 2986.)"

Editor's Note.—All the provisions after the word "illegal" in the last sentence were inserted by the North Carolina Legislature and do not appear in the proposed Uniform Law.

A Procedure Statute.—In so far as this section relates to the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions, it is merely procedural. Monarch Refrigerating Co. v. Farmers' Peanut Co., 74 F. (2d) 790, 793. This section and §§ 1-248, 1-249, are mere procedural statutes, regulating the practice of the courts, and can, of course, be changed. The original attempt to be looked to as limiting the powers of corporations. Id.

Negotiability Not Affected by Mortgage.—The recital on the face of a note, to wit: "This is one of a series of notes secured by deed of trust or mortgage," does not affect the negotiable character of the notes under this section. Walter v. Kilpatrick, 191 N. C. 458, 461, 132 S. E. 148. Additional Act Destroying Negotiability.—A bond to pay money, and to do something else, "as to feed and clothe a slave," is not negotiable. Knight v. Wilkinson R. Co., 46 N. C. 357.

Enforcement of Foreign Homestead Waiver.—A provision in the notes waiving of the homestead exemption will not be enforced by the courts of this State although the note may have been executed by parties in another state. Exchange Bank v. Land Co., 128 N. C. 596, 59 S. E. 245. Applied in Branch Banking, etc., Co. v. Legett, 185 N. C. 65, 116 S. E. 1. See note under section 25-9.

§ 25-12. Effect of omissions; seal; designation of particular money. —The validity and negotiable character of an instrument are not affected by the fact that (1) it is not dated; or (2) does not specify the value given, or that any value has been given therefor; or (3) does not specify the place where it is drawn or the place where it is payable; or (4) bears a seal; or (5) designates a particular kind of current money in which payment is to be made. But nothing in this section shall alter or repeal any statute requiring in

[ 893 ]
certain cases the nature of the consideration to be stated in the instrument. (Rev., s. 2155; 1899, c. 295, § 2; C. S. 2987.)

Editor's Note.—Prior to this section it was held that a negotiable instrument payable in 'current funds' was not negotiable. It was also intimated that one paid in "currency was not, but that one payable in "legal tender notes" was negotiable.

See the note to the following section.

Statement of Transaction.—A negotiable instrument, setting out the transaction for which the instrument is given, cannot be negatived for the reason that due course of law was not taken, or that notice of the infirmity or defect, where there is nothing in such contract to restrict negotiability in the instrument or to indicate fraud or an existing breach. Bank v. Hatcher, 151 N. C. 359, 66 S. E. 308; Bank v. Michael, 96 N. C. 53, 1 S. E. 835.

Bonds under Seal Negotiable.—Bonds for the payment of money only, while they retain in other respects the properties and incidents of obligations under seal, are in this State put upon the footing of promissory notes and both are made negotiable securities under the statute. Pate v. Brown, 85 N. C. 166, 167.

§ 25-13. When payable on demand.—An instrument is payable on demand (1) when it is expressed to be payable on demand, or at sight or on presentation; or (2) in which no time for payment is expressed. Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand. (Rev., s. 2157; 1899, c. 733, s. 7; C. S. 2988.)

Editor's Note.—In Freeman v. Ross, 15 Ga. 253, it was held that a draft in which no time of payment was expressed was due instantly, and after presentment it became an overdue instrument and a holder after that time took with notice of all equities. One who took before presentment was due instantly, and after presentment it became an overdue instrument and a holder after that time took with notice of all equities. One who took before presentment took it overdue. Rosewell Mfg. Co. v. Hudson, 72 Ga. 20, 2 S. E. 124, and a note payable "after date" without expressing any time is payable on demand. Morrison v. Morrison, 102 Ga. 170, 29 S. E. 125. A note payable on or before a certain date is payable on that date. The maker may pay before the date if he likes, but if he wishes he may delay payment until the date named. James v. Benjamin, 72 Ga. 185.

Demand Not Necessary.—When an instrument is payable on demand it is not necessary to aver and prove demand, the suit itself is sufficient demand. Dougherty v. Western Bank, 13 Ga. 287.

Statute of Limitations.—A promissory note, payable on demand, is due immediately, and the statute of limitations in this case is the same as regards the person so issuing, accepting or indorsing it, payable on demand. (Rev., s. 2157; 1899, c. 733, s. 7; C. S. 2988.)

§ 25-14. When payable to order.—The instrument is payable when it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of (1) a payee who is not maker, drawer or drawee; or (2) the drawer or maker; or (3) the drawee; or (4) two or more payees jointly; or (5) one or some of several payees; or (6) the holder of an office for the time being. When the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty. (Rev., s. 2158; 1899, c. 733, s. 8; C. S. 2989.)

Editor's Note.—See 13 N. C. Law Rev. 80.

Negotiability.—Unless a note is payable "to the order of a special person or to bearer" it is not negotiable. Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23. So a note payable to a specific person in this case is negotiable. Insurance Co. v. Jones, 191 N. C. 176, 179, 131 S. E. 937.

§ 25-15. When payable to bearer.—The instrument is payable to bearer (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or to bearer; or (3) when it is payable to the order of a fictitious or nonexistent person, and such fact was

known to the person making it so payable; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last indorsement is an indorsement in blank. (Rev., s. 2159; 1899, c. 733, s. 9; C. S. 2990.)

The terms bearer and holder are of the same import, and where either is employed in an instrument it may be negotiated by delivery. Pryor v. American Trust Co., 15 Ga. App. 829, 84 S. E. 312.

Fictitious Payee.—A negotiable instrument payable to a fictitious payee does not make one whose name is identified as that appearing on the instrument payee, but the intention of the maker in inserting the name governs. Norton v. City Bank (Va.) 294 Fed. 839.


§ 25-16. No formal language required.—The negotiable instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof. (Rev., s. 2160; 1899, c. 733, s. 10; C. S. 2991.)

§ 25-17. Presumption as to date.—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement, as the case may be. (Rev., s. 2161; 1899, c. 733, s. 11; C. S. 2992.)

§ 25-18. Antedated and postdated.—The instrument is not invalid for the reason only that it is antedated or postdated, provided that this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. (Rev., s. 2162; 1899, c. 733, s. 12; C. S. 2993.)

When Postdated Check Subject to Payment.—Since postdated checks are payable at the time of their date and not before, the drawer cannot accept them and charge them against funds of the drawer prior to that time. The drawer does not undertake to have the funds in the drawee's hands until the time it bears date. Smith v. Maddox-Rucker Bkgl. Co., 8 Ga. App. 288, 68 S. E. 1092.

Status of Postdated Check before Maturity.—A postdated check is payable on or after the day of its date; but in the meantime it is negotiable, and the drawer cannot be charged with payment of it, since it has not become a negotiable instrument until the time it bears date. (Rev., s. 2163; 1899, c. 733, s. 13; C. S. 2994.)

§ 25-19. When date may be inserted.—When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him the date so inserted is to be regarded as the true date. (Rev., s. 2163; 1899, c. 733, s. 13; C. S. 2994.)

§ 25-20. When blanks may be filled. — Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as
a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion be negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. (Rev., s. 2164; 1899, c. 733, s. 14; C. S. 2998.)

When a principal verbally authorizes an agent to fill up with a specific sum a blank in a bond, left with him for the purpose only, and not for the purpose of transferring the property in the bond, it is conclusively presumed that a valid delivery of the bonds had been made so far as the rights of the holder are concerned. Bankers’ Trust Co. v. Statesville, 203 N. C. 399, 166 S. E. 160.

Presumption of Delivery to Payee.—Whenever a bill or note is found in the hands of the party it will be presumed that it was delivered to him, but the presumption may be rebutted. Pate v. Brown, 85 N. C. 166, 167.

Delivery to Other than Payee.—It is not necessary that delivery be made in the hands of the payee. Such delivery is sufficient to bind the maker. Irvin v. Harris, 183 N. C. 647, 192 S. E. 887.

Parol Proof of Conditional Delivery.—Contemporaneous Parol Agreements. It seems to be the rule that as against any person not a holder in due course a contemporaneous parol agreement by the party making the delivery is not sufficient to prove that the delivery was conditional, and that there was no contract on the failure of the condition. The instrument cannot be varied by such agreements. See, Robertson v. Virginia Nat. Bank, 135 Va. 166, 115 S. E. 536, Ed. Note.

Therefore it is competent to prove a collateral agreement, as between the immediate parties, making a note non-payable upon a contingency which would deprive the note of all consideration even though the note is under seal. Furginton v. McNell, 174 N. C. 420, 422, 93 S. E. 957.

But in an action upon a note the defendants were not permitted to set up the defense that as a part of the contemporaneous bargain they were given further time, until certain lands had been sold, for such would be in contradiction of the written instrument. Cherokee County v. Meroney, 173 N. C. 653, 92 S. E. 616.

§ 25-23. Construction, where instrument is ambiguous.—Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated it will be considered to be dated as of the time it was issued.

4. Where there is conflict between the written and printed provisions of the instrument the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note the holder may treat it as either at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words “I promise to pay” is signed by two or more persons, they are deemed to be jointly and severally liable thereon. (Rev., ss. 1952, 2341; 1899, c. 733, s. 17; C. S. 2998.)

Cross Reference.—As to how indorsement made, see § 25-36; as to liability of indorser, see §§ 25-69, 25-70.

Editor’s Note.—See 13 N. C. Law Rev. 81.

Note without interest.—In a note given for a specified amount “without interest” will be construed to bear interest after maturity. Dowd v. Railroad, 70 N. C. 468.

Figures Not Material.—The figures are not a material part of an instrument as the words control. State v. Longino, 62 W. Va. 310, 58 S. E. 621.

The indorsement may be on any part of the note, even the face or under the maker’s name. Colona v. Parksley Nat. Bank, 125 Va. 812, 22 S. E. 979.

§ 25-24. Signature must appear; trade or assumed name.—No person is liable on the instru-
ment whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. (Rev., s. 2167; 1899, c. 733, s. 18; C. S. 2990.)

**Name in Body of Instrument Not Necessary.—** It is not necessary that the name of the obligor appear in the note, it is sufficient that he sign it. Howell v. Parsons, 89 N. C. 387. 90 S. E. 32.

**Maker Must Show Lack of Consideration.—** Where, between the original parties, the maker sets up the want of consideration for a note he has made to the payee, as a defense in an action thereon, the burden is upon him to prove that it was a consideration, and his failure to do so will entitle the payee to a judgment in his favor. Merchants Nat. Bank v. Andrews, 179 N. C. 341, 102 S. E. 506; Finer v. Brittain, 165 N. C. 340, 81 S. E. 662.

**Instrument is Made by an Agent for its Principal, the Agent, if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability. (Rev., s. 2169; 1899, c. 733, s. 19; C. S. 3000.)**

**Sufficient Disclosure of Principal. — Where a negotiable instrument is made by an agent for its principal, the agent, in order to exempt himself from liability, must not only name the principal, but must also state his authority. If the signature is that of the principal though done by an agent. A mere description of the relation is not sufficient to relieve the agent of liability. Graham v. Campbell, 56 Ga. 258; Lester v. McIntosh, 101 Ga. 675, 29 S. E. 7.**

If the principal is distinctly indicated and the contract is in his name, the agent is not liable if he has the power to bind the principal. No form is indicated, all that is necessary is that the parties and intent be made plain. Merchants Bank v. Central Bank, 1 Ga. 418; Rawlings v. Robson, 70 Ga. 595.

**Agreement as to Personal Liability.—** Where an administrator signs in the name of the estate and thereunder writes his name as administrator, and at the time of the execution of the note the parties agree that he should not be personally liable, the administrator is personally liable thereon, in view of this section. Bank of Spruce Pines v. Vance, 205 N. C. 103, 170 S. E. 119.

**Sufficiency of Principal by Foral.—** As between themselves it may be shown that it was the intent of the parties that the principal and not the agent be bound, and that the instrument was given and accepted as such. Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665; Ocilla Southern R. Co. v. Morton, 13 Ga. App. 504, 79 S. E. 480.

But where the principal is not sufficiently described parol evidence cannot be introduced to charge him. The reason for this rule is that for a party to be bound by an instrument it must appear on the instrument. Bankhalter v. Perry, 127 Ga. 438, 56 S. E. 631; Redell v. Scarlett, 72 Ga. 56.

**Applicability to Fiduciaries. — See 9 N. C. L. Rev. 444.**

**§ 25-27. Effect of signature by procurement.—** A signature by procurement operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent so signing acted within the actual limits of his authority. (Rev., s. 2170; 1899, c. 733, s. 21; C. S. 3002.)

**Signature of Attorney.—** An attorney to whom a note is sent for collection has, prima facie, no authority to indorse the same in the name of his client, and the purchaser should inquire as to the extent of the attorney's authority. Sill v. Weisger Clothing Co., 114 N. C. 436, 438, 19 S. E. 365.

**§ 25-28. Effect of forged signature.—** When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. (Rev., s. 2171; 1899, c. 733, s. 23; C. S. 3003.)**

**Cross Reference. — As to liability of acceptor in case of forged signature, see § 25-56.**

**Editor's Note. — When a signature is forged no title can be acquired therefor. Hillman v. Cornell, 137 Va. 200, 119 S. E. 74. Such infirmity inheres in the factum of the instrument and by the terms of the statute renders it inoperative; and this is true even where the instrument is in the hands of a bona fide holder for value. Pettyjohn v. National Exch. Bank, 101 Va. 111, 43 S. E. 203. The same rule applies whether it is the signature of the maker or the indorser that is attacked.**

**Where the name of the maker of the instrument is forged, the instrument is neither a bill nor a check, since the statute provides that a forged signature is wholly inoperative. Dauenhauer v. Peoples Bank, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682.**

A bank is presumed to know the signature of its customer, and if it pays a forged check it cannot charge the amount to the account of the depositor, unless the depositor is negligent. Yarborough v. Trust Co., 142 N. C. 377, 55 S. E. 296.

**Use of drafts presented for payment by an agent, the bank must be assured of the agency to hold another as principal. Letters of instruction to the agent are not sufficient to show power to draw drafts on the principal. Bank v. Co., 143 N. C. 326, 55 S. E. 318.**

Where the clerk of the superior court executed a check to the person named in a court order, and the brother of the payee of the check, by fraudulently representing himself to be the true owner, the payee may not hold himself to be the payee, took the check to plaintiff and endorsed it upon the instrument. Burkhalter v. Perry, 127 Ga. 438, 56 S. E. 631; Redell v. Scarlett, 72 Ga. 56.
§ 25-29. Presumption of consideration.—Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.

(Rev., s. 2172; 1899, c. 733, s. 24; C. S. 3004.)

Editor's Note.—See 13 N. C. Law Rev. 52.

In Plenter Bank v. Velvertom, 185 N. C. 314, 177 S. E. 295, this section is construed with §§ 25-33 and 25-55 and it is held that one taking without indorsement takes subject to equities between the original parties, and the presumption of consideration may be rebutted.

Holder's Lack of Consideration.—Where, between the original parties, the maker sets up the want of consideration for a note he has made to the payee as a defense, in an action thereon the burden of proof is thrown upon the maker to prove his defense, and his failure to do so will entitle the payee to a judgment in his favor. Merchants Nat. Bank v. Andrews, 179 N. C. 341, 102 S. E. 500. Piner v. Brittain, 165 N. C. 411, 145 S. E. 463. See also Bank of Lewiston v. Harrington, 205 N. C. 244, 170 S. E. 916.

Where there is evidence tending to show that the president of a bank had received from the defendant an exchange of notes for the former's benefit, and the defendant's bank's action on the note admits its execution and delivery, it is prima facie evidence that the note was given for a consideration and defendant must show failure of consideration when questioned by him. American Trust Co. v. Armour, 196 N. C. 327, 145 S. E. 619.

When Holder Must Show Consideration.—While a valuable consideration is essential to the support of negotiable instruments, it is not necessary to prove that there was consideration in the mind of the person who made the instrument. Merchants Nat. Bank v. Anthony, 115 N. C. 186, 51 S. E. 728; Pridgen v. Baugh & Sons Co., 30 Fed. (2d) 353.

Instruments under Seal.—The lack of consideration cannot benefit a maker of a bond under seal because the law concludes presumptions that it was made upon consideration. Campbell v. McCracklin, 90 N. C. 491.

Hunt v. Eure, 183 N. C. 716, 177 S. E. 489.

Drafts with Bill of Lading Attached.—Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the conscience of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft, and he cannot retain the price of the goods on account of a debt due him from the consignor. Willard Mfg. Co. v. Tierney, 133 N. C. 630, 631, 45 S. E. 1026.

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§ 25-32. When lien on instrument constitutes holder for value.—Where the holder has a lien on the instrument arising either from contract or by implication of law he is deemed a holder for the extent of his lien. (Rev., s. 2175; 1899, c. 733, s. 27; C. S. 3007.)

§ 25-33. Effect of want of consideration.—Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is the result of fraud or accident.

§ 25-34. Liability of accommodation party.—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to the holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. (Rev., s. 2177; 1899, c. 733, s. 29; C. S. 3009.)
one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by indorsement by him who has the instrument. In case of a corporation the delivery of a note being made payable to X or order, indorsement by him was necessary to transfer the title and give the plaintiffs, as the holder, the benefit of the presumptions of the negotiable instrument act; and proof of such indorsement by the payee was necessary. Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803; Mayers v. McMtinmon, 140 N. C. 64, 53 S. E. 447; Myers v. Petty, 153 N. C. 462, 464, 69 S. E. 417.

§ 25-40. Special indorsement; indorsement in blank.—A special indorsement specifies the person to whom or to whose order the instrument is payable, and without proof of indorsement the holder is not one in due course. Woods v. Finley, 153 N. C. 497, 69 S. E. 502.

§ 25-39. Kinds of indorsement.—An indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. (Rev., s. 2179; 1899, c. 733, s. 31; C. S. 3011.)

Cross References.—As to indorsement by agent, see § 25-25.

In General.—The position of the indorser is immaterial, it may be on the face or the back of the instrument so long as the intention of the parties can be ascertained. Quinn v. Sterne, 26 Ga. 221; First Nat. Bank v. Messer, 176 Ga. 296, 71 S. E. 148.

Prerequisite to Indorsement on Additional Paper.—While a lack of room for further indorsements is not a prerequisite to an indorsement, an essential requirement is that the paper be physically attached or that it should have been when the indorsement was made, and that an assignment or transfer on a separate sheet to provide that the contract of indorsement provided for in N. C. 18, 91 S. E. 353: Commercial Security Co. v. Main St. Pharmacy, 174 N. C. 655, 94 S. E. 268.

Indorsement by Letter Attached to Note.—Where a note was sent to a bank as security and attached to a letter, in which it is stated that the holder did assign the note to the bank as collateral security, it was held that the signature on the letter was the indorsement. Colona v. Parkside Nat. Bank, 120 Va. 812, 92 S. E. 979.

Indorsement with Rubber Stamp.—Where the name of the drawer is stamped on the back of the note with a rubber stamp, and there is no authority to do so and with intent to indorse it, it is a valid indorsement, but does not prove it itself. Mayers v. McMtinmon, 140 N. C. 640, 53 S. E. 447.

§ 25-37. Effect of indorsement by infant or corporation.—The indorsement or assignment of the instrument by a corporation, an infant, or married woman passes the property therein, notwithstanding that from want of capacity the corporation, infant, or married woman may incur no liability thereon. (Rev., s. 2180; 1899, c. 733, s. 22; C. S. 3012.)

Editor's Note.—Married Women.—In the case of Vann v. Edwards, 128 N. C. 425, 39 S. E. 66; 130 N. C. 70, 72, 40 S. E. 833; 135 N. C. 661, 47 S. E. 784, which was decided under the prior law, and was before the Supreme Court three times, it was held that an infant may dispose of her property without the assent of her husband except in those cases where a written instrument or conveyance is required for that purpose.

The delivery of a note to the indorsee after it has been indorsed by the wife, the owner and the husband, is a sufficient conveyance. But the indorsement may be explained as having been made between intermediate parties. Coffin v. Smith, 136 N. C. 257, 38 S. E. 864.

Corporations.—If a corporation indorses a negotiable instrument when it has no power to do so it cannot be bound by subsequent holders. Savannah Ice Co. v. Canal-Louisiana Bank, etc., Co., 12 Ga. App. 221, 58 S. E. 386.

Instruments.—In stipulating that the indorsement of the instrument by an infant 'passes the property therein,' it was meant to provide that the contract of indorsement is not void, and that his indorsee has the right to enforce payment from all parties prior to the infant indorser. The incapacity of the minor cannot be avoided by prior parties. It was explained that the indorsee should become the owner of the instrument by title indefeasible as against the infant, or to make the act of indorsement an irrevocable one. The act does not consti- tute the instrument against a holder who had knowledge of the in- dorser's infancy. The quoted words are not qualified to save his rights in such an assumed case. It must be admitted that the Legislature did not intend any such radical and grossly inequitable departure from a settled and salutary rule of law." Murray v. Thompson, 156 Tenn. (9 Thomp.) 118, 188 S. W. 571.

§ 25-38. Indorsement must be of entire instrument.—An indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue. (Rev., s. 2181; 1899, c. 733, s. 32; C. S. 3013.)

In General.—An assignment of a note, to enable the assignee to sue thereon, must be made by the payee, and must be for the whole, and not for a part of the sum mentioned in the note. Martin v. Hayes, 44 N. C. 423.

§ 25-39. Kinds of indorsement.—An indorsement may be either in blank or special, and it may also be either restrictive or qualified or conditional. (Rev., s. 2182; 1899, c. 733, s. 33; C. S. 3014.)

§ 25-40. Special indorsement; indorsement in blank.—A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery. (Rev., s. 2183; 1899, c. 733, s. 34; C. S. 3015.)

Cross References.—As to right of holder to change blank
indorsed to special, see § 25-41; as to right of holder without indorsement when payable to order, see §§ 25-55 and annotations.

**Indorsement Where Note Payable to Bearer.—** Although a note payable to bearer may be transferred by delivery, it may also be transferred by indorsement of the holder, and in such case the indorser incurs the same obligation, and liability as an indorser of a note payable to order. Lilly v. Baker, 88 N. C. 151.

**Right of Indorser in Blank When Instrument Subsequently Acquired by Delivery.** An indorsement “without recourse,” but not saying to whom the bill was indorsed was an indorsement in blank, and the bill became payable to bearer; and notwithstanding that afterwards indorsed it in full or specially, yet when it came again to C. by delivery, he had a right to demand payment of the bill from any prior indorser. French v. Hill, 50 N. C. 351.

**Transfer by Blank Indorsement Presumed.** An indorsement in blank by the payee of a note is presumed to have been intended as a transfer thereof. Davis v. Morgan, 64 N. C. 570. And nothing else appearing such indorsement constitutes a transfer of the note. Coffin v. Smith, 128 N. C. 252, 38 S. E. 864; but as between the immediate parties parol evidence is admissible to show a qualified or special contract. Hoffman v. Moore, 82 N. C. 311; Bank v. Pegram, 118 N. C. 671, 24 S. E. 487; Mendenhall v. Davis, 72 N. C. 155; Hill v. Shields, 81 N. C. 251.

**Title of Attorney Holding for Collection.** A bond indorsed in blank by the attorney for collection amounts to an assignment of the title, and conveys authority to the attorney to dispose of it as his own. Parker v. Stallings, 61 N. C. 29; Bank v. Peck, 77 N. C. 7.

**Indorsement to Particular Class Is Special.** The designation of a particular class is sufficient to render an indorsement special, and therefore an indorsement to “any banker, banker or trust company” is a special endorsement preventing transfer by a subsequent holder of the signature thus making it payable to himself or some other person. Parker v. Stallings, 61 N. C. 590; Hoffman v. Moore, 15 Fed. 675; Tyson & Rawles v. Bank, 77 S. E. 864; Bank v. Rochambeau, 193 N. C. 1, 136 S. E. 259; Federal Reserve Bank v. Whittford, 227 N. C. 267, 176 S. E. 584.

**In General.** There are general and restrictive indorsements. In case of restrictive indorsement the indorser cannot indorse to one, who will become a holder in due course, and have a right to sue either indorser. A restrictive indorsement restricts the rights of the indorseree to specified stamped drafts. Jazzler v. Jacobson, 6 N. C. 138.

**Indorsed as Counterpart Security.** A note indorsed to a bank is restrictive where the indorsement is unrestricted, if it appears that the note is only indorsed as collateral security, and for collection, or it appears that the indorser has given the bank or subagent who has taken the paper for a like purpose and affected by the restriction. Boykin v. Bank, 118 N. C. 566, 24 S. E. 357; Bank v. Hubble, 117 N. Y. 384; Balback v. Barney, 23 N. C. 219.

**Transfer by Blank Indorsement Presumed.** When indorsement is restrictive which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for, or to the use of, some other person. As to note with words “without recourse” the mere absence of words implying power to negotiate does not make an indorsement restrictive. (Rev., s. 2183; 1899, c. 733, s. 35; C. S. 3016.)

**Time of Filling Blank.** Where a note is indorsed in blank, the holder has the authority to make it payable to himself or to any other person by filling up the blank over the signature of the indorser, and this may be done at or before the trial. Tyson v. Hooker, 47 N. C. 29; Lilly v. Baker, 88 N. C. 151. It then becomes a special indorsement. Tyson v. Joyner, 139 N. C. 70, 74, 51 S. E. 803.

**Indorsement Enlarging Liability.** Demand, notice and protest waived in case the note is payable to order; as for deposit or for collection, is taken and held by the bank as agent of the indorser, and for the purpose indicated, and subject to the right of the indorser to arrest payment or collection, the paper must be indorsed in blank by the subagent who has taken the paper for a like purpose and affected by the restriction. Boykin v. Bank, 118 N. C. 566, 24 S. E. 357; Bank v. Hubble, 117 N. Y. 384; Balback v. Barney, 23 N. C. 219.

**Restrictive Indorsement.** A bank may indorse a note in blank and still resell the same as its own, as it has legal title although holding in trust. Edgcombe Bonded Warehouse Co. v. Security Nat. Bank, 216 N. C. 246, 4 S. E. (2d) 853.

**Indorsement and the Right of Indorser.** Changing liability by filling blank. — In case of an indorsement in blank any holder may fill in the blank over the signature thus making it payable to himself or some other person. But filling in the indorsement over the signature of the indorser in blank indorsement into a special indorsement by payment of the bill from any prior indorser. French v. Hill, 50 N. C. 351.

**Indorsement Where Note Payable to Bearer.** Although a note payable to bearer may be transferred by delivery, it may also be transferred by indorsement of the holder, and in such case the indorser incurs the same obligation, and liability as an indorser of a note payable to order. Lilly v. Baker, 88 N. C. 151.

**Cross Reference.** See notes to § 25-45.

**Effect of Indorsement; rights of indorsee.** A restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsee acquire only the title of the first indorsee under the restrictive indorsement. (Rev., s. 2186; 1899, c. 735, s. 37; C. S. 3018.)

**Editor’s Note.** Prior to the passage of this and the preceding section it was uniformly held in this State that a bank holding a note with an indorsement in blank that collection could not bring suit in its own name, but must bring suit in the name of the indorser. In Bank v. Exum, 163 N. C. 199, 79 S. E. 498, decided after this section, the same rule was followed without calling attention to, and not referring to this and the preceding section. The case of Bank v. Rochambeau, 193 N. C. 1, 136 S. E. 259, decided the same question and follows the prior ruling.

**Indorsement Where Note Payable to Bearer.** Although a note payable to bearer may be transferred by delivery, it may also be transferred by indorsement of the holder, and in such case the indorser incurs the same obligation, and liability as an indorser of a note payable to order. Lilly v. Baker, 88 N. C. 151.

**Effect of Indorsement Without Recourse.** Notes indorsed by the payee named thereon who wrote above his signature on the back of each note: the words, “without recourse” is a qualified indorsement. Its effect is to constitute the indorser a mere assignor of the title to the note, which he held at the date of the indorsement. It does not impair the negotiable character of the note so indorsed. Bank v. Hatcher, 151 N. C. 359, 66 S. E. 308; Evans v. Freeman, 142 [ 900 ]

Alone, a qualified indorsement is not sufficient notice as to indiscriminately a negotiable instrument, but when combined with other suspicious facts it may become evidence to show its negotiability. Merchants Nat. Bank v. Branson, 165 N. C. 344, 81 S. E. 410.

Qualifying Words May Precede or Follow Signature.—The words qualifying an endorsement of a negotiable instrument, such as "without recourse" and words of like effect, may either precede or follow the signature of the transferor of title. Medlin v. Miles, 201 N. C. 683, 161 S. E. 207.

§ 25-45. Conditional indorsement.—Where an indorsement is conditional, a party is required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same or the proceeds thereof subject to the rights of the person indorsing conditionally. (Rev., s. 2188; 1899, c. 733, s. 39; C. S. 3020.)

Cross Reference.—As to indorsement with enlarged liability, see notes to § 25-43.

§ 25-46. Indorsement of instrument payable to bearer.—Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement. (Rev., s. 2189; 1899, c. 733, s. 40; C. S. 3021.)

Cross References.—As to special indorsee indorsing in blank, see notes to § 25-40; as to who is bearer, see § 25-15.

§ 25-47. Indorsement of instrument payable to two or more persons.—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. (Rev., s. 2190; 1899, c. 733, s. 41; C. S. 3022.)

Editor's Note.—See 11 N. C. L. Rev. 92.

§ 25-48. Effect of instrument drawn or indorsed to a person as cashier.—Where an instrument is drawn or indorsed to a person as cashier or other fiscal officer of a bank or corporation it is deemed prima facie to be payable to the bank or corporation; but may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer. (Rev., s. 2191; 1899, c. 733, s. 42; C. S. 3023.)

§ 25-49. Indorsement, where payee's name misspelled.—Where the name of a payee or indorsee is wrongly designated or misspelled he may indorse the instrument as there described, adding, if he think fit, his proper signature. (Rev., s. 2192; 1899, c. 733, s. 43; C. S. 3024.)

§ 25-50. Indorsement in representative capacity.—Where any person is under obligation to indorse in a representative capacity he may indorse in such terms as to negative personal liability. (Rev., s. 2193; 1899, c. 733, s. 44; C. S. 3025.)

Cross Reference.—As to liability of person signing as agent, see § 25-26.

§ 25-51. Presumption as to time of indorsement.—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue. (Rev., s. 2194; 1899, c. 733, s. 45; C. S. 3026.)

In General.—In愿意ments in blank upon negotiable instruments are presumed to be made contemporaneously with the execution of such instrument. Southerland v. Fremont, 107, N. C. 571, 125 S. E. 357.

§ 25-52. Presumption as to place of indorsement.—Except where the contrary appears, the indorsement is presumed prima facie to have been made at the place where the instrument is dated. (Rev., s. 2195; 1899, c. 733, s. 46; C. S. 3027.)

§ 25-53. Continuation of negotiable character.—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. (Rev., s. 2196; 1899, c. 733, s. 47; C. S. 3028.)

Cross Reference.—As to negotiation by prior party, see note to § 25-56.

In General.—An indorser in full, who takes up a bill, is remitted to his former title, and may strike out his indorsement and sue as indorsee those standing before him on the bill, although he may have once made a restrictive indorsement. French v. Barney, 23 N. C. 249, 221.

Suit without Striking Subsequent Indorsees.—An indorser of a note may strike out the subsequent indorsers and bring suit, or he may bring suit without striking the subsequent indorsers, as possession is prima facie evidence of payment to the indorsee. Smith v. St. Lawrence, 2 N. C. 174.

§ 25-55. Effect of transfer without indorsement.—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires in addition the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. (Rev., s. 2198; 1899, c. 733, s. 49; C. S. 3030.)

Cross Reference.—As to indorsement in blank, see § 25-40.

In General.—Where a note is payable to order and not to bearer, the indorsement of the payee is necessary to
§ 25-56. When prior party may negotiate instrument.—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. (Rev., s. 2199; 1899, c. 733, s. 50; C. S. 3031.)

Editor's Note.—In 1 N. C. Law Rev. 187 there is a discussion of cases involving this section 25-56. The rule seems to be as laid down in Adrian v. McCaskill, 103 N. C. 182, 9 S. E. 384, that one who obtains possession of a negotiable instrument after having formerly indorsed it is a holder notwithstanding the signature on the collateral note may have been indorsed, and he holds it subject to any valid defense open to the maker, and it was error to exclude evidence tending to show fraud. Mayers v. McMinnim, 140 N. C. 640, 53 S. E. 447. See also Keith v. Basicn, 153 N. C. 293, 69 S. E. 220.

§ 25-56. What constitutes holder in due course.—A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; and (4) that at the time it was negotiated to him he had no notice of any irregularity in the instrument or defect in the title of the person negotiating it. (Rev., s. 2201; 1899, c. 733, s. 52; C. S. 3033.)

Cross References.—As to defenses which may or may not be set up against a holder in due course, see § 25-63 and notes; as to defective title, see § 25-61; as to the right of holder to sue, see § 25-63; as to validity of instrument in favor of holder, see § 25-65; as to defenses which are good as against a holder in due course, see note to § 25-61.

Indorsement Necessary.—To constitute a holder in due course, it is required that the instrument be indorsed. Bank v. Yelverton, 185 N. C. 314, 117 S. E. 299; Mayers v. McMinnim, 140 N. C. 640, 53 S. E. 447. See also Keith v. Henderson Countv, 204 N. C. 21, 24, 167 S. E. 481.

Indorsement Implies “Due Course.”—The holder of a negotiable instrument duly indorsed is, prima facie, a purchaser for value, in good faith, before maturity, and without notice of an irregularity or defect in the instrument or title. Worth Co. v. International Feed Co., 172 N. C. 335, 342, 90 S. E. 295; Smathers v. Toxaway Hotel Co., 168 N. C. 69, 44 S. E. 529. The transfer by endorsement to another of a collateral note is not a holder in due course, and it makes no difference if he had no notice of the equities of the parties, he is subject to them notwithstanding. Steinhilper v. Bank, 153 N. C. 293, 69 S. E. 220.

One who obtains possession of a note or bill after endorsing it back to a prior party may negotiate in-in instrument, and take the same as he obtains it. (Rev., s. 2200; 1899, c. 733, s. 51; C. S. 3032.)

Art. 3. Rights of Holder

§ 25-57. Right of holder to sue; payment.—The holder of a negotiable instrument may sue thereon in his own name. Dillingham v. Gardner, 219 N. C. 227, 13 S. E. (2d) 478.

§ 25-58. Fraud as Preventing Party from Being Holder in Due Course.—Where the endorser alleged in his answer that he signed the note upon representations made by the maker that the payee was lending the money to the maker to finance the equipment of a law office, that in fact the note was given to the maker for funds of the payee on deposit in a bank which had been wrongfully converted by the maker, and that the payee had full knowledge of, agreed to, and participated in, the fraudulent scheme to procure the endorsement to sign the note with false representations that the answer was sufficiently broad to allege fraud, and the payee was not a holder in due course under this section. Mitchell v. Strickland, 207 N. C. 141, 176 S. E. 200.

Wrongful Procurement by Company of Holder.—Defendant's evidence tended to show that he executed the note in suit to be used to pay for shares of stock of the corporate payee, that the stock was never delivered to him and consequently he was not a holder in due course, but that it was procured from his office without his knowledge or consent by the president of the payee who was also a collecting agent for a bank, and who turned the note over to the bank as collateral for a loan made to him. Held: If in procuring the note the note the president of the company was acting as an agent of the company, knowledge of the instrument, nothing else appearing, would not be imputed to the bank and it would be a holder in due course, while, if, in procuring the note, he was acting as agent of the bank it would have imputed knowledge of the instrument and would not be a holder in due course, and therefore, it being ad-
mitted that he was an agent of the bank, an instruction
that the maker could not be held liable if the note had been
obtained by fraud, the burden of proof thereon is reversable

§ 25-59. Notice before full amount paid.—Where the transference has received notice of any
infirmity in the instrument or defect in the title of the person negotiating the same before he has
paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the
extent of the amount theretofore paid by him. (Rev., s. 2203; 1899, c. 733, s. 54; C. S. 3035.)

Cross Reference.—As to what constitutes notice, see § 25-

§ 25-60. Notice before full amount paid.—Where the transference has received notice of any
infirmity in the instrument or defect in the title of the person negotiating the same before he has
paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the
extent of the amount theretofore paid by him. (Rev., s. 2203; 1899, c. 733, s. 54; C. S. 3035.)

Cross Reference.—As to what constitutes notice, see § 25-

In General.—The title passes to one who takes a negotiable
paper without notice of any defect or equities no matter how
little he paid, in the absence of fraud. If there is fraud
involving the maker, he is not entitled to the benefit of the

§ 25-61. When title defective.—The title of a person
who negotiates an instrument is defective
within the meaning of this chapter when he
obtained the instrument, or any signature thereeto, by fraud, duress or force and fear or
other unlawful means, or for an illegal considera-
tion, or when he negotiates it in bad faith or
under such circumstances as amount to a fraud. (Rev., s. 2204; 1899, c. 733, s. 55; C. S. 3036.)

Cross Reference.—As to burden of proof when title de-

Editor's Note.—A careful reading of this section will reveal
that it applies to "the title of a person who may not
have full knowledge or of the means of
knowing the circumstances. The question of whether or
not fraud, duress, usury, illegality of consideration, etc.,
will render the instrument unenforceable in the hands of
a person in due course without notice presents itself.

In the case of the fraud which is sufficient to avoid an
instrument as to such holder there is a considerable
amount of conflict. See 8 C. J. sections 1048, 1049, pp. 789, 790.
However, it would seem that the better rule is that fraud
ordinarily renders the instrument voidable only, and there-
fore, in accordance with the general rule it should be that where
the holder is one in due course held against a holder in
due course as to such holder there is a considerable amount
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the holder is one in due course held against a holder in
due course as to such holder there is a considerable amount
of conflict. See 8 C. J. sections 1048, 1049, pp. 789, 790.
§ 25-62. What constitutes notice of defect.—To constitute a notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith. (Rev., s. 2205; 1899, c. 733, s. 55; C. S. 3037.)

In General.—Observables irregularities on the face of the instrument will no longer suffice to affect the rights of a holder in due course. It is necessary that circumstances set out in this section should occur in order to charge the holder with notice. Holleman v. Trust Co., 185 N. C. 49, 110 S. E. 323; Critcher v. Ballard, 180 N. C. 111, 112, 104 S. E. 134; Smathers & Co. v. Toxaway Hotel Co., 162 N. C. 346, 78 S. E. 316; Smathers & Co. v. Toxaway Co., 167 N. C. 469, 470, 83 S. E. 844.

1. A bank taking a note indorsed to it by its president takes notice to the president constitutes notice to the bank. Le Duc v. Moore, 111 N. C. 516, 15 S. E. 466.

2. A bank relying on the knowledge of the person, has knowledge of such facts and circumstances which make it incumbent on him to inquire as to the character of the note which he purchased, when the note is affected with fraud, or the facts would disclose. Bunting v. Hicks, 22 N. C. 130, 32 Am. Dec. 609; Hubert v. Douglas, 94 N. C. 122. Loftin v. Hill, 131 N. C. 106, 110, 42 S. E. 548. But knowledge of the circumstances within the bank's notice to the same defenses as if it were nonnegotiable. Fed. (2d) 554.

3. To state that a holder in due course and who is not himself a party to the same defenses as if it were nonnegotiable. Fed. (2d) 554.

4. To state that a holder in due course and who is not himself a party to the same defenses as if it were nonnegotiable. Fed. (2d) 554.

5. To state that a holder in due course and who is not himself a party to the same defenses as if it were nonnegotiable. Fed. (2d) 554.

§ 25-63. Rights of holder in due course. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. (Rev., s. 2206; 1899, c. 733, s. 57; C. S. 3038.)

Cross Reference.—For discussion of rights of holder taking through a holder in due course, see note to § 25-62.

In General.—One taking a note as a holder in due course can, under this section, enforce his right against all prior parties, except in case of a defective title as provided in section 25-61. Bank v. Mena, 110 N. C. 550, 17 S. E. 918; Davidson v. Powell, 114 N. C. 575, 19 S. E. 601; Bank v. Griffin, 135 N. C. 72, 68 S. E. 919; Standing Stone Nat. Bank v. Walser, 163 N. C. 53, 54, 77 S. E. 1006. But see section 25-65 as to burden of proof where defect is shown.

The maker of a note may not set up defenses he may have against the payee of the note in an action by a holder in due course, but where the holder is not a holder in due course without notice, the maker may set up all defenses which he may have as against the payee. Federal Reserve Bank v. Atmore, 200 N. C. 437, 157 S. E. 129. Where the same suitably alleged, it is sufficient to state that the defendant was not a holder in due course for value without notice, all defenses which the defendant may have are presentable under the pleadings. Id.

Exempt from Scheme to Evade Usury Laws.—Where a borrower is entitled to enforce an equity against the payee because of a device to evade the usury laws, this equity cannot be enforced against a holder in due course. Federal Reserve Bank v. Jones, 203 N. C. 648, 650, 172 S. E. 185.


§ 25-64. When subject to original defenses.—In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument has all the rights of such former holder in respect of all parties prior to the latter. (Rev., s. 2207; 1899, c. 733, s. 58; C. S. 3039.)

Editor's Note.—The dictum in Pierce v. Carlton, 184 N. C. 175, 184 S. E. 176, 157 S. E. 129, does not apply to where a party to the fraudulent in procuring the instrument but who takes with notice, and then passes the instrument on to a holder in due course, will take a good title and hold as a holder in due course when he acquires the instrument from the holder in due course. The court cites Calvert's Negotiable In-
The holder by indorsement must show that the instrument was indorsed before maturity. An indorsement by a rubber stamp is a valid indorsement but does not prove itself. *N。 C。 102, 109, 55 S。 E。 522； Bank v。 Fountain, 148 N。 C。 590, 62 S。 E。 738； Park v。 Exum, 156 N。 C。 228, 72 S。 E。 309； Standing Stone Nat。 Bank v。 Walser, 162 N。 C。 53, 63, 77 S。 E。 1006； Fidelity Trust Co。 v。 Allen, 165 N。 C。 45, 46, 79 S。 E。 263； Smathers & Co。 v。 Toxaway Hotel Co。, 168 N。 C。 69, 72, 84 S。 E。 47； Bank v。 Branson, 165 N。 C。 344； 81 S。 E。 510； Discount Co。 v。 Baker, 176 N。 C。 546, 97 S。 E。 495。

The credibility of the plaintiff's evidence that he is a holder in due course is for the jury. *Manufacturing Co。 v。 Summers, 143 N。 C。 102, 105, 55 S。 E。 522； Bank v。 Fountain, 148 N。 C。 590, 62 S。 E。 738； Park v。 Exum, 156 N。 C。 228, 72 S。 E。 309； Standing Stone Nat。 Bank v。 Walser, 162 N。 C。 53, 63, 77 S。 E。 1006； Fidelity Trust Co。 v。 Allen, 165 N。 C。 45, 46, 79 S。 E。 263。 Rule applied in Merchants Nat。 Bank v。 Howard, 188 N。 C。 543, 550, 125 S。 E。 126。 Intermediary Bank's Burden of Proving Title—Where a nonresident debtor attaches in the hands of a local bank, the burden is on the intervenor to show that the property was attached. *Forsyth Mills v。 Milling Co。, 148 N。 C。 161, 114 S。 E。 756。 Renewal Note Subject to Defenses against the Original—If a note is negotiated after maturity and then taken up by a renewal note, the renewal note is subject to all the equities the original note was subject to. *Grace v。 Strickland, 188 N。 C。 369, 124 S。 E。 856。 Section applied in Manufacturing Co。 v。 Summers, 143 N。 C。 102, 105, 55 S。 E。 522； Dyer v。 Bray, 208 N。 C。 248, 180 S。 E。 173。 Cited in Dixon v。 Smith, 204 N。 C。 480, 165 S。 E。 683； Mansfield v。 Wade, 208 N。 C。 790, 182 S。 E。 475； Pickett v。 Fulford, 211 N。 C。 160, 189 S。 E。 485。 Art。 6。 Liabilities of Parties。 § 25-66。 Liability of maker。—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. （Rev。, s。 2209； 1899, c。 733, s。 60； C。 S。 3041。） Quoted in White v。 Johnson & Sons, 205 N。 C。 773, 774, 172 S。 E。 370。 Cited in Taft v。 Covington, 199 N。 C。 51, 56, 151 S。 E。 597； Howell v。 Robertson, 149 N。 C。 517, 520 S。 E。 32； Wachovia Bank & Trust Co。 v。 Black, 198 N。 C。 219, 151 S。 E。 269； Davis v。 Alexander, 207 N。 C。 417, 419, 177 S。 E。 417。
§ 25-67. Liability of drawer.—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be placed for the drawer by insert in the instrument an express stipulation negating or limiting his own liability to the holder. (Rev., s. 2210; 1899, c. 733, s. 61; C. S. 3042.)

Cross Reference.—See note under § 53-71.

Right of Drawer to Arrest Payment.—A drawer of a draft, ordinarily standing towards subsequent parties as a general endorser, may, by appropriate words appearing on the back check draw against the instrument as to persons affected with notice, retain the right to arrest payment. Murchison Nat. Bank v. Dunn Oil Mills Co., 150 N. C. 718, 116 A. I. R. 682.

Where a draft or bill is transferred to a bank by restrictive indorsement, as for deposit or for collection, the instrument is taken and held by the bank as agent for the indorser and the instrument so acts in behalf of the indorser, and the right of the indorser to arrest payment or divert the proceeds in the hands of any intermediate or subsequent who has taken the paper for like purpose and affected by the receiver, when making presents, is fortified by §§ 2211, 2212, 1899, c. 733, s. 62; C. S. 8044.)


Rights of Holder without Notice of Restrictions.—When a bank to which a draft, appearing on its face to be negotiable, is forwarded by another bank, purchases it for value, without notice of an agreement restricting its negotiation, the drawer may not stop payment of the draft as against the rights of the bank so holding the draft. Murchison Nat. Bank v. Dunn Oil Mills Co., 150 N. C. 718, 64 S. E. 885.


§ 25-68. Liability of acceptor.—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits (1) existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse. (Rev., s. 2211; 1899, c. 733, s. 62; C. S. 3043.)

Cross Reference.—As to unlawfulness of bank to handle draft connected with receipt for liquor sale the sale of which is unlawful, see § 25-99.

Burdon on Accrue to Prove Signature of Drawer.—When the drawee draws against a depositor of the bank, the bank is held to act in good faith, and the drawee as true and genuine, and the manner in which the bank makes presentment, and the position of the bank as trustee, are shown to be sufficient to establish the fact of the endorsement and the genuineness of the signature, unless there is other evidence to the contrary. This is true where the bank is called upon to pass judgment on the endorsement which is executed in writing, and it is sufficient to warrant the bank to the payee and to all subsequent parties. State Bank v. Savings, etc., Co., 178 N. C. 184, 186, 100 S. E. 304.

§ 25-69. When person deemed indorser.—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. (Rev., 2212; 1899, c. 733, s. 63; C. S. 3044.)

In General.—A person indorsing a note at the time it is made shall be held as original promisor. If the note is indorsed after delivery, and the payee and negotiated, the indorsement binds the indorser as indorser only, but if it is not negotiated, he is liable as guarantor. Lilly v. Baker, 88 N. C. 353.


Such "appropriate words" as provided under this section, must appear upon the instrument itself or in some sufficient writing attached thereto and becoming an essential and integral part thereof, and parol evidence is in no event admitted to show that one signing as endorser is primarily liable on the note. Waddell v. Hood, 207 N. C. 250, 176 S. E. 558.

Indorsement as Surety.—When it is set out in the body of a note that indorsers on the back guarantee, they shall be held liable as sureties and not as indorsers. Dillard v. Merchantile Co., 190 N. C. 225, 129 S. E. 598.

Parol Evidence Admissible.—When parol evidence is admissible as between the parties to explain the instrument, for example, "the surety on the face of a note, and an accommodation indorser, may, as between themselves, be shown by parol to be co-sureties by virtue of a verbal understanding to that effect. So, several successive accommodation indorsers of a negotiable instrument may be shown by parol to be co-sureties." Brandt Suretyship Guaranty, Vol. 1 (3 ed.), pp. 562-563. Evers v. St. Louis, 168 N. C. 585; Gillam v. Walker, 189 N. C. 129, 126 S. E. 424.

It is therefore not competent to show that the liability of one whose name is written on the back of a note as an indorser has been created by parol, or that such person, in accepting the note without notice of an agreement restricting its negotiation, was acting as surety in the belief that he was acting as guarantor, or that he was so acting, and by reason thereof the note was not payable to the payee and all subsequent parties. So, where the note was payable to the order of a third person, he was liable as indorser and not as surety. Bushee v. Creech, 192 N. C. 499, 500, 135 S. E. 226; Fourth Nat. Bank v. Wilson, 168 N. C. 537, 84 S. E. 666.

Where the directors of a corporation sign a negotiable instrument on the back thereof as endorsers, the holder may not show by parol that they signed as co-makers, or guarantors, or sureties. Wrenn v. Lawrence Cotton Mills, 198 N. C. 99, 150 S. E. 676.

Testimony in direct contradiction of the written agreement as expressed in the endorsement to "guarantee payment of this note ... with full knowledge of this knowledge of this contract," should be excluded under this section. Carr v. Clark, 205 N. C. 265, 266, 171 S. E. 88.


§ 25-70. Liability of irregular indorser.—Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties; (2) if the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or
§ 25-71. Warranty, where negotiation by delivery.—Every person negotiating an instrument by delivery or by a qualified indorsement warrants:

(1) that the instrument is genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities other than bills and notes. (Rev., s. 2214; 1899, c. 733, s. 65; C. S. 3046.)

Cross Reference.—As to qualified indorsement, see § 25-44.

§ 25-72. Liability of general indorsor.—Every indorser who indorses without qualification warrants to all subsequent holders in due course (1) that the matters and things mentioned in subdivisions one, two and three of § 25-71; and (2) that the instrument validly and subsisting. And in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its value it guarantees to a holder in due course among other matters and things that the instrument, at the time of the indorsement, was a valid and subsisting obligation. Wachovia Bank, etc., v. Tatham, 204 N. C. 198, 167 S. E. 626.

Cross Reference.—As to words which exempt transferor from liability as general endorser, see § 25-44 and note.

§ 25-73. Liability of substituted indorsor.—Where an endorser as substitute succeeds to the rights and obligations of another endorser with whom he has substituted his name on a negotiable note, he is subject to all the warranties which prevail in case of unqualified indorsement on an instrument negotiable by delivery only. (Rev., s. 2216; 1899, c. 733, s. 67; C. S. 3048.)


§ 25-74. Order in which indorsors are liable.—As respects one another, indorsors are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsors who are deemed to indorse jointly and severally. (Rev., s. 2217; 1899, c. 733, s. 68; C. S. 3049.)

Cross Reference.—As to liability of substitute holder when instrument is negotiated back to prior holder, see § 25-56.

§ 25-75. Liability of agent or broker.—The provisions made as to warranties which prevail in case of unqualified indorsements refer to lawful transactions, and do not relate to transactions coming within the meaning of our usury laws. Seabury v. Duffy, 158 N. C. 432, 74 S. E. 355.

Parol Evidence.—Where an unqualified endorsement is supported by a valuable consideration and the endorser cannot introduce parol evidence of an agreement entered into by the parties contemporaneously with the execution of the note that payable was to be made from funds other than those which are represented by the note, he cannot introduce parol evidence in contradiction of the written terms of the note that he was not to be held liable in any event. Kilpatrick v. Walthall, 142 N. C. 54, 54 S. E. 847.

Set-off of Deposits against Note.—Where a depositor in an insolvent national bank had indorsed a note on which he was in fact primarily liable, and procured the bank to discount it as a benefit to himself in suit by the bank's receiver to recover the amount of the note, to set off his deposit in the bank against his liability on the note, Williams v. Rose, 215 Fed. 506; 17 L. R. A. 462; Scott v. Armstrong, 146 U. S. 499, 36 L. Ed., 1059; Yardley v. Philiber, 167 U. S. 344, 346, 124 L. Ed. 192; Williams v. Coleman, 190 N. C. 368, 371, 129 S. E. 82.

Not Applicable to Usury. — The provisions made as to limitations which prevail in case of unqualified indorsor warranties refer to lawful transactions, and do not relate to transactions coming within the meaning of our usury laws. Seabury v. Duffy, 158 N. C. 432, 74 S. E. 355.

Parol Evidence.—Where an unqualified endorsement is supported by a valuable consideration and the endorser cannot introduce parol evidence of an agreement entered into by the parties contemporaneously with the execution of the note that payable was to be made from funds other than those which are represented by the note, he cannot introduce parol evidence in contradiction of the written terms of the note that he was not to be held liable in any event. Kilpatrick v. Walthall, 142 N. C. 54, 54 S. E. 847.

Contributions between Indorsors. — An indorser of a negotiable instrument who has paid a judgment obtained thereon in an action against him and the insolvent makers, cannot, nothing else appearing, recover the amount in his action thereon for a subsequent indorser. Lynch v. Lonard, 153 N. C. 270, 69 S. E. 146.


An indorser of a negotiable instrument who paid a judgment obtained thereon in an action against him and the insolvent makers, cannot, nothing else appearing, recover the amount in his action thereon for a subsequent indorser. Lynch v. Lonard, 153 N. C. 270, 69 S. E. 146.


Parol Evidence against Right of Indorsement.—An action upon a negotiable note by a remote indorsor, who purchased bona fide, for full value and without notice, the payee, who indorsed the note in blank, evidence of an agreement between the payee and his indorsee that the note was not one liable on his indorsement is not admissible. Hill v. Shields, 81 N. C. 250.

Cross Reference.—See § 25-44 for set-off of deposits against a note. § 25-75. Liability of agent or broker.—Where
a broker or other agent negotiates an instrument without endorsement he incurs all the liabilities prescribed by § 25-71, unless he discloses the name of his principal and the fact that he is acting only as agent. (Rev. s. 2218; 1899, c. 733, s. 69; C. S. 3060.)

Cross Reference.—See also §§ 25-26 and 25-50.

Art. 7. Presentment for Payment.

§ 25-76. Effect of want of demand on principal debtor.—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. (Rev., s. 2219; 1899, c. 733, s. 70; C. S. 3051.)

Cross References.—As to when presentment is not necessary in order to charge drawer and indorsers, see §§ 25-85, 25-86; as to place of presentment, see § 25-79; as to notice to cease to be liable before presentment, see §§ 25-82 et seq.

Presentment Necessary to Hold Drawers.—When a draft on a third person is given in settlement of an antecedent debt, it is the duty of the holder to present it, and a failure to do so will discharge the debt. Mauney & Son v. Coit, 80 N. C. 300.

Presentment Must Be Made in a Reasonable Time to Hold Drawer.—A drawer of a bill, having funds in the hands of the drawee has a right that the bill be presented for payment, and he cannot be charged unless the bill was presented in a reasonable time, although he knew at the time of drawing the bill that the drawee was insolvent. Cedar Falls Co. v. Wallace, 83 N. C. 225; Long v. Stephen-son, 72 N. C. 569.

Effect of Guaranteeing Prior Indorsements.—A certificate of deposit forwarded to another bank by the drawer bank must be presented in a reasonable time, and if the drawer bank presented the drawer is not liable, although it stamped the certificate "Prior indorsements guaranteed." Bank v. Trust Co., 159 N. C. 85, 74 S. E. 747.

Presentment of Checks.—A postdated check, like any other check need not be presented on the day of its date, but may be presented within a reasonable time thereafter, and the fact that the drawer had money on deposit to meet it on that date, but did not have it when the check was presented, is not equivalent to a "tender of payment." Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. Rep. 339.

Sufficient Funds on Deposit May Amount to Tender.—If a certificated bank for acceptance was the authorized agent of the plain-tiff for acceptance was the authorized agent of the plain-tiff. Burrus v. Life Ins. Co., 124 N. C. 9, 12, 32 S. E. 323.

§ 25-79. Place of presentment. — Presentment for payment is made at the proper place (1) where a place of payment is specified in the instrument and it is there presenteled; (2) where no place of payment is specified, but the address of the person to make the payment is given in the instrument, and it is there presenteled; (3) where no place of payment is specified and no address is given and the instrument is presenteled at the usual place of business or residence of the person to make payment; (4) in any other case if presenteled to the person to make payment whenever he can be found, or if presenteled at his last known place of business or residence. (Rev., s. 2222; 1899, c. 733, s. 72; C. S. 3053.)

Place of Payment Specified.—Whenever a bill of exchange or draft is made payable in a particular place, the burden is upon the maker to prove that place is sufficient, and a personal one is not necessary whether the maker lives at the same place or a different one. Sullivan v. Mitchell, 4 N. C. 93. But the maker is not bound to pay it until it is presenteled at the place where it is expressed to be payable. Bank v. Bank, 35 N. C. 75.

Presentment of a draft for payment at the place of its date is sufficient, no presentment of presentment appearing. Wittkowicz v. Smith, 84 N. C. 671.

§ 25-80. Instrument must be exhibited. — The instrument must be exhibited to the person from whom payment is demanded, and, when it is payable, must be delivered up to the party paying it. (Rev., s. 2223; 1899, c. 733, s. 74; C. S. 3055.)

Lost or Destroyed Note.—The provisions of this section that upon presentment of a note it must be delivered up to the party paying it, does not apply where the note has been lost or destroyed, and, under the facts of this
§ 25-81. Presentment where instrument payable at bank.—Where the instrument is payable at a bank presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. (Rev., s. 2224; 1899, c. 733, s. 75; C. S. 3056.)

§ 25-82. Presentment where principal debtor is dead.—Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found. (Rev., s. 2225; 1899, c. 733, s. 76; C. S. 3057.)

§ 25-83. Presentment to persons liable as partners.—Where the persons primarily liable on the instrument are liable as partners and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. (Rev., s. 2226; 1899, c. 733, s. 77; C. S. 3058.)

In General.—Where the protest of a notary public stated that he presented a bill, which purported to be drawn on a fictitious person, or one of the members thereof, it was held to be evidence that A was a member of that firm, and that presentment was properly made. Elliott v. White, 31 N. C. 98.

§ 25-84. Presentment to joint debtors.—Where there are several persons not parties primarily liable on the instrument and no place of payment is specified, presentment must be made to them all. (Rev., s. 2227; 1899, c. 733, s. 78; C. S. 3059.)

§ 25-85. When presentment not required to charge the drawer.—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. (Rev., s. 2228; 1899, c. 733, s. 79; C. S. 3060.)

In General.—The drawers, having funds in the hands of the drawee, had the right to expect their bill to be honored by them, and they were entitled to presentment of their bill in a reasonable time and strict notice if dishonored on the part of the plaintiff, although the defendants at the time they drew the bill may have believed the drawers were insolvent and had been so notified by them and requested not to draw on them. Cedar Falls Co. v. Wallace Bros., 83 N. C. 225, 228.

§ 25-86. When presentment not required to charge the indorser.—Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented. (Rev., s. 2229; 1899, c. 733, s. 80; C. S. 3061.)

This section is not applicable where holder testifies that his acceptance is not for accommodation. Hyde v. Tatham, 201 N. C. 167, 168 S. E. 632.

Lack of Funds with Which to Pay.—Where the treasurer of a corporation indorses the corporate note payable at a certain bank, and at its maturity the corporation has no funds at the bank, it is not necessary that the note should have been presented to the bank for payment. Meyers Co. v. Battle, 170 N. C. 168, 66 S. E. 1034.

Burden of Proof on Holder.—If it is in fact an accommodation paper, then, notwithstanding the form of the paper, the drawer would be primarily liable and not entitled to notice, but the burden to show this is on the holder, and the burden of being a mere indorsement of the paper governs and the drawer is entitled to notice. National Bank v. Bradley, 117 N. C. 526, 530, 23 S. E. 455.

§ 25-87. When delay in presentment is excused. —Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence. (Rev., s. 2230; 1899, c. 733, s. 81; C. S. 3062.)

Delay Caused by One Liable.—Where an agent has incurred a personal liability on a negotiable instrument given in part of the consideration therefor, not to avoid payment on the ground of delay in presenting it for payment, when the delay was at his own request and by his own conduct. Caldwell Co. v. George, 176 N. C. 602, 97 S. E. 507.

§ 25-88. When presentment may be dispensed with.—Presentment for payment is dispensed with (1) where after the exercise of reasonable diligence presentment as required by this chapter cannot be made; (2) where the drawee is a fictitious person; (3) by waiver of presentment, express or implied. (Rev., s. 2231; 1899, c. 733, s. 82; C. S. 3063.)

Where Presentment Cannot Be Made.—Where the maker is a nonresident without any domicile in the State, and goes on a voyage about the time the note falls due, no demand on him is necessary in order to charge the indorser. Moore v. Coffield, 12 N. C. 247.

Implied Waiver of Presentments.—Where a check was given for county bonds and the bonds could not be issued at once, and the drawer cooperated with the county to get the bond issue, there is a sufficient implied waiver of immediate presentment, and a presentment within a reasonable time after the bond issue was sufficient to bind the drawer. Caldwell County v. George, 176 N. C. 602, 97 S. E. 507.

§ 25-89. When instrument dishonored by non-payment.—The instrument is dishonored by non-payment when (1) it is duly presented for payment and payment is refused or cannot be obtained; or (2) presentment is excused and the instrument is overdue and unpaid. (Rev., s. 2232; 1899, c. 733, s. 83; C. S. 3064.)

§ 25-90. Liability of persons secondarily liable when instrument dishonored. —Subject to the provisions of this chapter, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder. (Rev., s. 2233; 1899, c. 733, s. 84; C. S. 3065.)

Cross Reference.—As to right of surety to demand payee or holder to bring suit when he considers himself in danger of loss, see § 26-7.

§ 25-91. Time of maturity. —Every negotiable instrument is payable at the time fixed therein without grace, except as allowed by the succeeding section. When the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day. (Rev., s. 2234; 1899, c. 733, s. 85; 1907, c. 897; 1909, c. 800, s. 1; C. S. 3066.)

§ 25-92. When days of grace allowed.—All bills of exchange payable within the state, at sight, in which there is an express stipulation to that effect and not otherwise, shall be entitled to days of grace as the same are allowed by the custom of merchants on foreign bills of exchange payable at the expiration of a certain period after
§ 25-93

The times when payment is due, or when drafts are payable on demand, or drafts payable on demand. (Rev., s. 2235; Code, s. 43; 1905, c. 327; 1907, c. 861; C. S. 3067.)

§ 25-93. How time is computed.—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment. (Rev., s. 2236; 1899, c. 733, s. 86; C. S. 3068.)

§ 25-94. Rule where instrument is payable at bank.—Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. (Rev., s. 2237; 1899, c. 733, s. 87; C. S. 3069.)

Where a note is made payable at a certain bank it amounts to an order to the bank to pay same out of the maker's deposit upon presentment when due. Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351. (Rev., s. 2241; 1899, c. 733, s. 90; C. S. 3072.)

§ 25-95. What constitutes payment in due course.—Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. (Rev., s. 2238; 1899, c. 733, s. 88; C. S. 3070.)


§ 25-96. To whom notice of dishonor must be given.—Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. (Rev., s. 2239; 1899, c. 733, s. 89; C. S. 3071.)

Cross Reference.—As to notice to principal, see § 25-76.

In General.—The draft having been accepted, the drawee became primarily liable, and in the event of dishonor notice must be given to all those who are secondarily liable as drawee and indorsers. Denny v. Palmer, 27 N. C. 610; Tiedman Com. Paper, sec. 336; 3 Randolph Com. Paper, sec. 112; 2 Daniel Eng. Inst., sec. 993; Brown v. Tague, 52 N. C. 573; National Bank v. Bradley, 117 N. C. 526, 530, 23 S. E. 455.

Following the statute it was held in Perry Co. v. Taylor Bros., 148 N. C. 362, 62 S. E. 421, that failure to give notice of dishonor discharged the indorser from further liability. Barber v. Abeher, 175 N. C. 603, 604, 96 S. E. 43.

Notice to Surety.—A surety on a note is not discharged from liability on dishonor by reason of his consent to an extension of time for payment granted the principal. Davis v. Royall, 204 N. C. 147, 167 S. E. 339.

§ 25-97. By whom notice given.—The notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay to the holder, and who upon taking it up would have a right to reimbursement from the party to whom notice is given. (Rev., s. 2240; 1899, c. 733, s. 90; C. S. 3072.)

In General.—The notice required by law to be given to an endorser is sufficient if it is sufficient to put him in possession of the fact of dishonor to the party to whom notice is given; but whether a notice is sufficient depends on the circumstances of the case. (Rev., s. 2241; 1899, c. 733, s. 91; C. S. 3073.)

§ 25-98. Notice given by agent.—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. (Rev., s. 2241; 1899, c. 733, s. 91; C. S. 3073.)

§ 25-99. Effect of notice given on behalf of holder.—Where notice is given by or on behalf of the holder, it inures to the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. (Rev., s. 2242; 1899, c. 733, s. 92; C. S. 3074.)

§ 25-100. Effect where notice is given by party entitled thereto.—Where notice is given by or on behalf of a party entitled to give notice it inures to the benefit of the holder and all parties subsequent to the party by whom notice is given. (Rev., s. 2243; 1899, c. 733, s. 93; C. S. 3075.)

§ 25-101. When agent may give notice.—Where the instrument has been dishonored in the hands of an agent he may either himself give notice to the parties liable thereon or he may give notice to his principal. If he give notice to his principal he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder. (Rev., s. 2244; 1899, c. 733, s. 94; C. S. 3076.)

§ 25-102. When notice sufficient.—A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the in-
§ 25-103. Form of notice.—The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by nonacceptance or nonpayment. It may in all cases be given by delivering it personally or through the mails. (Rev., s. 2246; 1899, c. 733, s. 96; C. S. 3078.)

§ 25-104. To whom notice may be given.—Notice of dishonor may be given either to the party himself or to his agent in that behalf. (Rev., s. 2247; 1899, c. 733, s. 97; C. S. 3079.)

§ 25-105. Notice when party is dead.—When any party is dead and his death is known to the party giving notice, the notice must be given to a personal representative if there be one, and if with reasonable diligence he can be found. If there is no personal representative, notice may be sent to the last residence or last place of business of the deceased. (Rev., s. 2248; 1899, c. 733, s. 98; C. S. 3080.)

§ 25-106. Notice to partners.—When the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution. (Rev., s. 2249; 1899, c. 733, s. 99; C. S. 3081.)

§ 25-107. Notice to persons jointly liable.—Notice to joint parties who are not partners must be given to each of them unless one of them has authority to receive such notice for the others. (Rev., s. 2250; 1899, c. 733, s. 100; C. S. 3082.)

§ 25-108. Notice to bankrupt.—Where a party has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of his creditors, notice may be given either to the party himself or to his trustee or assignee. (Rev., s. 2251; 1899, c. 733, s. 101; C. S. 3083.)

§ 25-109. Time within which notice must be given.—Notice may be given as soon as the instrument is dishonored, and, unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter. (Rev., s. 2252; 1899, c. 733, s. 102; C. S. 3084.)

Notice, Burden.—The burden is on the holder of a negotiable note to show that notice of nonpayment was given the endorsers, and in the absence of evidence of such notice to an endorser, or to his personal representative after his death, the holder is not entitled to recover on the endorsement. Williams v. Fowler Automobile Co., 207 N. C. 309, 178 S. E. 567.

§ 25-110. Notice where parties reside in the same place.—When the person giving and the person to receive notice reside in the same place notice must be given within the following times: (1) If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following; (2) if given at his residence it must be given before the usual hours of rest on the day following; (3) if sent by mail it must be deposited in the post office in time to reach him in the usual course on the day following. (Rev., s. 2253; 1899, c. 733, s. 103; C. S. 3085.)

§ 25-111. Notice where parties reside in different places.—Where the person giving and the person to receive notice reside in different places the notice must be given within the following times: (1) If sent by mail it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter; (2) if given otherwise than through the post office, then within the time that notice would have been received in due course of mail if it had been deposited in the post office within the time specified in the last subdivision. (Rev., s. 2254; 1899, c. 733, s. 104; C. S. 3086.)

In General.—As to what was a reasonable notice under varying circumstances, it has now been long settled that a reasonable notice is one which is sent by the first post after the day of dishonor, and when there is a daily mail, this necessarily means the next day, if the next day's mail does not leave before business hours. National Bank v. Bradley, 117 N. C. 525, 530, 23 S. E. 455; Hubbard v. Troy, 24 N. C. 134; Denny v. Palmer, 27 N. C. 619.

Sufficient Proof of Notice.—It was unanimously held by the Supreme Court of the United States, in Lindenberger v. Beal, 6 Wheat. 104, that the evidence of the letter containing notice, put into the post office, directed to the defendant at his place of residence, was sufficient proof of the notice to be left to the jury, and that it was unnecessary to give notice to the defendant to produce the letter before parol evidence could be admitted. Faribault v. Ely, 13 N. C. 67.

§ 25-112. When sender deemed to have given due notice.—Where notice of dishonor is duly addressed and deposited in the post office the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. (Rev., s. 2255; 1899, c. 733, s. 105; C. S. 3087.)

§ 25-113. What constitutes deposit in postoffice.—Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter-box under the control of the postoffice department. (Rev., s. 2256; 1899, c. 733, s. 106; C. S. 3088.)

§ 25-114. Time of notice to antecedent parties.—Where a party receives notice of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. (Rev., s. 2257; 1899, c. 733, s. 107; C. S. 3089.)

§ 25-115. Where notice must be sent.—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: (1) Either to the postoffice nearest to his place of residence or to the postoffice where he is accustomed to receive his letters; or (2) if he lives in one place and has his place of business in another, notice may be sent to either place; or (3) if he be sojourning in another place notice may be sent to the place where he is sojourning. But where the notice is actually received by the party within the time specified in this chapter it will be sufficient, though not sent in accordance with requirements of this section. (Rev., s. 2258; 1899, c. 733, s. 108; C. S. 3090.)

Diligent Attempt to Notify Necessary.—A holder of a dishonored bill must give notice to all indorsers, or make a diligent attempt to give this notice, if he does not know
§ 25-116. Waiver of notice.—Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied. (Rev., s. 2259; 1899, c. 733, s. 109; C. S. 3091.)

Mistake.—When one, thinking there has been a presentment for payment, makes promises that would amount to a waiver, had there been a presentment, he is not liable on the grounds of waiver of notice if there had been no presentment for payment. Lilly v. Petteeway, 73 N. C. 358.


Promise to Pay after Failure to Be Notified.—A promise to pay generally, or a promise to pay a part, or a part payment, made with full knowledge that he had been fully released from liability on the bill by the neglect of the holder to give notice, will operate as a waiver and bind the party who makes it for the payment of the whole bill. Dixon v. Elliot, 1 Car. & P., 472; Margetson v. Atkins, 3 Car. & P., 383; Harvey v. Thorpe, 23 Miss., 538; Shaw Bros. v. McNeill, 95 N. C. 555, 558.

Waiver of presentment for payment of a note, the indorsers had reason to believe, and did believe, that the note would not be paid by the maker, this circumstance was deemed to be a waiver not only of a formal presentment but also of notice, when the drawee was a fictitious person or a person not having capacity to contract; (3) where the drawer is the person to whom the instrument is presented for payment; (4) where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; (5) where the drawer has countermanded payment. (Rev., s. 2264; 1899, c. 733, s. 114; C. S. 3096.)

Cross Reference.—As to notice, see note to § 25-85.

§ 25-117. Who affected by waiver.—Where the waiver is embodied in the instrument itself it is binding upon all parties, but where it is written above the signature of an indorser it binds him only. (Rev., s. 2260; 1899, c. 733, s. 110; C. S. 3092.)

In General.—Where upon the face of a negotiable note there is an agreement to waive notice of dishonor or an extension of time, etc., one placing his name on the back thereof is deemed to be an indorser without indication of other lien or security, and is bound by the agreement expressed on the face of the instrument waiving notice, etc. Gillam v. Walker, 189 N. C. 189, 126 S. E. 424.

Endorser Is a "Party" to the Note.—An extension of time for payment of a note will not discharge an indorser when the note provides that extension of time for payment is waived by all parties to the note, the endorser being a party to the note. Vannoy v. Stafford, 209 N. C. 184, 18 S. E. 480.


§ 25-118. Waiver of protest.—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor. (Rev., s. 2261; 1899, c. 733, s. 111; C. S. 3093.)

Waiver Binding Partnership.—Where a partner, after the dissolution of the firm, gives a draft in payment of a partnership debt, he cannot waive protest so as to bind his former copartner, especially when the latter has been a dormant member. Mauney & Son v. Coit, 80 N. C. 300.

Inland Bills.—Although protest is not necessary on an inland bill, yet its waiver in such a case is construed to signify as much as when applied to foreign bills. Shaw Bros. v. McNeill, 95 N. C. 355.

Foreign Bills.—A protest is necessary only in case of foreign bills. A waiver of protest on a foreign bill is also a waiver of presentment and notice. Shaw Bros. v. McNeill, 95 N. C. 355.


§ 25-119. When notice is dispensed with.—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. (Rev., s. 2263; 1899, c. 733, s. 112; C. S. 3094.)

§ 25-120. Delay in giving notice.—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. (Rev., s. 2263; 1899, c. 733, s. 113; C. S. 3095.)

§ 25-121. When notice need not be given to drawer.—Notice of dishonor is not required to be given to the drawer in either of the following cases: (1) Where the drawer and the drawee are the same person; (2) Where the drawee is a fictitious person or a person not having capacity to contract; (3) Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary unless in the meantime the instrument has been accepted. (Rev., s. 2265; 1899, c. 733, s. 115; C. S. 3097.)

In General.—Although, at the time of the indorsement of a note, the indorsers had reason to believe, and did believe, that the note would not be paid by the maker, this circumstance does not dispense with the necessity of a due notice. Denny v. Palmer, 27 N. C. 610.


§ 25-122. Notice of nonpayment where acceptance refused.—Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary unless in the meantime the instrument has been accepted. (Rev., s. 2266; 1899, c. 733, s. 116; C. S. 3098.)

§ 25-123. Effect of omission to give notice of nonacceptance.—An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission. (Rev., s. 2267; 1899, c. 733, s. 117; C. S. 3099.)

§ 25-125. When protest need not be made; when it must be made.—Where any negotiable
§ 25-126. How instrument discharged.—A negotiable instrument is discharged (1) by payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) whereas of principal or not becoming the holder of the instrument at or after maturity in his own right. (Rev., s. 2269; 1899, c. 733, s. 119; C. S. 3101.)

In an action on a note the maker and sureties may rely on the discharge of the note by the payee's acceptance of the note of another party in the sum due, and the payee's delivery to them of the papers on which defendants were bound, without the intentional cancellation by the payee, under this section, which is not required to be in writing. Hood System Industrial Bank v. Dixie Oil Co., 205 N. C. 778, 172 S. E. 360.

An instruction that a negotiable instrument may be discharged by an act which would discharge a simple contract for the payment of money is not error under this section. Compromise Payment by Surety.—When the liability of a surety or accommodation endorser is discharged by compromise and settlement, the maker is entitled to credit only for the amount actually paid. First, etc., Nat. Bank v. Hinton, 216 N. C. 159, 4 S. E. (2d) 332.

Cited in Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198 S. E. 666.

§ 25-127. Discharge of person secondarily liable.—A person secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by an act of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the consent of the party secondarily liable or unless the right of recourse against such party is expressly reserved. (Rev., s. 2270; 1899, c. 733, s. 120; C. S. 3102.)

Release of Maker Discharges Indorser.—Where the holder of a negotiable instrument releases the maker from liability thereon, he thereby discharges from liability his indorser from whom he acquired the instrument. Con. Buchanan, 192 N. C. 771, 130 S. E. 129.

A tender of payment under § 25-76 would discharge only persons secondarily liable on the note, as provided by this section, and would not discharge the liability of the maker and surety on the note. Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351.

Expiration of Payment.—In an action upon a negotiable instrument the defendants on its face being joint makers, the mere fact that the plaintiff had told one of the defendants, without the knowledge of the other, "that he would take up and carry the note until fall," is not an extension of payment for a "fixed and definite" period, which would operate as a release to such other from liability. Roberson v. Spain, 173 N. C. 23, 91 S. E. 361.

Where the face of a note contains an agreement that the party should not remain bound notwithstanding any extension of time granted the maker, upon payment of interest by him, the endorsers remain liable although ignorant of such extensions and payments of interest by the maker, they being bound by their agreement in the note and the extension being supported by the necessary elements of certainty, mutuality and consideration. Fidelity Bank v. Hess, 177 N. C. 171, 175 S. E. 225.


§ 25-128. Right of party paying instrument.—When the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except (1) where it is payable to the order of the third person and has been paid by the drawer; and (9) where it was made or accepted for accommodation and has been paid by the party accommodated. (Rev., s. 2271; 1899, c. 738, s. 121; C. S. 3103.) Right to Put into Circulation.—When a bill of exchange made payable to a third person is protested and taken up by the drawer, the latter cannot again put it in circulation. Price v. Franks, 24 N. C. 170.

Liability of Principal—An indorser who pays off and discharges the note of his principal can only recover from the latter the amount actually paid by him. Pace v. Robertson, 65 N. C. 360.

Cited in Roberson v. Spain, 173 N. C. 21, 91 S. E. 361.

§ 25-129. Renunciation by holder.—The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. (Rev., s. 2272; 1899, c. 733, s. 122; C. S. 3104.)

In General.—The right of an obligor to defend an action against himself on a negotiable note, under the provisions of this section may be done by virtue thereof only as therein shown when resting only by parol. Manly v. Beam, 190 N. C. 7659; 130 S. E. 633.

A parol agreement between an official of a bank that the bank would release the endorsers or sureties on a note upon the maker confessing judgment thereon is not enforceable, a verbal renunciation being ineffectual under the provisions of this section. Page Trust Co. v. Lewis, 200 N. C. 356, 150 S. E. 294.

No writing is necessary if "the instrument is delivered to the person primarily liable thereon." Hood System Industrial Bank v. Dixie Oil Co., 205 N. C. 778, 779, 172 S. E. 360.

§ 25-130. Unintentional cancellation; burden of proof.—A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative, but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority. (Rev., s. 2273; 1899, c. 733, s. 123; C. S. 3105.)

§ 25-131. Effect of alteration of instrument.—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the
alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration he may enforce payment thereof according to its original tenor. (Rev., s. 2274; 1899, c. 733, s. 124; C. S. 3106.)

Cross Reference.—See annotations to § 25-132.

In General.—It is familiar learning that if the payee of a bond alters it in any material part, without the consent of the obligor, the bond is avoided and may be defeated on the plea of non est factum. Mathis v. Mathis, 20 N. C. 55; Dunn v. Clements, 55 N. C. 58; Darwin v. Rippey, 63 N. C. 319; Davis v. Coleman, 29 N. C. 427.

Liability on Raised Checks.—Where the maker of a check, whether a bank or other corporation, or an individual, fills out the blank spaces by writing in ink any medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified; or which adds an interest; or which adds a place of payment where no place of payment is specified; or which adds any other change or addition which alters the effect of the instrument in any respect, is a material alteration. (Rev., s. 2275; 1899, c. 733, s. 125; C. S. 3107.)

§ 25-132. What constitutes a material alteration.

—Any alteration which changes (1) the date; (2) the sum payable either for principal or interest; (3) the time or place of payment; (4) the number or the relation of the parties; (5) the medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified; or which adds anything more than is already implied by law is not sufficient to be construed as a material alteration. Darwin v. Rippey, 63 N. C. 319.

In General.—Adding the words "in specie" after the word "dollars" in a note is a material alteration. Darwin v. Rippey, 63 N. C. 319.

The cutting of the name of one of the makers of a promissory note and substituting that of another was a material alteration of the note, and vitiated it. Davis v. Coleman, 29 N. C. 424, 427.

Striking Out Endorser's Name and Substituting Another Is Material.—Where the payee of a negotiable instrument acquires it with certain endorsers thereon and subsequently strikes out the name of one endorser and another signs as endorser in lieu of the endorser whose name was stricken out, the change is a material one under this section, and the holder may enforce payment upon the ground that the transaction was ultra vires, and then purchased in due course before maturity by an innocent purchaser for value, the bank may not resist payment upon the ground that the transaction was ultra vires, and not within the authority of its charter, authorizing it to accept bills, notes, commercial paper, etc., for it comes within the statutory definition of an inland bill of exchange, and may be treated as a bill or note, at the option of the holder. Sherrell v. American Trust Co., 176 N. C. 591, 97 S. E. 471.


§ 25-134. Bill not an assignment of funds in hands of drawer.—A bill of itself does not operate as an assignment of the funds in the hands of the drawer available for the payment thereof, and the drawer is not liable on the bill unless and until he accepts the same. (Rev., s. 2277; 1899, c. 733, s. 127; C. S. 3109.)

Editor's Note.—See 13 N. C. Law Rev. 131, as to what orders constitute an assignment.


§ 25-135. Bill addressed to more than one drawer.—A bill may be addressed to two or more drawees jointly, whether they are partners or not, but not to two or more drawer in the alternative or in succession. (Rev., s. 2278; 1899, c. 733, s. 128; C. S. 3110.)

§ 25-136. Inland and foreign bills of exchange.—An inland bill of exchange is a bill which is or on its face purports to be both drawn and payable within this state. Any other bill is a foreign bill. The contrary appears on the face of the bill the holder may treat it as an inland bill. (Rev., s. 2279; 1899, c. 733, s. 129; C. S. 3111.)

§ 25-137. When bill may be treated as promissory note.—Where in a bill drawer and drawee are the same person, or where the drawer is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note. (Rev., s. 2280; 1899, c. 733, s. 130; C. S. 3112.)

§ 25-138. Referee in case of need.—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need: that is to say, in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit. (Rev., s. 2281; 1899, c. 733, s. 131; C. S. 3115.)

Art. 11. Acceptance.

§ 25-139. Acceptance defined; how made.—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. (Rev., s. 2282; 1899, c. 733, s. 132; C. S. 3114.)

Acceptance by Agent.—The authority to draw, accept or indorse bills, notes and checks will not readily be implied as an incident to the express authority of an agent. It must ordinarily be conferred expressly, but it may be implied if the execution of the paper is a necessary incident to the business, that is, if the purpose of the agency cannot otherwise be accomplished. Bank v. Hay, 143 N. C. 352, 55 S. E. 811.


§ 25-140. Holder entitled to acceptance on face of bill.—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is re-
§ 25-141. Acceptance by separate instrument.— Where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. (Rev., s. 2284; 1899, c. 733, s. 134; C. S. 3116.)

Letters of Acceptance.—A letter written to a drawer within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who takes the bill on the credit of the letter, a virtual acceptance, and binds the person who makes the promise, even though there are no funds in his hands belonging to the drawer, if the bill is drawn payable at a fixed time, and not at or after sight. Nimock v. Woody, 97 N. C. 1, 55 S. E. 811.

Where the letters, upon which the plaintiff bank relied as authority to an agent to make the draft which it cashed, show that the alleged authority to draw was nothing more than private instructions by the principal to his agent as to how he should conduct this part of the business, and were not to be used as a basis of credit to the agent, the court properly nonsuited the plaintiff. Bank v. Hay, 143 N. C. 326, 55 S. E. 811.

§ 25-142. When promise to accept equivalent to acceptance.—An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. (Rev., s. 2285; 1899, c. 733, s. 135; C. S. 3117.)

§ 25-143. Time allowed drawee to accept.—The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but the acceptance, if given, dates as of the day of presentment. (Rev., s. 2286; 1899, c. 733, s. 136; C. S. 3118.)


§ 25-144. Liability of drawee retaining or destroying bill.—Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same. (Rev., s. 2287; 1899, c. 733, s. 137; C. S. 3119.)


§ 25-145. Acceptance of incomplete bill.—A bill may be accepted before it has been signed by the drawer or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. (Rev., s. 2288; 1899, c. 733, s. 138; C. S. 3120.)

§ 25-146. Kinds of acceptances.—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. (Rev., s. 2289; 1899, c. 733, s. 139; C. S. 3121.)

§ 25-147. What constitutes a general acceptance.—An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only, and not elsewhere. (Rev., s. 2290; 1899, c. 733, s. 140; C. S. 3122.)

§ 25-148. What constitutes a qualified acceptance.—An acceptance is qualified which is (1) conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated; (2) partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn; (3) local; that is to say, an acceptance to pay only at a particular place; (4) qualified as to time; (5) the acceptance of some one or more of the drawees, but not of all. (Rev., s. 2291; 1899, c. 733, s. 141; C. S. 3123.)

Qualified as to Time.—Where one accepted a draft on him "payable when I receive funds to the use of the drawer," he became liable when the moneys were placed to his credit though he had not taken manual possession thereof. Wallace Brothers v. Douglas, 116 N. C. 659, 21 S. E. 357.

§ 25-149. Rights of parties as to qualified acceptance.—The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonored by nonacceptance. When a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill unless they expressly or impliedly authorized the holder to take a qualified acceptance or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance he must, within a reasonable time, express his dissent to the holder or he will be deemed to have assented thereto. (Rev., s. 2292; 1899, c. 733, s. 142; C. S. 3124.)


§ 25-150. When presentment for acceptance must be made.—Presentment for acceptance must be made (1) where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or (2) where the bill expressly stipulates that it shall be presented for acceptance; or (3) where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable. (Rev., s. 2293; 1899, c. 733, s. 143; C. S. 3125.)

§ 25-151. Failure to present in reasonable time discharges drawer and indorsers. — Except as herein otherwise provided the holder of a bill which is required by § 25-71 to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so the drawer and all indorsers are discharged. (Rev., s. 2294; 1899, c. 733, s. 144; C. S. 3126.)

§ 25-152. How presentment made.—Present-
ment for acceptance must be made by or on behalf of the holder, at a reasonable hour on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and (1) where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only; (2) where the drawee is dead, presentment may be made to his personal representative; (3) where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. (Rev., s. 2295; 1899, c. 733, s. 145; C. S. 3127.)

In General.—A draft payable at no definite place in a city or town, must be presented at the maker's residence or place of business, if he has such, at its maturity, and if he has none, then the presence of the instrument in the city is a sufficient presentation. Peoples Nat. Bank v. Lutterloh, 95 N. C. 495, 499.

§ 25-153. On what days presentment may be made.—A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of this chapter. (Rev., s. 2296; 1899, c. 733, s. 146; 1909, c. 500, s. 1; C. S. 3128.)

§ 25-154. Presentment where time is insufficient.—Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers. (Rev., s. 2297; 1899, c. 733, s. 147; C. S. 3129.)

§ 25-155. Where presentment is excused.—Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance in either of the following cases: (1) Where the drawee is dead or has absconded or is a fictitious person or a person not having capacity to contract by bill; (2) where after the exercise of reasonable diligence presentment cannot be made; (3) where, although presentment has been irregular, acceptance has been refused on some other ground. (Rev., s. 2298; 1899, c. 733, s. 148; C. S. 3130.)

§ 25-156. When dishonored by nonacceptance.—A bill is dishonored by nonacceptance (1) when it is duly presented for acceptance and such an acceptance as is prescribed in this chapter is refused or cannot be obtained; or (2) when a presentment for acceptance is excused and the bill is not accepted. (Rev., s. 2299; 1899, c. 733, s. 149; C. S. 3131.)

§ 25-157. Duty of holder, where bill not accepted.—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and indorsers. (Rev., s. 2300; 1899, c. 733, s. 150; C. S. 3132.)

§ 25-158. Rights of holder, where bill not accepted.—When a bill is dishonored by nonacceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary. (Rev., s. 2301; 1899, c. 733, s. 151; C. S. 3133.)

Art 13. Protest.

§ 25-159. In what cases protest necessary.—Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance; and where such a bill which had not previously been dishonored by nonacceptance is dishonored by non-payment, it must be duly protested for nonpayment. If it is not so protested the drawers and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest in case of dishonor is unnecessary. (Rev., s. 2302; 1899, c. 733, s. 152; C. S. 3134.)

Waiver of Protest.—In foreign bills the protest may be waived; the words, "I waive protest," or "waiving protest," or any similar words, infer that the protest is waived, and when applied to foreign bills, are universally regarded as expressly waiving presentment and notice, the protest being, according to the law merchant, the formal and necessary evidence of the dishonor of such an instrument. Shaw Bros. v. McNell, 95 N. C. 535, 539.

Protest in Another State.—A promissory note made in another state need not be protested before the owner may sue an indorser, there being no evidence that this is required in the state where the note was executed. Bank v. Carr, 130 N. C. 479, 41 S. E. 876.

How Protested.—By the law merchant a protest of a bill by a public notary is, in itself, evidence. And by our statute such protest is prima facie evidence. Gordon v. Price, 32 N. C. 385.

Protest of Inland Bills.—Protest of an order or inland bill is not necessary to enable the holder to recover the principal and interest. Notice in due time of non-acceptance or non-payment is all that is required for that purpose. Hubbard v. Troy, 24 N. C. 134; National Bank v. Bradley, 117 N. C. 526, 23 S. E. 455; Peoples Nat. Bank v. Lutterloh, 95 N. C. 495.

§ 25-160. How protest made.—The protest must be annexed to the bill or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify (1) the time and place of presentment; (2) the fact that presentment was made and the manner thereof; (3) the cause or reason for protesting the bill; (4) the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. (Rev., s. 2303; 1899, c. 733, s. 153; C. S. 3135.)

§ 25-161. By whom protest made.—Protest may be made by (1) a notary public; or (2) by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. Rev., s. 2304; 1899, c. 733, s. 154; C. S. 3136.)

§ 25-162. When protest to be made.—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting. (Rev., s. 2305; 1899, c. 733, s. 155; C. S. 3137.)

§ 25-163. Where protest made.—A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonored by nonac-
§ 25-164. Protest both for nonacceptance and nonpayment.—A bill which has been protested for nonacceptance may be subsequently protested for nonpayment. (Rev., s. 2307; 1899, c. 733, s. 157; C. S. 3139.)

§ 25-165. Protest before maturity, where acceptor insolvent.—Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. (Rev., s. 2308; 1899, c. 733, s. 158; C. S. 3140.)

§ 25-166. When protest dispensed with.—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. (Rev., s. 2309; 1899, c. 733, s. 159; C. S. 3141.)

§ 25-167. Protest where bill is lost.—Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. (Rev., s. 2310; 1899, c. 733, s. 160; C. S. 3142.)


§ 25-168. When a bill may be accepted for honor.—Where a bill of exchange has been protested for dishonor by nonacceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party there may be a further acceptance by a different person for the honor of another party. (Rev., s. 2311; 1899, c. 733, s. 161; C. S. 3143.)

§ 25-169. How acceptance for honor made.—An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. (Rev., s. 2312; 1899, c. 733, s. 162; C. S. 3144.)

§ 25-170. When deemed an acceptance for honor of drawer.—Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. (Rev., s. 2313; 1899, c. 733, s. 163; C. S. 3145.)

§ 25-171. Liability of acceptor for honor.—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. (Rev., s. 2314; 1899, c. 733, s. 164; C. S. 3146.)

§ 25-172. Agreement of acceptor for honor.—The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawer; and provided, also, that it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given to him. (Rev., s. 2315; 1899, c. 733, s. 165; C. S. 3147.)

§ 25-173. Maturity of bill payable after sight accepted for honor.—Where a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for nonacceptance and not from the date of the acceptance for honor. (Rev., s. 2316; 1899, c. 733, s. 166; C. S. 3148.)

§ 25-174. Protest of bill accepted for honor.—Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need. (Rev., s. 2317; 1899, c. 733, s. 167; C. S. 3149.)

§ 25-175. How presentment for payment to acceptor for honor made.—Presentment for payment to the acceptor for honor must be made as follows: (1) If it is to be presented in the place where the protest for nonpayment was made it must be presented not later than the day following its maturity; (2) if it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time in this chapter specified. (Rev., s. 2318; 1899, c. 733, s. 168; C. S. 3150.)

§ 25-176. When delay in making presentment excused.—The provisions of § 25-87 apply where there is delay in making presentment to the acceptor for honor or referee in case of need. (Rev., s. 2319; 1899, c. 733, s. 169; C. S. 3151.)

§ 25-177. Dishonor of bill by acceptor for honor.—When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him. (Rev., s. 2320; 1899, c. 733, s. 170; C. S. 3152.)

Art. 15. Payment for Honor.

§ 25-178. Who may make payment for honor.—Where a bill has been protested for nonpayment any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. (Rev., s. 2321; 1899, c. 733, s. 171; C. S. 3153.)

§ 25-179. How payment for honor must be made.—The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it. (Rev., s. 2322; 1899, c. 733, s. 172; C. S. 3154.)

§ 25-180. Declaration before payment for honor.—The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. (Rev., s. 2323; 1899, c. 733, s. 173; C. S. 3155.)
§ 25-181. Preference of parties offering to pay for honor.—Where two or more persons offer to pay a bill for the honor of different parties the person whose payment will discharge most parties to the bill is to be given the preference. (Rev., s. 2324; 1899, c. 733, s. 174; C. S. 3156.)

§ 25-182. Effect on subsequent parties, where bill is paid for honor.—Where a bill has been paid for honor all parties subsequent to the party for whom it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. (Rev., s. 2325; 1899, c. 733, s. 175; C. S. 3157.)

§ 25-183. Where holder refuses to receive payment supra protest.—Where the holder of a bill refuses to receive payment supra protest he loses his right of recourse against any party who would have been discharged by such payment. (Rev., s. 2326; 1899, c. 733, s. 176; C. S. 3158.)

§ 25-184. Rights of payer for honor.—The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor is entitled to receive both the bill itself and the protest. (Rev., s. 2327; 1899, c. 733, s. 177; C. S. 3159.)

Art. 16. Bills in a Set.

§ 25-185. Bills in a set constitute one bill.—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. (Rev., s. 2328; 1899, c. 733, s. 178; C. S. 3160.)

§ 25-186. Rights of holders, where different parts are negotiated.—Where two or more parts of a set are negotiated to different holders in due course the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. (Rev., s. 2329; 1899, c. 733, s. 179; C. S. 3161.)

§ 25-187. Liability of holder who indorses two or more parts to a set of different persons.—Where the holder of a set indorses two or more parts to different persons he is liable on every such part first presented to him. (Rev., s. 2330; 1899, c. 733, s. 180; C. S. 3162.)

§ 25-188. Acceptance of bills drawn in sets.—The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. (Rev., s. 2331; 1899, c. 733, s. 181; C. S. 3163.)

§ 25-189. Payment by acceptor of bills drawn in sets.—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. (Rev., s. 2332; 1899, c. 733, s. 182; C. S. 3164.)

§ 25-190. Effect of discharging one of a set.—Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged. (Rev., s. 2333; 1899, c. 733, s. 183; C. S. 3165.)

Art. 17. Promissory Notes and Checks.

§ 25-191. Negotiable promissory note defined.—A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order it is not complete until indorsed by him. (Rev., s. 2334; 1899, c. 733, s. 184; C. S. 3166.)

Cross Reference.—As to form of negotiable instrument, see § 25-7 et seq.

In General.—To render a note non-negotiable it must show on its face that the promise to pay is conditional, or render the amount to be paid uncertain. First National Bank v. Michael, 96 N. C. 55, 1 S. E. 855. A note not payable in the order or bearer is not a negotiable paper. Newland v. Moore, 173 N. C. 298, 92 S. E. 367.

Bond Treated as Promissory Note under Seal.—A bond is in form negotiable, and when indorsed for value and without notice before maturity it is to be regarded, so far as its negotiability is concerned and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under seal. Miller v. Tharel, 75 N. C. 148; Spence v. Tappan, 79 N. C. 246. The principle was applied in Lewis v. Long, 102 N. C. 206, 9 S. E. 637, in which it was decided that an obligor on a bond could not, as against an indorsee for value, before maturity and without notice, set up the defense that he executed the same as a surety only. Christian v. Parrott, 114 N. C. 215, 218, 19 S. E. 131.

Note under Seal.—A written instrument, whereby a party promises to pay the party therein named a sum certain at a time specified therein, is a promissory note in this State, although it be under seal. First Nat. Bank v. Michael, 96 N. C. 53, 1 S. E. 855.

§ 25-192. Check defined.—A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided the provisions of this chapter apply to a bill of exchange payable on demand apply to a check. (Rev., s. 2335; 1899, c. 733, s. 185; C. S. 3167.)

Cross Reference.—See note under § 53-71.

A check is further defined as a written order on a bank or banker, purporting to be drawn against a deposit of funds, for the payment at all events of a sum of money to a certain person therein named, or to him or his order, or to bearer, and payable on demand. Woody v. First Nat. Bank, 194 N. C. 549, 140 S. E. 150.

Restrictions as to Payments.—A stipulation stamped on the face of a check, that it will positively not be paid to a certain company of old regents and their assigns, is not a restriction on the holder. Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 785, 24 S. E. 524.

Time of Presentment.—A "check" is a bill of exchange drawn on a bank, payable on demand, and instruments payable on demand may be presented within a reasonable time after their issue. Philadelphia Lile Ins. Co. v. Haywood, 236 Fed. 820.


§ 25-193. Within what time a check must be presented.—A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon
§ 25-194. Bank may refuse to honor check more than six months old in the absence of contrary instructions.—Where a check or other instrument payable on demand at any bank or trust company doing business in this State is presented for payment more than six months from its date, such bank or trust company, may, unless expressly instructed by the drawer or maker to pay the same, refuse payment thereof and no liability shall thereby be incurred to the drawer or maker for dishonoring the instrument by non-payment. (1939, c. 341, s. 3; C. S. 3168.)

§ 25-195. Effect of certification of check.—Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance. (Rev., s. 2337; 1899, c. 733, s. 187; C. S. 3169.)

§ 25-196. Effect, where holder of check procures it to be certified.—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon. (Rev., s. 2338; 1899, c. 733, s. 188; C. S. 3170.)

§ 25-197. Check not assignment of funds.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until accepted or certified the check. (Rev., s. 2339; 1899, c. 733, s. 189; C. S. 3171.)

Editor's Note.—See 13 N. C. Law Rev. 131.

In General.—A depositor is a creditor of a bank, his deposit becoming a part of the general fund, the property of the bank, and subject to assignment by the owners of the bank and a check-holder is, to the extent of his check, the assignee of the depositor's debt due him by the bank, but he has no lien upon the deposit for the amount of this check and a payee or holder of a check has an interest in the deposit as against the drawer, subject to the bank's right to pay outstanding checks before notice. Hawes v. Blackwell, 104 N. C. 196, 13 S. E. 256.

§ 25-198. When stop-payment order given to bank expires.—No revocation, countermand or stop-payment order relating to the payment of any check or draft against an account of a depositor in any bank or trust company doing business in this State shall remain in effect for more than six months after the service thereof on the bank, unless the same be renewed, which renewals may be made from time to time. (1929, c. 341, s. 3.)

§ 25-199. Application to present orders. — No notice affecting a bank upon which revocation, countermand or stop-payment order has been made prior to March 19, 1929, shall be deemed to continue for a period of more than six months thereafter. (1929, c. 341, s. 2.)
§ 26-1. Surety and principal distinguished in judgment and execution.—In the trial of actions upon contracts either of the defendants may show in evidence that he is surety, and if it be satisfactorily shown, the jury in their verdict, or the justice of the peace in his judgment, shall distinguish the principal and surety, which shall be indorsed on the execution by the clerk or justice of the peace issuing it. (Rev., s. 2840; Code, s. 2100; R. C., c. 31, s. 124; 1826, c. 31, s. 1; C. S. 3961.)

Cross Reference.—As to right of surety to subrogation, see notes to § 26-3.

In General.—A surety is bound with his principal as an original promisor. Baylies' Sureties and Guarantors, 4. Coleman v. Fuller, 105 N. C. 328, 339, 11 S. E. 175.

The surety pays a debt, which becomes his own debt when the principal fails to pay it. 2 Parsons Notes and Bills, 117-118. Coleman v. Fuller, 105 N. C. 128, 130, 11 S. E. 175.

Construed Strictly.—The liability of a surety cannot be enlarged by construction. Shoe Co. v. Peacock, 150 N. C. 545, 64 S. E. 437.

Order of Liability.—The order in which parties to a security agreement are mentioned or the order in which, independently of contract, they will be held bound in equity. Smith v. Smith, 16 N. C. 173.

Where it appeared that a negotiable instrument was signed by three persons other than the principal obligor, and it also appeared from a writing executed some time thereafter by one to indemnify the other two that they (the other two) "signed as co-sureties" of the third, it was held that the character of suretyship in which all three signed was sufficiently established. Southerland v. Fremont, 107 N. C. 565, 12 S. E. 237.

Same.—Parol Evidence to Show Co-principals.—In Williams v. Glenn, 92 N. C. 253, the note (under seal) was made when W. "as principal" and B. and G. "as sureties," yet as between the obligors the court held that parol evidence was admissible to show that Boyd and Glenn were co-principals, and that the rule against the introduction of such evidence was not applicable to them. Smith v. Carr, 128 N. C. 150, 153, 38 S. E. 732.

While all of the makers may appear as principals upon the face of the paper, or some principals and some sureties, yet it may be shown that while appearing as principals they were in fact sureties, or some principals and others sureties; and upon the establishment of the fact of suretyship, the right of contribution follows. Smith v. Carr, 128 N. C. 150, 153, 38 S. E. 732.

Same—Issue Submitted.—In an action against the maker and indorsers of a note, an issue should be submitted as to whether the endorsers were sureties, or whether one was a supplemental surety to the other. Parish v. Graham, 129 N. C. 239, 39 S. E. 825.

May Allege and Prove Suretyship.—When sued, either of the defendants may allege that he is surety, and, if the allegation be proven, the jury in their verdict and the court in the judgment shall distinguish the principal and surety, and it shall be so indorsed on the execution issued for the collection of the judgment. Bank v. McArthur, 261 Fed. 97, 101.

In Gatewood v. Leak, 59 N. C. 357, 6 S. E. 635, 637, it was said: "If the appellee was surety, as he alleges, he might, as above noticed, under the statute, (this section) have shown, by proper evidence in the trial in the actions in which the judgments were obtained by the appellant, that he was such surety, and the jury in their verdict, or the justice of the peace in his judgment, would have distinguished him as surety, and the executions would have been issued with a proper indorsement to that effect; and in that case the sheriff would have levied the sum required to be collected, first, out of the property of the principal if he had sufficient property to that purpose.

Same—Practice of Courts.—It is not the practice of the courts to see that evidence of suretyship is produced and such fact inserted in the judgment, in the absence of the indorsants and without any averment or request on their part. Morehead Banking Co. v. Duke, 121 N. C. 110, 28 S. E. 191.

Effect of Not Alleging Suretyship.—In Bank v. McArthur, 261 Fed. 97, 101, it was said that "It would not seem that, by failing to set up his suretyship in the action brought by the American National Bank on the note, McArthur lost any equitable rights against McBryde to which he was entitled as surety. It is true, as held in Gates v. Smith, 99 N. C. 357, 6 S. E. 635, that the surety, who has failed to set up the fact and have it found as provided by the statute, cannot enjoin the plaintiff in the judgment from proceeding to sell his land for its satisfaction. Neither McArthur nor plaintiff may enjoin the bank from enforcing its judgment against himself until it has exhausted McBryde's property."

The magistrate is not bound to discriminate except upon the application of, and due proof by, the surety. Stewart v. Ray, 26 N. C. 269.

Effect of Finding of Jury.—Where a suit is brought at law against two persons, a finding, by the jury, of one that the defendants are principals and the other surety, if in fact it appears, at all between the parties, does not in equity establish the relation of suretyship. Lowder v. Noding, 43 N. C. 208.

When Execution Does Not Distinguish.—Where an execution, against two persons, a finding, by the court, of one which is principal and which surety, the sheriff has a right to collect it from either; and the sheriff may collect it from the surety, though the plaintiff in the execution directed him to collect it from the other. Shiford v. Cline, 35 N. C. 463.

Right of Surety to Subrogation.—See notes to § 26-3.

Right of Surety to Assign Judgment.—It was stated by the Supreme Court of this state in Barring v. Boyd, 192 N. C. 189; that the right of a surety to keep alive a judgment, which he has paid, by having an assignment made to a stranger for his benefit, is unquestionable. When he advances the money, he has a clear equity (if he desires it) to have an assignment to the right of the creditor. When he advances payment as surety for the purpose of coercing payment against the principal. Whether money advanced in such a way be an extinguishment or a purchase seems to be a question of intent. If it be paid, and nothing be said or done to show a contrary intention, an extinguishment will be presumed; but if an assignment be made to one not a party, so as to show a purpose to keep it alive, it is sufficient. That a party defendant furnishes the money, and that the assignment is made on a day subsequent to the advancement of the money, can make no difference, provided it was intended, at the time it was advanced, as a purchase and not as a payment. Hanley v. McArthur, 261 Fed. 27, 101.

Signing on Faith of Creditors Representations.—Persons signing a note as surety upon faith in the creditor's representation that another will sign as co-surety, leaving the note with the creditor for that purpose, are not bound thereon to such creditor upon the failure of the fulfillment of the representation. Bank v. Hunt, 124 N. C. 171, 32 S. E. 546, cited and distinguished. Bank v. Jones, 147 N. C. 419, 61 S. E. 193.

Bond Joint and Several on Face.—Although the bond is joint and several on its face it can be shown by parol that a party thereto is a surety. Brandt on Surety, secs. 29 and 30.


Statute of Limitations.—If the purchaser of a note before maturity, for value and without notice, subsequently receives notice that a party thereto is a surety and delays action for three years after maturity the surety will be precluded by the three years' statute of limitations. Coffey v. Reinhardt, 114 N. C. 509, 19 S. E. 370.
§ 26-2. Principal liable on execution before surety.—Whenever an execution, indorsed as aforesaid, shall come into the hands of any officer for collection, he shall seize upon the property of the principal, or so much thereof as shall be necessary to satisfy the execution, and for want of sufficient property of the principal, also on the property of the surety, and make sale of all the property of the principal levied on before that of the surety. (Rev. s. 2841; Code, s. 2101; R. C., c. 31, s. 125; 1826, c. 31, s. 2; C. S. 3063.)

§ 26-3. Summary remedy of surety against principal.—Any person who may have paid money for and on account of those for whom he became surety, upon producing to the superior court, or any justice of the peace having jurisdiction of the same, a receipt, and showing that an execution has issued, and he has satisfied the same, and making it appear by sufficient testimony that he has laid out and expended any sum of money as the surety of such person, may move the court or justice of the peace for the case may be, for judgment against his principal for the amount which he has actually paid; a citation having been served upon the surety, an order otherwise valid is not rendered void by reason of such a judgment heretofore rendered. (Rev., s. 2841; Code, s. 2093; R. C., c. 110, s. 1; 1897, c. 487, s. 1; C. S. 3063.)

I. GENERAL CONSIDERATIONS

I. Subrogation

II. Assignments

Editor’s Note.—See 13 N. C. Law Rev. 116. The words “Superior Court” used in this section mean the clerk of the Superior Court. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

Citation Issued to Principal.—The section providing that a surety who has paid out money upon a judgment against his principal and himself may have a citation issued to the principal by the court to show cause why execution against him should not be issued, and that the principal has not reimbursed him, is constitutional. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

Notice to Corporation to Show Cause.—A notice issued by a court of competent jurisdiction, served upon the secretary and treasurer of a corporation, to show cause why an execution should not be awarded him therefor, is constitutional. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

Validity of Order.—While, under the section the court may not revive a dormant judgment against the principal and the surety, an order otherwise valid is not rendered void by the addition of the words “that the judgment heretofore rendered as hereby revived, to the end that execution may be issued.” The last sentence will be regarded as surplusage. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

When Surety Entitled to Action for Money Paid.—A judgment against a surety will not entitle him to maintain an action for money paid to the use of the defendant, until it has been satisfied. Hodges v. Armstrong, 14 N. C. 253.

To enable a surety to recover for money paid to the use of his principal, he must prove an actual payment in satisfaction of the debt. Hodges v. Armstrong, 14 N. C. 253.

Right of Surety When Funds Misapplied.—Where a surety prays a judgment against his principal he may recover any funds wrongly converted or misapplied by the principal. Fink v. Co. v. Jordan, 13 N. C. 522; Dalrymple v. Edward Cowan, 13 N. C. 221.

Surety Cannot Trace Property.—A surety who has to pay the debt, has no equity to follow the specific property which the principal debtor purchased with the borrowed money. Carter v. Minner, 94 N. C. 391.

Same.—Bank Deposits.—Where the principal debtor borrowed a sum of money, which he deposited in a bank which soon afterwards became insolvent, and the surety had to pay the judgment against the corporation and himself, which judgment the corporation and the surety had to pay from the dividends from the insolvent bank, until he can recover a judgment. Carlton v. Simonton, 94 N. C. 391.

Right against Partnership.—Where a writ is issued against two copartners for partnership debt, and one of them is arrested and gives bail, such bail, upon being afterwards compelled by due course of law to pay the debt, has no remedy against the individual for whom he became bail. He has no claim upon the other partner. The case of Osborne v. Cunningham, 4 Dev. & Bat., 423, cited and approved. Fink v. Co. v. Jordan, 13 N. C. 522. Where one endorsed a note at the request of a member of a firm for the purpose of obtaining money for the use of the firm, and the proceeds were so used, the endorser, upon the payment of the note, cannot recover, although no member of such firm signed the note. Springs v. McCoy, 122 N. C. 628, 29 S. E. 501.

When Surety’s Liability Barred by Limitations.—Property in the hands of another person in the place of a creditor, so that the former can succeed to the rights of the latter in relation to the surety, an order otherwise valid is not rendered void by reason of such a judgment heretofore rendered. Fink v. Co. v. Jordan, 13 N. C. 522; Dalrymple v. Edward Cowan, 13 N. C. 221.

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated and not that the execution shall be delivered to the officer at the time designated and not that the execution shall be satisfied; and therefore, if a surety to render a sum of money, which he deposited in a bank which

§ 26-4. Summary remedy against surety.—A surety who has paid money for an-
ties, the surety may maintain an equitable suit to compel his assignment and surrender. Bank v. McArthur, 261 Fed. 97, 103.

It is held that an indorsor on a note may pay it and become a claimant against his principal's estate. Eno v. Crook, 10 N. Y. 66; Freeman on Judgments, 471; Lennox v. Frout, 3 W. N. Y. 643; S. C. 63, 26 S. E. 791; Harrison v. Styles, 74 N. C. 290; Wiswall v. Potts, 58 N. C. 184, 189. And this is true whether they knew of it or not. Matthews v. Joyce, 85 N. C. 258, 266; Brandt on Suretyship, sec. 282; Blanton & Co. v. Smith, 126 N. C. 420, 25 S. E. 1035.

III. ASSIGNMENTS.

Preservation of Lien by Assignment.—A surety may preserve the lien of judgment against the principal and himself by paying the judgment creditor and having the judgment assigned to a third person for his own benefit; and this assignment will pass to the third party the benefit of any security given by the principal to the surety. James v. Galbrith, 93 N. C. 358, 352; Sherrod v. Price, 119 N. C. 60, 63, 26 S. E. 791; Mitchell v. Styles, 74 N. C. 290; Wiswall v. Potts, 58 N. C. 184, 189. For this is true whether they knew of it or not. Matthews v. Joyce, 85 N. C. 258, 266; Brandt on Suretyship, sec. 282; Blanton & Co. v. Smith, 126 N. C. 420, 25 S. E. 1035.

When Assignment of Right by Surety.—Where one of two defendants has paid a joint judgment upon a note against another, the judgment is assigned to one of the payors for his use, who brings action to recover against the other judgment debtor, he may, as between himself and the other payor, and for his own use, maintain an action, without regard to the assignment, for the full amount of the judgment in the original action, and recover the full amount of the judgment he has paid, the action being, in substance, one by the surety on the note to recover against the principal thereof. Hayter v. Hitt, 34 N. C. 739, 740; Story, op. cit., sec. 2018.

When One-half of Judgment Paid and Other Assigned.—Where a surety who paid and had satisfaction entered as to one-half of a judgment against himself, his principal and another surety, and procured the judgment as to the other half to be assigned to a trustee for his benefit, it was in effect the same as if he had procured the whole judgment to be so assigned. Peeples v. Gay, 115 N. C. 38, 20 S. E. 173.

When Person Charged with Notice of Assignment.—Where a judgment against a principal and the sureties on a note is paid, and the surety who paid and had satisfaction entered as to one-half of the judgment thereof is made to a trustee for the benefit of the sureties, but by a mistake payment is entered on the judgment record, which is afterwards corrected by the entry thereon of the assignment, and the assignment thereof is made to a trustee for the benefit of the sureties, after the assignment is entered on the record, takes with notice of the assignment. Patton v. Cooper, 132 N. C. 791, 44 S. E. 676.

§ 26-4. Subrogation of surety paying debt of deceased principal.—Whenever a surety, or his representative, shall pay the debt of his deceased principal, the claim thus accruing shall have such priority in the administration of the assets of the principal as had the debt before its payment. (Rev. s. 2842; Code, s. 2096; R. C. c. 110, s. 4; 1829, c. 227; C. S. 3904.)

Second. The section which confines the claim of a surety, paying the debt which he is surety, the dignity, in the administration of the assets of the principal, which the debt, if unpaid would have had, applies to a judgment upon the payment be made before or after the death of the principal. Drake v. Coltrane, 44 N. C. 300.

When Co-surety Deemed Bond Creditor.—A co-surety, who pays the bond debt for which the other is primarily bound, and an administration thereof is made to a trustee for the benefit of the sureties, is deemed to have paid the bond debt, for the payment of which the defendant's intestate was equally bound, he becomes a bond creditor as to the assets of the intestate; and when, pending an action for contribution, the administrator paid off the bonds voluntarily, with equal dignity with said surety debt, having previously paid an open account, he committed a devastit to the extent of the plaintiff's claim for contribution, such claim being for
II. When Surety Obtains Advantage over Co-sureties. III. Contribution Enforced.

I. The Right to Contribution Generally.

Editor's Note.—Atwater v. Farthing, 118 N. C. 388, 24 S. E. 736, was a case where A endorsed a note for the maker, and subsequently, but before it was discounted, F endorsed it. The note was then passed to and paid to mortgagee, in Russel v. Owen, 203 N. C. 590 and Dawson v. Pettway, 20 N. C. 531.

There are a number of other cases to the same effect, but these are the leading ones. The learned Justice concluded the opinion by saying: "It was admitted by the learned counsel who argued for the defendant that Daniel v. McCrae, 9 N. C. 590 and Dawson v. Pettway, 20 N. C. 531.

In the case of Brown v. McLean, 217 N. C. 555, 8 S. E. 2d 687, was a case where A endorsed a note for the maker, and subsequently, but before it was discounted, F endorsed it. The note was then passed to and paid to mortgagee, in Russel v. Owen, 203 N. C. 590 and Dawson v. Pettway, 20 N. C. 531.

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Release of Principal.—A surety who seeks to recover from a co-surety a ratalable part of money paid must take care to do so before the time for his action to recover the principal has run out. As one, when he is about to become a surety with others, he may stipulate for the common benefit of the sureties. But after that connection has been severed by an agreement among the sureties, each of them has his distinct and several claim to the benefit of both. Where two persons engage in a common risk as sureties whereby they agree to become co-sureties, Gilliam v. Walker, 189 N. C. 189, 126 S. E. 424.

Co-surety Paying Bond Debt Deemed Bond Creditor.—In K. v. Reams, 73 N. C. 391 it was held that a co-surety who pays the bond debt, for which the other creditor is only bound, shall be deemed a bond creditor in the administration of the estate of the deceased co-surety. Peebles v. Gay, 115 N. C. 38, 41, 20 S. E. 173.

Rights of Surety Paying Entire Debt.—Under the act of 1807, now this section, one surety may recover at law from another his ratalable proportion of the debt of the principal, for the benefit of the surety who pays the debt are not enlarged nor is the co-surety deprived of any just grounds of defense which would before have been available to him in equity. Hall v. Robinson, 30 N. C. 56.

Liability Need Not Be Fixed by Judgment.—It is not necessary, to entitle a surety to maintain an action for contribution, without regard to the share of contribution, which the absent co-surety would have had to pay, had he been within the reach of the process of our courts. Jones v. Johnson, 41 C. N. 115.

Accommodation Endorser Not Liable as Co-surety.—Where A, as surety, signed the note of B, payable to C, and it was endorsed by C, at the request and for the accommodation of A, no judgment against B, when two persons engage in a common risk as sureties whereby they agree to become co-sureties of B, it was held that A had no right to contribution from C. Smith v. Locke, 36 N. C. 357.

Liability Not Be Fixed by Judgment.—It is not necessary, to entitle a surety to maintain an action for contribution, that the amount of his liability which was paid shall be fixed by a judgment. Bright v. Lennon, 83 N. C. 184.

Statute of Limitations.—In the case of a surety's payment and action for contribution against the co-surety, the statute of limitations runs only from the payment. Sherrod v. Woodward, 15 N. C. 360; Craven v. Freeman, 82 N. C. 361, 363.
A surety who pays money for his principal, may maintain an action against his co-surety for his ratabile part, without first making a demand, and the statute of limitations therefore begins to run from the time of the payment of the money. Sherrod v. Edwards, 117 N. C. 644; Craven v. Freeman, 82 N. C. 361. And if so, the withdrawal of such a plea or a waiver of it ought not to affect any claim which the principal has against his co-surety, of whose discharge the evidence is lost, but it is not obligatory in morals or law to use it to defeat a just debt. Bright v. Lennon, 37 N. C. 184.

A surety to a guardian bond, when sued by the wards, is not bound to avail himself of the statute of limitations and a failure to do so does not release co-sureties. Jones v. Blanton, 41 N. C. 64.

B. Actions and Incidents Therein.

Action at Law for Aliquot Parts.—An action at law by a surety for contribution lies only against the co-sureties, severally, for the aliquot part due from each. Adams v. Hayes, 120 N. C. 383, 27 S. E. 47.

Where a surety agrees to pay a note to a bank agreed, after the insolvency of their principal, to employ a broker to buy notes of the bank to an amount sufficient to pay the debt, and one of them paid the broker for notes purchased by him, and the other, after the fact, it was held he could maintain an action on the case against his co-surety for contribution. DeRossett v. Bradley, 63 N. C. 17.

Surety Should Allege Principal's Insolvency.—When one surety brings an action of assumpsit, for money paid for the use and at the request of the defendant, against the principal, the use of which was not asked, and the insolvency of the principals, or a horse or the like, which is payment in money, or in money's worth, such as bank notes, is compelled to pay the debt, it was held that, though the proper principal except by the averment that plaintiff was compelled to pay the debt of his principal, must have been compelled to pay the debt of his principal, must make all his co-sureties parties to a bill for contribution, if they are in this State and solvent. But where one is out of the jurisdiction of the court, and others are within it, the plaintiff, stating the fact in his bill, is at liberty to proceed against the latter alone. Jones v. Blanton, 41 N. C. 115.

Principal or Executor Party Defendant.—To a bill brought by a surety against his co-surety for contribution, their common principal, or, if he be dead, his executor or administrator should be made a party defendant. Rainey v. Yarborough, 37 N. C. 249.

Principal's Rejection of Principal's Insolvency.—When it appears that the principal on a note has secured his discharge in bankruptcy from his obligations, including a note paid at maturity by one of two sureties thereon, and that a few months thereafter the other, who had paid nothing, to claim contribution against his co-surety, who had paid nothing, the right of action given by Rev. sec. 2844, now this section, will not, without more, be denied upon the ground that it requires the insolvency of the principal, in such cases, to be shown at the institution of the action. Shuford v. Coxe, 164 N. C. 46, 80 S. E. 61.

Interest on Collateral.—In an action against an alleged co-surety to recover money paid in settlement of their joint liability, the amount received by the plaintiff as interest on collateral deposited, should be deducted from the amount recovered by plaintiff. Carr v. Smith, 129 N. C. 232, 39 S. E. 831.

Discharge of Levy by Co-surety.—A, having a judgment against B, as principal, and C, as surety, without the consent of A, has an execution issued and levied upon B's property. A, has a right to withdraw the execution and discharge the levy, without making herself liable to C. Forbes v. Smith, 120 N. C. 241.

Principal's Reputation to Show Insolvency.—In an action for contribution by a surety against his co-surety, the plaintiff may offer evidence of their principal's insolvency by showing his general reputation, and this even after direct evidence of the said principal's insolvency. Leak v. Covington, 59 N. C. 559, 6 S. E. 241.

Record of Judgment in Evidence.—A surety seeking contribution from a co-surety, may offer the record of a judgment against the surety as such, which, in the absence of any suggestion of fraud or collusion in procuring the same, is prima facie proof of the damages suffered by the said surety. Leak v. Covington, 59 N. C. 559, 6 S. E. 241.

Operation of Parol Evidence Rule.—The rule that parol evidence cannot be admitted to contradict a written contract, applies to actions on the contract itself, but not so as to arise collaterally out of it. So, where it appeared on the face of a note that certain parties thereto were sureties, in an action for contribution, parol evidence is admissible to show that they were really principals. Williams v. Glenn, 92 N. C. 253.

§ 26-6. Dissenting surety not liable on stay of execution.—Whenever any judgment shall be obtained before a justice against a principal and his surety, and the principal debtor shall desire to stay the execution thereon, but the surety is unwilling that such stay shall be had, the surety may cause his dissent thereto to be entered by the justice, which shall absolve him from all liability to the surety who may stay the same. And the constable or other officer, who may have the collection of the debt, shall make the money out of the property of the principal debtor, and that of the surety for the stay of execution, if he can, before he shall sell the property of the surety before judgment. (Rev. s. 2845; Cod. s. 2982); R. C. C. 110; S. C. 1850, c. 6, c. 1; C. S. 3506.)

§ 26-7. Surety may notify creditor to sue.—In all cases where any surety or indorser on any note, bill, bond, or other written obligation shall consider himself in danger of loss in consequence of his contingent liability, either from the insolvency or misconduct of the principal, in the note, bill, bond, or other written obligation, or from the negligence of the payee or holder of any

[985]
such instrument, it shall be lawful for such surety or indorser, at any time after such note, bill, bond, or other written obligation becomes due and payable, to cause written notice to be given to the payee or holder of any such paper or obligation, requiring him to bring suit on such note, bill, bond, or other written obligation, and to use all reasonable diligence to save harmless such surety or indorser: Provided, nothing herein contained shall apply to official bonds, or bonds given by any person acting in a fiduciary capacity. (Rev., s. 2846; Code, s. 2097; 1868-9, c. 232, s. 1; C. S. 2893.)

Cross Reference.—As to statute of limitations, see subdivisions 1 and 6 of § 1-52.

Reasonable Compliance. — The requirements of this section are reasonably complied with when the holder of a negotiable instrument, except a promissory note, fails to bring action within thirty days after notice of protest, within thirty days after such protest, or within thirty days after such notice of protest where no protest is recorded in the instrument, and it is made to appear that he is a non-resident. Taylor v. Bridger, 185 N. C. 55, 114 S. E. 94.

Protection Secured. — In Moore v. Goodwin, 109 N. C. 218, 13 S. E. 772, which was a case holding that payment made by a principal upon a bond, before the cause of action thereon accrued, extinguishes the surety's liability, and renders the clause therein provided for in the instrument void, it was held that the provisions of the statute of limitations, Mr. Justice Davis, who delivered the opinion of the court, said in reference to this section: "Counsel says that if several co-obligors owe a debt of $1,000 upon which this bond shall be created, if payment shall be made of the pitiful sum of ten cents within every three years, the debt may be kept in force against the sureties for a century. The hardship and injustice, so eloquently portrayed by counsel, is placed upon the statute, and without the exception provided for in the pre-existing law, by requiring the creditor, after receiving notice in accordance with this section, within thirty days causes the maker to be a party defendant, and it is made to appear that he is a non-resident. Taylor v. Bridger, 185 N. C. 55, 114 S. E. 94.

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Section, and if the holder does not do so within thirty days from the date of the commencement of a suit thereon, without the knowledge or consent of the surety, it was held that such contract has the effect of suspending the plaintiff's right of action and of exonerating the surety from liability. Carrier v. Duncan, 84 N. C. 676.

Reservation of Right against Surety. — An agreement with a principal on a sufficient consideration to forbear to sue for a fixed period, without reserving the right to proceed against the surety and made without his assent, will exonerate him from liability. Forbes v. Sheppard, 98 N. C. 11, 3 S. E. 817.

The exoneration grows out of the agreement to forbear and is not affected by the creditor's breach of it. Forbes v. Sheppard, 98 N. C. 11, 3 S. E. 817.

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Reservation of Right against Surety. — An agreement with a principal on a sufficient consideration to forbear to sue for a fixed period, without reserving the right to proceed against the surety and made without his assent, will exonerate him from liability. Forbes v. Sheppard, 98 N. C. 11, 3 S. E. 817.

The exoneration grows out of the agreement to forbear and is not affected by the creditor's breach of it. Forbes v. Sheppard, 98 N. C. 11, 3 S. E. 817.
the clerk of the Superior Court of the county in which the said judgment is rendered and docketed, such judgment shall be canceled as to said surety, endorser or other person secondarily liable and shall cease to be a lien upon his real estate and other property, but such cancellation shall not have the force and effect nor operate as a cancellation and discharge of the judgment as to any other person against whom the said judgment shall be rendered and the person so paying the said judgment shall have all the rights given to a surety who has been compelled to pay a judgment against the principal debtor and cosureties which are given in this chapter, notwithstanding the cancellation of the said judgment as herein provided for. (1925, c. 38.)

Chapter 27. Warehouse Receipts.


Sec. 27-1. Name of chapter.—This chapter may be cited as the Uniform Warehouse Receipts act. (1917, c. 37, s. 62; C. S. 4036.)

§ 27-2. Terms defined.—In this chapter, unless the context or subject-matter otherwise requires—

“Action” includes counterclaim, set-off, and suit in equity.

“Delivery” means voluntary transfer of possession from one person to another.

“Fungible goods” means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

“Goods” means chattels or merchandise in storage, or which has been or is about to be stored.

“Holder” of a receipt means a person who has both actual possession of such receipt and a right of property therein.

“Order” means an order by indorsement.

“Owner” does not include mortgagee or pledgee.

“Person” includes a corporation or partnership of two or more persons having a joint or common interest.

Sec. 27-30. Creditor’s remedy against receipt.


27-32. Against what goods lien enforced.

27-33. Loss of lien.

27-34. What liens enforced against negotiable receipts.

27-35. Right to retain until liens satisfied.

27-36. Other legal remedies for warehouseman.


27-39. Other remedies not excluded.

27-40. Liability discharged by sale for liens.

Art. 4. Negotiation and Transfer of Receipts.

27-41. Negotiation by delivery.

27-42. Negotiation by indorsement.

27-43. Transfer of nonnegotiable receipts.

27-44. Who may negotiate a receipt.


27-46. Rights acquired by transfer.

27-47. Right to compel indorsement.


27-49. Indorser not liable for failure of prior parties.

27-50. No warranty by collection of debt secured by receipt.

27-51. Rights of bona fide holder not affected by fraud.

27-52. Subsequent purchasers protected.

27-53. Right of purchaser superior to seller’s lien.

Art. 5. Criminal Offenses.

27-54. Issuing receipt for goods not stored.

27-55. Issuing receipt with false statement.

27-56. Issuing fraudulent duplicates.

27-57. Failure to state in receipt the interest of warehouseman.


27-59. Fraudulent deposit and negotiation.
To “purchase” includes to take as mortgagee or as pledgee. “Purchaser” includes mortgagee and pledgee.

“Receipt” means a warehouse receipt. “Value” is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor. “Warehouseman” means a person lawfully engaged in the business of storing goods for profit.

A thing is done “in good faith” within the meaning of this chapter, when it is in fact done honestly, whether it be done negligently or not. (1917, c. 37, s. 58; C. S. 4037.)

Cross Reference.— As to public warehouses in general, see § 66-35 to 66-60.

What Constitutes Warehousemen. — It matters not if a concern is a person or partnership. If the concern is engaged in the business and goods are stored for profit, this section applies. It matters not if the concern stores its own and the goods of others. The receipt issued by the concern under consideration terms itself “warehouse receipt” and shows on the face that the goods are stored for profit; it gives the “storage rates.” Webb & Co. v. Friedberg, 189 N. C. 166, 150 S. E. 338.

§ 27-3. Uniform construction. — This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1917, c. 37, s. 57; C. S. 4038.)

§ 27-4. General law applied. — In any case not provided for in this chapter, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. (1917, c. 37, s. 56; C. S. 4029.)

Art. 2. Issue of Warehouse Receipts.

§ 27-5. Who may issue receipts. — Warehouse receipts may be issued by any warehouseman. (1917, c. 37, s. 1; C. S. 4041.)

§ 27-6. What receipt must contain. — Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—

1. The location of the warehouse where the goods are stored.
2. The date of issue of the receipt.
3. The consecutive number of the receipt.
4. A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order.
5. The rate of storage charges.
6. A description of the goods or of the packages containing them.
7. The signature of the warehouseman, which may be made by his authorized agent.
8. If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and
9. A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is at the time of the issue of the receipt unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred, and the purpose thereof, is sufficient. A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required. (Rev., s. 3032; 1917, c. 37, s. 2; C. S. 4042.)

§ 27-7. Other terms inserted; exceptions. — A warehouseman may insert in a receipt issued by him any other terms and conditions, provided that such terms and conditions shall not—
1. Be contrary to the provisions of this chapter.
2. In anywise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. (1917, c. 37, s. 3; C. S. 4043.)

§ 27-8. Nonnegotiable receipts. — A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a nonnegotiable receipt. (1917, c. 37, s. 4; C. S. 4044.)

§ 27-9. Nonnegotiable receipts marked. — A nonnegotiable receipt shall have plainly placed upon its face by the warehouseman issuing it “nonnegotiable,” or “not negotiable.” In case of the warehouseman’s failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character. (Rev., s. 3032; 1917, c. 37, s. 7; C. S. 4045.)

§ 27-10. Negotiable receipts. — A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt, is a negotiable receipt. No provisions shall be inserted in a negotiable receipt that it is nonnegotiable. Such provision, if inserted, shall be void. (Rev., s. 3032; 1917, c. 37, s. 5; C. S. 4046.)

§ 27-11. Duplicate negotiable receipts. — When more than one negotiable receipt is issued for the same goods, the word “duplicate” shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt. (1917, c. 37, s. 6; C. S. 4047.)

Art. 3. Obligations and Rights of Warehousemen on Receipts.

§ 27-12. Delivery of goods on proper demand. — A warehouseman, in the absence of some lawful excuse provided by this chapter, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—
1. An offer to satisfy the warehouseman’s lien;
2. An offer to surrender the receipt if negoti-
§ 27-13. To whom goods may be delivered.—A warehouseman is justified in delivering the goods, subject to the provisions of §§ 27-14, 27-15, and 27-16, to one who is—

1. The person lawfully entitled to the possession of the goods, or his agent;

2. A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods or who has written authority from the person so entitled, either indorsed upon the receipt or written upon another paper; or

3. A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediator or immediate indorsee. (1917, c. 37, s. 9; C. S. 4049.)

Cross Reference.—As to right of person injured to bring action on warehouseman's bond, see § 66-37.

§ 27-14. Liability for wrong delivery.—Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (2) and (3) of the preceding section, and though he delivered the goods as authorized by said subdivisions, he shall be so liable if prior to such delivery he had either—

1. Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

2. Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. (1917, c. 37, s. 10; C. S. 4050.)

§ 27-15. Liability on receipt not taken up on delivery.—Except as hereafter provided in this article, when the goods may have been sold to satisfy warehouseman's charges or because of their perishable or hazardous nature, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable, to any one who purchases for value and in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman. (1917, c. 37, s. 11; C. S. 4051.)

§ 27-16. Liability on receipt for partial delivery.

—Except when goods may have been sold to satisfy warehouseman's lien or because of their perishable or hazardous nature, as hereafter provided in this article, where a warehouseman delivers a part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel the receipt or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman. (1917, c. 37, s. 12; C. S. 4052.)

§ 27-17. Effect of alteration of receipt.—The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was—

1. Immaterial,

2. Authorized, or

3. Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt as they were before alteration. Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. A purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. (1917, c. 37, s. 13; C. S. 4053.)

§ 27-18. Delivery in case of lost receipt.—Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties, to be approved by the court, to protect the warehouseman from any liability or expense which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also, in its discretion, order the payment of the warehouseman's reasonable costs. The delivery of the goods under an order of the court as provided in this section shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. (1917, c. 37, s. 14; C. S. 4054.)

§ 27-19. Effect of issuing duplicate receipt.—A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncancelled at the date of the issue of the duplicate, but shall impose upon him no other liability. (1917, c. 37, s. 15; C. S. 4055.)
§ 27-20. Claim of title no defense for nondelivery; exceptions.—No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt. (1917, c. 37, s. 16; C. S. 4056.)

§ 27-21. Interpleader in conflicting claims.—If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate, require all known claimants to interplead. (1917, c. 37, s. 17; C. S. 4057.)

§ 27-22. Reasonable time to investigate conflicting claims.—If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. (1917, c. 37, s. 18; C. S. 4058.)

§ 27-23. Title in third person no defense; exceptions.—Except as provided in §§ 27-21 and 27-22 and except when the goods may have been delivered to the person authorized to have such delivery, as heretofore provided in this article, or when the goods may have been sold to satisfy the warehouseman's lien or because of their perishable or hazardous nature, as hereafter provided in this article, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt. (1917, c. 37, s. 19; C. S. 4059.)

§ 27-24. Failure to deliver goods as described.—A warehouseman shall be liable to the holder of a receipt issued by him or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts, for damages caused by the nonexistence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor. (1917, c. 37, s. 20; 1931, c. 358, s. 1; C. S. 4060.)

Editor's Note.—The Act of 1931, inapplicable to litigation pending May 4, 1931, added the words "issued by him or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts," in the first sentence of this section.

§ 27-25. Liability for negligence.—A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise; but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. (1917, c. 37, s. 21; C. S. 4061.)

§ 27-26. Goods kept separate.—Except as provided in § 27-27, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited. (1917, c. 37, s. 22; C. S. 4062.)

§ 27-27. Effect of confusion of goods.—If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. (Rev., s. 3034; 1917, c. 37, s. 23; C. S. 4063.)

§ 27-28. Liability of warehouseman when goods confused.—The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate. (1917, c. 37, s. 24; C. S. 4064.)

§ 27-29. Goods not subject to attachment or execution.—If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court. (1917, c. 37, s. 25; C. S. 4065.)

Ordinary Constituting Injunction.—In view of § 1-490, an order of the judge operating to prevent the holder of warehouse certificates from disposing of them except under order of the court, is a sufficient compliance with this section constituting it an injunction. Standard Bonded Warehouse Co. v. Cooper, 30 Fed. (2d) 842, 845.

§ 27-30. Creditor's remedy against receipt.—A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (1917, c. 37, s. 26; C. S. 4066.)
§ 27-31. Warehouseman’s lien.—Subject to the subsequent provisions of this article specifying what liens may be enforced against a negotiable receipt, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering, and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman’s lien. (1917, c. 37, s. 27; C. S. 4067.)

Cited in Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 147 S. E. 674; Standard Bonded Warehouse Co. v. Cooper, 30 Fed. (2d) 842.

§ 27-32. Against what goods lien enforced.—Subject to the subsequent provisions of this article specifying what liens may be enforced against a negotiable receipt, a warehouseman’s lien may be enforced—

1. Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and

2. Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person has been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid. (1917, c. 37, s. 28; C. S. 4068.)

§ 27-33. Loss of lien.—A warehouseman loses his lien upon goods—

1. By surrendering possession thereof, or

2. By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this chapter. (1917, c. 37, s. 29; C. S. 4069.)

§ 27-34. What liens enforced against negotiable receipts. — If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerate other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms for a warehouseman’s lien as heretofore provided in this article, although the amount of the charges so enumerated is not stated in the receipt. (1917, c. 37, s. 30; C. S. 4070.)

§ 27-35. Right to retain until liens satisfied.—A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. (1917, c. 37, s. 31; C. S. 4071.)

§ 27-36. Other legal remedies for warehouseman.—Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. (1917, c. 37, s. 32; C. S. 4072.)

§ 27-37. Enforcement of liens.—A warehouseman’s lien for a claim which has become due may be satisfied as follows:

1. Notice given. The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

   a. An itemized statement of the warehouseman’s claim, showing the sum due at the time of the notice and the date or dates when it became due;

   b. A brief description of the goods against which the lien exists;

   c. A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered or from the time when the notice should reach its destination according to the due course of post if the notice is sent by mail; and

   d. A statement that unless the claims are paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

2. Sale of goods. In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

3. Right of claimant to pay charges. At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouse-
man shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this chapter, to the possession of the goods on payment of charges thereon. Otherwise, the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. (Rev., ss. 3036, 3037, 3038; 1917, c. 37, s. 33; C. S. 4073.)

§ 27-38. Sale of perishable goods.—If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods and to remove them from the warehouse; and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of § 27-37. (Rev., ss. 3039, 3040; 1917, c. 37, s. 34; C. S. 4074.)

§ 27-39. Other remedies not excluded.—The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman’s claim as shall not be paid by the proceeds of the sale of the property. (Rev., s. 3041; 1917, c. 37, s. 35; C. S. 4075.)

Cited in Standard Bonded Warehouse Co. v. Cooper, 30 Fed. (2d) 842.

§ 27-40. Liability discharged by sale for liens.—After goods have been lawfully sold to satisfy a warehouseman’s lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable. (1917, c. 37, s. 36; C. S. 4076.)

Art. 4. Negotiation and Transfer of Receipts.

§ 27-41. Negotiation by delivery.—A negotiable receipt may be negotiated by delivery—

1. Where by the terms of the receipt the warehouseman undertakes to deliver the goods to the bearer; or

2. Where by the terms of the receipt the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where by the terms of a negotiable receipt the goods are deliverable to bearer, or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiable only by the indorsement of such indorsee. (1917, c. 37, s. 37; C. S. 4077.)

Cited in Standard Bonded Warehouse Co. v. Cooper, 30 Fed. (2d) 842.

§ 27-42. Negotiation by indorsement.—A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are deliverable. Such indorsement may be in blank, to bearer, or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer, or to another specified person. Subsequent negotiation may be made in like manner. (1917, c. 37, s. 38; C. S. 4078.)

§ 27-43. Transfer of nonnegotiable receipts.—A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A nonnegotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right. (1917, c. 37, s. 39; C. S. 4079.)

§ 27-44. Who may negotiate a receipt.—A negotiable receipt may be negotiated by any person in possession of the same however such possession may have been acquired, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of such person or if at the time of negotiation the receipt is in such form that it may be negotiated by delivery. (1917, c. 37, s. 40; 1931, c. 358, s. 2; C. S. 4080.)

Editor's Note.—The Act of 1931 struck out the former section and inserted the above in lieu thereof. It provided that the act should not affect litigation pending May 4, 1931. See 9 N. C. L. Rev. 404.

§ 27-45. Rights acquired by negotiation.—A person to whom a negotiable receipt has been duly negotiated acquires thereby—

1. Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

2. The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him. (1917, c. 37, s. 41; C. S. 4081.)

§ 27-46. Rights acquired by transfer.—A person to whom a receipt has been transferred but not negotiated acquires thereby, as against the transferee, the title of the goods, subject to the terms of any agreement with the transferrer. If the receipt is nonnegotiable, such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferrer or transferee of a nonnegotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an
attachment or execution upon the goods by a creditor of the transferrer, or by a notification to the warehouseman by the transferrer or a subsequent purchaser from the transferrer of a subsequent sale of the goods by the transferrer. (1917, c. 37, s. 42; C. S. 4082.)

§ 27-47. Right to compel indorsement.—Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferrer is essential for negotiation, the transferee acquires a right against the transferrer to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. (1917, c. 37, s. 43; C. S. 4083.)

§ 27-48. Warranties in negotiation and transfer. —A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants:
1. That the receipt is genuine;
2. That he has a legal right to negotiate or transfer it;
3. That he has knowledge of no fact which would impair the validity or worth of the receipt; and
4. That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a receipt the goods represented thereby. (1917, c. 37, s. 44; C. S. 4084.)

§ 27-49. Indorser not liable for failure of prior parties. —The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations. (1917, c. 37, s. 45; C. S. 4085.)

§ 27-50. No warranty by collection of debt secured by receipt. —A mortgagee, pledgee, or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described. (1917, c. 37, s. 46; C. S. 4086.)

§ 27-51. Rights of bona fide holder not affected by fraud. —The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress, or conversion, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, in good faith without notice of the breach of duty, or loss, theft, fraud, accident, mistake, or duress or conversion. (1917, c. 37, s. 47; 1931, c. 358, s. 3; C. S. 4087.)

Editor's Note. —The Act of 1931 amended this section to conform with § 27-44, as amended. See 9 N. C. L. Rev. 494. It also provided that litigation pending May 4, 1931, should not be affected.

Fraudulent Negotiation by Superintendent. —Warehouse receipts, issued under § 306-435, which, upon being returned endorsed, were negotiated by the superintendent of the warehouse as collateral for a loan to himself, in breach of his duty to cancel them, are directly within the force of this section. Lacy v. Globe Indemnity Co., 189 N. C. 24, 126 S. E. 316.

§ 27-52. Subsequent purchasers protected. —Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage, or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation. (1917, c. 37, s. 48; C. S. 4088.)

§ 27-53. Right of purchaser superior to seller's lien. —Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transit shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transit. Nor shall the warehouseman be obliged to deliver or justify in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation. (1917, c. 37, s. 49; C. S. 4089.)

Art. 5. Criminal Offenses.

§ 27-54. Issuing receipt for goods not stored. —A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both (1917, c. 37, s. 50; C. S. 4090.)

§ 27-55. Issuing receipt with false statement. —A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 51; C. S. 4091.)

§ 27-56. Issuing fraudulent duplicates. —A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part thereof is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt

[933]
after proceedings for delivery as heretofore pro-
vided in this chapter, shall be guilty of a crime,
and upon conviction shall be punished for each
offense by imprisonment not exceeding five years
or by a fine not exceeding five thousand dollars,
or by both. (1917, c. 37, s. 52; C. S. 4092.)

§ 27-57. Failure to state in receipt the interest
of warehouseman.—Where there are deposited
with or held by a warehouseman goods of which
he is owner, either solely or jointly or in com-
mon with others, such warehouseman, or any of
his officers, agents, or servants who, knowing
this ownership, issues or aids in issuing a nego-
tiable receipt for such goods which does not
state such ownership, shall be guilty of a crime, and
upon conviction shall be punished for each of-
fense by imprisonment not exceeding one year
or by a fine not exceeding one thousand dollars,
or by both. (1917, c. 37, s. 53; C. S. 4093.)

§ 27-58. Delivering goods without obtaining re-
cipe.—A warehouseman, or any officer, agent,
or servant of a warehouseman, who delivers
goods out of the possession of such warehouse-
man, knowing that a negotiable receipt the nego-
tiation of which would transfer the right to the
possession of such goods is outstanding and un-
canceled, without obtaining the possession of
such receipt at or before the time of such deliv-
ery, except in the cases heretofore provided for
in this chapter for the delivery of goods upon a
lost receipt and for the sale of goods to satisfy
the warehouseman’s lien or because of their
perishable or hazardous nature, shall be guilty
of a crime, and upon conviction shall be punished
for each offense by imprisonment not exceeding
one year or by a fine not exceeding one thou-
sand dollars, or by both. (1917, c. 37, s. 54; C. S.
4094.)

Cross Reference.—As to punishment for unlawful disposi-
tion of property stored, see also § 66-40.

§ 27-59. Fraudulent deposit and negotiation.—
Any person who deposits goods to which he has
not title, or upon which there is a lien or mort-
gage, and who takes for such goods a negotiable
receipt which he afterwards negotiates for value
with intent to deceive and without disclosing his
want of title or the existence of the lien or
mortgage, shall be guilty of a crime, and upon
conviction shall be punished for each offense by
imprisonment not exceeding one year or by a
fine not exceeding one thousand dollars, or by
both. (1917, c. 37, s. 55; C. S. 4095.)